



**Cabrillo Pacific University**

**College of Law**

3620 AERO COURT, SAN DIEGO, CA. 92123

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON-CIRCULATING



# CALIFORNIA REPORTER REFERENCES

## 108 CALIFORNIA APPELLATE REPORTS, 2d SERIES

| Cal.App.<br>Page | P.2d<br>Vol. Page | Cal.App.<br>Page | P.2d<br>Vol. Page | Cal.App.<br>Page | P.2d<br>Vol. Page | Cal.App.<br>Page | P.2d<br>Vol. Page |
|------------------|-------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
| 1                | 237 715           | 200              | 239 84            | 463              | 239 4             | 655              | 239 481           |
| 6                | 238 87            | 207              | 238 652           | 466              | 238 1031          | 662              | 239 693           |
| 12               | 237 684           | 217              | 238 168           | 475              | 239 19            | 669              | 239 656           |
| 14               | 238 99            | 219              | 238 688           | 488              | 239 37            | 686              | 239 513           |
| 25               | 238 145           | 223              | 238 633           | 491              | 239 38            | 696              | 239 466           |
| 33               | 238 115           | 231              | 238 659           | 496              | 238 1052          | 701              | 239 456           |
| 37               | 238 1             | 235              | 238 592           | 502              | 238 1046          | 705              | 239 688           |
| 41               | 238 117           | 242              | 238 643           | 510              | 238 1025          | 713              | 239 684           |
| 44               | 238 121           | 245              | 238 649           | 514              | 238 1023          | 719              | 239 449           |
| 48               | 238 23            | 251              | 238 662           | 517              | 239 11            | 724              | 239 509           |
| 50               | 238 124           | 254              | 238 679           | 522              | 238 1079          | 730              | 239 451           |
| 53               | 238 111           | 269              | 238 1027          | 529              | 239 118           | 734              | 239 506           |
| 60               | 238 21            | 274              | 238 626           | 536              | 238 1056          | 739              | 239 697           |
| 64               | 238 125           | 279              | 238 667           | 538              | 238 1018          | 743              | 239 454           |
| 69               | 238 19            | 284              | 238 674           | 538              | 241 20            | 746              | 239 702           |
| 72               | 238 34            | 288              | 238 1084          | 540              | 238 1039          | 749              | 239 671           |
| 74               | 238 162           | 294              | 238 606           | 546              | 239 18            | 764              | 239 898           |
| 84               | 238 158           | 297              | 238 587           | 548              | 239 65            | 771              | 239 699           |
| 91               | 237 1005          | 303              | 239 48            | 554              | 239 44            | 775              | 240 1             |
| 95               | 238 8             | 321              | 239 61            | 557              | 239 72            | 781              | 239 912           |
| 111              | 238 109           | 325              | 239 28            | 561              | 237 553           | 784              | 239 680           |
| 114              | 238 3             | 329              | 239 109           | 568              | 239 69            | 790              | 239 642           |
| 122              | 238 119           | 343              | 238 1019          | 575              | 239 472           | 793              | 240 41            |
| 125              | 238 141           | 346              | 239 78            | 582              | 239 105           | 804              | 239 704           |
| 129              | 238 56            | 355              | 238 1042          | 583              | 239 105           | 806              | 240 366           |
| 131              | 238 143           | 358              | 239 150           | 584              | 239 75            | 820              | 239 908           |
| 135              | 238 18            | 379              | 239 123           | 588              | 239 458           | 827              | 240 40            |
| 136              | 238 616           | 388              | 238 1044          | 595              | 239 63            | 829              | 239 891           |
| 143              | 238 612           | 392              | 239 32            | 597              | 239 144           | 832              | 239 914           |
| 148              | 238 1057          | 397              | 239 88            | 601              | 239 463           | 841              | 239 889           |
| 154              | 238 1061          | 416              | 239 46            | 605              | 239 106           | 845              | 239 883           |
| 156              | 236 664           | 417              | 238 1021          | 609              | 239 497           | 849              | 240 351           |
| 161              | 238 645           | 420              | 239 42            | 615              | 239 77            | 856              | 239 885           |
| 168              | 238 641           | 424              | 239 6             | 617              | 239 468           | 861              | 240 691           |
| 172              | 238 621           | 431              | 239 30            | 624              | 239 500           | 873              | 240 337           |
| 175              | 238 630           | 434              | 238 1036          | 632              | 239 477           | 878              | 240 48            |
| 180              | 238 624           | 438              | 239 492           | 638              | 239 650           | 891              | 238 658           |
| 185              | 238 608           | 447              | 239 35            | 646              | 239 655           | 892              | 239 3             |
| 191              | 238 670           | 451              | 239 100           | 647              | 239 644           | 895              | 238 690           |
| 198              | 238 590           | 460              | 239 1             |                  |                   |                  |                   |

















# CALIFORNIA REPORTER

COVERING CASES REPORTED IN

## PACIFIC REPORTER SECOND SERIES



241 P.2d — 242 P.2d

---

CITE BY VOLUME AND PAGE  
OF THE  
PACIFIC REPORTER  
SECOND SERIES

Thus:  
241 P.2d 1

ST. PAUL, MINN.  
WEST PUBLISHING CO.

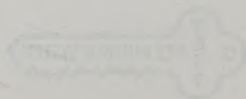
1952



# CALIFORNIA REPORTER

THE FOLLOWING CASES REPORTED IN

## PACIFIC REPORTER SECOND SERIES



241 P.2d - 242 P.2d

COPYRIGHT, 1952, BY WEST PUBLISHING Co.  
Pacific Reporter, Second Series. Vol. 241, Nos. 1-4;  
Vol. 242, Nos. 1-4.

COPYRIGHT, 1952, BY WEST PUBLISHING Co.

CITE BY VOLUME AND PAGE

OF THE

PACIFIC REPORTER  
SECOND SERIES

Thus:

241 P.2d 1

WEST PUBLISHING CO.  
1952

# JUDGES AND OFFICERS

---

## SUPREME COURT

### CHIEF JUSTICE

PHIL S. GIBSON ..... San Francisco

## DEPARTMENT ONE

### PRESIDING JUDGE

JOHN W. SHENK ..... San Francisco

### ASSOCIATE JUSTICES

JESSE W. CARTER ..... San Francisco

B. REY SCHAUER ..... Los Angeles

## DEPARTMENT TWO

### PRESIDING JUSTICE

DOUGLAS L. EDMONDS ..... San Francisco

### ASSOCIATE JUSTICES

ROGER J. TRAYNOR ..... Berkeley

HOMER R. SPENCE ..... San Francisco

### CLERKS

WILLIAM I. SULLIVAN ..... Clerk ..... San Francisco

HARRY M. GARDISER ..... Chief Deputy Clerk ..... San Francisco

LOREN F. WHITE ..... Deputy Clerk ..... San Francisco

A. ROBERT FAIRWELL ..... Deputy Clerk ..... San Francisco

RAYMOND J. BELL ..... Deputy Clerk ..... San Francisco

A. F. BRADOVICH ..... Deputy Clerk ..... Sacramento

HENRY P. CRABTREE ..... Deputy Clerk ..... Los Angeles

DAVID BLOMGREN ..... Deputy Clerk ..... Los Angeles

---

### ATTORNEY GENERAL

EDMUND G. BROWN ..... San Francisco

## JUDGES AND OFFICERS

### DISTRICT COURTS OF APPEALS

#### FIRST DISTRICT—SAN FRANCISCO

##### *Division 1*

###### PRESIDING JUSTICE

RAYMOND E. PETERS ..... San Francisco

###### ASSOCIATE JUSTICES

A. F. BRAY ..... San Francisco

FRED B. WOOD ..... San Francisco

##### *Division 2*

###### PRESIDING JUSTICE

JOHN T. NOURSE ..... San Francisco

###### ASSOCIATE JUSTICES

C. J. GOODELL ..... San Francisco

MAURICE T. DOOLING, Jr. .... Hollister

###### CLERKS

WALTER S. CHISHOLM ..... Clerk ..... San Francisco

L. R. ELKINGTON ..... Deputy Clerk ..... San Francisco

PAUL DINOIA ..... Deputy Clerk ..... San Francisco

#### SECOND DISTRICT—LOS ANGELES

##### *Division 1*

###### PRESIDING JUSTICE

THOMAS P. WHITE ..... Los Angeles

###### ASSOCIATE JUSTICES

WILLIAM C. DORAN ..... Los Angeles

LOUIS C. DRAPEAU ..... Los Angeles

##### *Division 2*

###### PRESIDING JUSTICE

MINOR MOORE ..... Los Angeles

###### ASSOCIATE JUSTICES

MARSHALL F. McCOMB ..... Los Angeles

W. TURNEY FOX ..... Los Angeles



## JUDGES AND OFFICERS

### DISTRICT COURTS OF APPEALS—Cont'd.

#### *Division 3*

##### PRESIDING JUSTICE

CLEMENT L. SHINN ..... Los Angeles

##### ASSOCIATE JUSTICES

PARKER WOOD ..... Los Angeles

PAUL VALLÉE ..... Los Angeles

##### CLERKS

JAMES E. BROWN ..... Clerk ..... Los Angeles

WM. E. DORAN ..... Deputy Clerk ..... Los Angeles

EUGENE B. STANLEY ..... Deputy Clerk ..... Los Angeles

### THIRD DISTRICT—SACRAMENTO

##### PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS ..... Sacramento

##### ASSOCIATE JUSTICES

PAUL PEEK ..... Long Beach

B. F. VAN DYKE ..... Sacramento

##### CLERKS

L. A. ENDRES ..... Clerk ..... Sacramento

THOMAS J. DILLON ..... Deputy Clerk ..... Sacramento

### FOURTH DISTRICT

*Fresno—San Bernardino—San Diego*

##### PRESIDING JUSTICE

CHARLES R. BARNARD ..... Fresno

##### ASSOCIATE JUSTICES

LLOYD E. GRIFFIN ..... San Diego

STANLEY MUSSELL ..... San Bernardino

##### CLERKS

EARL J. VERDECKBERG ..... Clerk ..... San Diego

LLOYD E. HIDDEN ..... Deputy Clerk ..... San Bernardino

ROY M. BOSTWICK ..... Deputy Clerk ..... Fresno

GEORGE J. KOBELIN ..... Deputy Clerk ..... San Diego

## JUDGES AND OFFICERS

### APPELLATE DEPARTMENT, SUPERIOR COURT

#### LOS ANGELES COUNTY

##### PRESIDING JUDGE

HARTLEY SHAW ..... Los Angeles

##### JUDGES

EDWARD T. BISHOP ..... Los Angeles

JESS E. STEPHENS ..... Los Angeles

##### CLERK

J. J. MACGREGOR ..... Los Angeles

#### SAN FRANCISCO COUNTY

##### PRESIDING JUDGE

HERBERT C. KAUFMAN ..... San Francisco

##### JUDGES

PRESTON DEVINE ..... San Francisco

EDWARD MOLKENBUHR ..... San Francisco

##### CLERK

JOSEPH F. WHITMAN ..... San Francisco

#### SAN DIEGO COUNTY

##### PRESIDING JUDGE

L. N. TURRENTINE ..... San Diego

##### JUDGES

ROBERT B. BURCH ..... San Diego

WILLIAM A. GLEN ..... San Diego

##### CLERK

BRUCE ROBINSON ..... San Diego

#### SACRAMENTO COUNTY

##### PRESIDING JUDGE

RAYMOND T. COUGHLIN ..... Sacramento

##### JUDGES

MALCOLM C. GLENN ..... Sacramento

GROVER W. BEDEAU ..... Sacramento

#### ALAMEDA COUNTY

##### PRESIDING JUDGE

S. VICTOR WAGLER ..... Oakland

##### JUDGES

RALPH HOYT ..... Oakland

THOMAS J. LEDWICH ..... Oakland

NEW APPELLATE DEPARTMENTS  
SUPERIOR COURTS

Effective January 1, 1952.

CONTRA COSTA COUNTY

PRESIDING JUDGE

HAROLD JACOBY ----- Martinez

JUDGES

HOMER W. PATTERSON ----- Martinez

HUGH H. DONOVAN ----- Martinez

FRESNO COUNTY

PRESIDING JUDGE

ARTHUR C. SHEPARD ----- Fresno

JUDGES

PHILIP CONLEY ----- Fresno

GEORGE M. DE WOLF ----- Fresno

KERN COUNTY

PRESIDING JUDGE

ROBERT B. LAMBERT ----- Bakersfield

JUDGES

W. L. BRADSHAW ----- Bakersfield

NORMAN F. MAIN ----- Bakersfield

RIVERSIDE COUNTY

PRESIDING JUDGE

OAKLEY K. MORTON ----- Riverside

JUDGES

RUSSELL S. WAITE ----- Riverside

JOHN G. GABBERT ----- Riverside

SAN BERNARDINO COUNTY

PRESIDING JUDGE

MARTIN J. COUGHLIN ----- San Bernardino

JUDGES

ARCHIE D. MITCHELL ----- San Bernardino

R. BRUCE FINDLAY ----- San Bernardino

SANTA CLARA COUNTY

PRESIDING JUDGE

WILLIAM F. JAMES ----- San Jose

JUDGES

M. G. DEL MUTOLO ----- San Jose

LEONARD AVILLA ----- San Jose

STANISLAUS COUNTY

PRESIDING JUDGE

B. C. HAWKINS ----- Modesto

JUDGES

H. L. CHAMBERLAIN ----- Modesto

SHERRILL HALBERT ----- Modesto





# CASES REPORTED

|                                                                                        | Vol. | Page      |
|----------------------------------------------------------------------------------------|------|-----------|
| Aetna Life Ins. Co. v. Industrial Acc. Commission, Sup. ....                           | 241  | P.2d 530  |
| Affleck; Western Surgical Supply Co. v., App. ....                                     | 242  | P.2d 929  |
| Agnew; People v., Super. ....                                                          | 242  | P.2d 410  |
| Alderson; Hostetter v., Sup. ....                                                      | 241  | P.2d 230  |
| American Dist. Tel. Co.; Better Foods Markets v., App. ....                            | 242  | P.2d 351  |
| Anderson v. Anderson, App. ....                                                        | 241  | P.2d 571  |
| Anderson v. Stansbury, Sup. ....                                                       | 242  | P.2d 305  |
| Anderson; Sunset Mill. & Grain Co. v., App. ....                                       | 242  | P.2d 941  |
| Anderson v. Wagnon, App. ....                                                          | 242  | P.2d 915  |
| Ansite; People v., App. ....                                                           | 241  | P.2d 1036 |
| Antelope Min. Corp.; Taormina v., App. ....                                            | 242  | P.2d 665  |
| Aparicio; People v., Sup. ....                                                         | 241  | P.2d 221  |
| Athens Hills Development Co.; Kritt v., App. ....                                      | 241  | P.2d 606  |
| Aureguy; Utz v., App. ....                                                             | 241  | P.2d 639  |
| Austin; Chacon v., App. ....                                                           | 241  | P.2d 1037 |
| Bakersfield Medical Group; Cagle v., App. ....                                         | 241  | P.2d 1013 |
| Bank of America, Nat. Trust & Sav. Ass'n; Kelly v., App. ....                          | 242  | P.2d 923  |
| Bank of America Nat. Trust & Sav. Ass'n v. Western United Construc-<br>tors, App. .... | 242  | P.2d 365  |
| Baratti v. Baratti, App. ....                                                          | 242  | P.2d 22   |
| Barnes; Hicks v., App. ....                                                            | 241  | P.2d 648  |
| Bass; People v., App. ....                                                             | 242  | P.2d 685  |
| Beck v. West Coast Life Ins. Co., Sup. ....                                            | 241  | P.2d 544  |
| Bermite Powder Co. v. Franchise Tax Bd. of Cal., Sup. ....                             | 242  | P.2d 9    |
| Bernstein; Hansen v., App. ....                                                        | 242  | P.2d 368  |
| Bertola; Butt v., App. ....                                                            | 242  | P.2d 32   |
| Better Food Markets v. American Dist. Tel. Co., App. ....                              | 242  | P.2d 351  |
| Beverly Oil Co. v. City of Los Angeles, App. ....                                      | 242  | P.2d 682  |
| Bland v. Potter, App. ....                                                             | 242  | P.2d 26   |
| Block v. Board of Police Com'rs of City of Los Angeles, App. ....                      | 242  | P.2d 68   |
| Blumer v. Kirkman Corp., Sup. ....                                                     | 241  | P.2d 17   |
| Board of Administration; Shaw v., App. ....                                            | 241  | P.2d 635  |
| Board of Police Com'rs of City of Los Angeles; Block v., App. ....                     | 242  | P.2d 68   |
| Bohannon; Hale v., Sup. ....                                                           | 241  | P.2d 4    |
| Boosman v. United Bldg. Co., App. ....                                                 | 241  | P.2d 58   |
| Bozzani Motors; Jacobs v., App. ....                                                   | 241  | P.2d 642  |
| Bradley v. Frazier Park Playgrounds, App. ....                                         | 242  | P.2d 958  |
| Brickman; Carlson v., App. ....                                                        | 242  | P.2d 94   |
| Briskman; Hart v., App. ....                                                           | 242  | P.2d 341  |
| Brock; Serve Yourself Gasoline Stations Ass'n v., App. ....                            | 241  | P.2d 593  |
| Brock v. Superior Court In and For City and County of San Francisco,<br>App. ....      | 241  | P.2d 283  |
| Brock; West Los Angeles Mill. Co. v., App. ....                                        | 241  | P.2d 283  |
| Brogdon v. Graham, App. ....                                                           | 242  | P.2d 76   |
| Bronnenberg; Kilstrom v., App. ....                                                    | 242  | P.2d 65   |
| Brown; New Zealand Ins. Co. v., App. ....                                              | 242  | P.2d 674  |
| Brownstein; People v., App. ....                                                       | 241  | P.2d 1056 |
| Burnett; People v., App. ....                                                          | 241  | P.2d 616  |
| Burns; People v., App. ....                                                            | 241  | P.2d 308  |
| Burns; People v., Sup. ....                                                            | 242  | P.2d 9    |
| Butt v. Bertola, App. ....                                                             | 242  | P.2d 32   |

# CASES REPORTED

|                                                                                                | Vol. | Page      |
|------------------------------------------------------------------------------------------------|------|-----------|
| C. A. B. Const. Co.; Covely v., App. ....                                                      | 242  | P.2d 87   |
| Cagle v. Bakersfield Medical Group, App. ....                                                  | 241  | P.2d 1013 |
| Calame v. Stevens, App. ....                                                                   | 242  | P.2d 109  |
| Cal-Dak Co. v. Say-On Drugs, App. ....                                                         | 242  | P.2d 333  |
| California-Western States Life Ins. Co. v. Industrial Acc. Commission,<br>Sup. ....            | 242  | P.2d 13   |
| Cameron v. Cameron, App. ....                                                                  | 242  | P.2d 408  |
| Carlson v. Brickman, App. ....                                                                 | 242  | P.2d 94   |
| Carlton v. Pacific Coast Gasoline Co., App. ....                                               | 242  | P.2d 391  |
| Carter; Hopkins v., App. ....                                                                  | 241  | P.2d 1063 |
| Central Automotive Maintenance Co.; Crocker First Nat. Bank of San<br>Francisco v., App. ....  | 242  | P.2d 72   |
| Chacon v. Austin, App. ....                                                                    | 241  | P.2d 1037 |
| Charlan; Miglietta v., App. ....                                                               | 242  | P.2d 365  |
| Chronicle Pub. Co.; Jefferson v., Sup. ....                                                    | 241  | P.2d 20   |
| City and County of San Francisco; McKinney v., App. ....                                       | 241  | P.2d 1060 |
| City of Concord; Martin Bros. v., App. ....                                                    | 242  | P.2d 406  |
| City of Long Beach; Filian v., App. ....                                                       | 241  | P.2d 56   |
| City of Long Beach; Welch v., App. ....                                                        | 241  | P.2d 26   |
| City of Los Angeles; Beverly Oil Co. v., App. ....                                             | 242  | P.2d 682  |
| City of Los Angeles; Peerless Laundry Services v., App. ....                                   | 241  | P.2d 269  |
| City of Los Angeles; Southwestern Inv. Corp. v., Sup. ....                                     | 241  | P.2d 985  |
| City of Los Angeles; Sykes v., App. ....                                                       | 241  | P.2d 1004 |
| City of Vernon v. Superior Court In and For Los Angeles County, Sup. ....                      | 241  | P.2d 243  |
| Clark v. Deschamps, App. ....                                                                  | 241  | P.2d 681  |
| Claudine v. West, App. ....                                                                    | 241  | P.2d 580  |
| Cochems v. Cochems, App. ....                                                                  | 242  | P.2d 56   |
| Cochems' Estate, In re, App. ....                                                              | 242  | P.2d 56   |
| Cole v. Rush, App. ....                                                                        | 241  | P.2d 601  |
| Collins; Hallaian v., App. ....                                                                | 242  | P.2d 58   |
| Commercial Cas. Ins. Co. of Newark, N. J. v. Industrial Acc. Commis-<br>sion, App. ....        | 242  | P.2d 13   |
| Commercial Cas. Ins. Co. of Newark, N. J. v. Industrial Acc. Commis-<br>sion, App. ....        | 242  | P.2d 20   |
| Conae v. Conae, App. ....                                                                      | 241  | P.2d 266  |
| Conner v. Southern Pac. Co., Sup. ....                                                         | 241  | P.2d 535  |
| Construction Products Corp.; Hayward Lumber & Inv. Co. v., App. ....                           | 241  | P.2d 1054 |
| Contra Costa County; Corrie v., App. ....                                                      | 242  | P.2d 381  |
| Contreras, In re, App. ....                                                                    | 241  | P.2d 631  |
| Corrie v. Contra Costa County, App. ....                                                       | 242  | P.2d 381  |
| Cortese; Miller v., App. ....                                                                  | 242  | P.2d 84   |
| Costa's Estate, In re, App. ....                                                               | 241  | P.2d 621  |
| Covely v. C. A. B. Const. Co., App. ....                                                       | 242  | P.2d 87   |
| Coyle; Hall v., Sup. ....                                                                      | 241  | P.2d 236  |
| Cramer v. Lee Wa Corp., App. ....                                                              | 241  | P.2d 550  |
| Crawford; Richfield Oil Corp. v., App. ....                                                    | 241  | P.2d 1020 |
| Crews; People v., App. ....                                                                    | 242  | P.2d 64   |
| Crocker First Nat. Bank of San Francisco v. Central Automotive Main-<br>tenance Co., App. .... | 242  | P.2d 72   |
| Crocker First Nat. Bank of San Francisco; Wood v., App. ....                                   | 241  | P.2d 1043 |
| Crofoot v. Weger, App. ....                                                                    | 241  | P.2d 1017 |
| Cuellar; People v., App. ....                                                                  | 242  | P.2d 694  |
| Culver City v. Superior Court In and For Los Angeles County, Sup. ....                         | 241  | P.2d 258  |
| Danielson v. Roche, App. ....                                                                  | 241  | P.2d 1028 |
| Dastagir v. Dastagir, App. ....                                                                | 241  | P.2d 656  |
| DeArmond v. Tucker, Sup. ....                                                                  | 241  | P.2d 990  |
| Decter v. Stevenson Properties, App. ....                                                      | 241  | P.2d 279  |
| De Lao; Rubin v., App. ....                                                                    | 242  | P.2d 360  |

# CASES REPORTED

|                                                                                         | Vol. | Page      |
|-----------------------------------------------------------------------------------------|------|-----------|
| Department of Corrections; Nelson v., App. ....                                         | 242  | P.2d 906  |
| Department of Mental Hygiene; Silverstein v., App. ....                                 | 242  | P.2d 101  |
| Deschamps; Clark v., App. ....                                                          | 241  | P.2d 681  |
| Dessauer; People v., Sup. ....                                                          | 241  | P.2d 238  |
| Downey; Smith v., App. ....                                                             | 241  | P.2d 618  |
| Dragovich v. Slosson, App. ....                                                         | 242  | P.2d 945  |
| Duprey v. Shane, App. ....                                                              | 241  | P.2d 78   |
| Eads v. Marks, App. ....                                                                | 241  | P.2d 582  |
| Eichman; Farole v., App. ....                                                           | 242  | P.2d 346  |
| Eli v. Murphy, App. ....                                                                | 242  | P.2d 902  |
| Etter; People v., App. ....                                                             | 242  | P.2d 899  |
| Farole v. Eichman, App. ....                                                            | 242  | P.2d 346  |
| Feigin; Rosenberg v., App. ....                                                         | 241  | P.2d 1043 |
| Filian v. City of Long Beach, App. ....                                                 | 241  | P.2d 56   |
| Fireman's Fund Indem. Co. v. Industrial Acc. Commission, App. ....                      | 241  | P.2d 299  |
| Fisher; Herring v., App. ....                                                           | 242  | P.2d 963  |
| Fishman, Application of, App. ....                                                      | 241  | P.2d 603  |
| Fishman, Ex parte, App. ....                                                            | 241  | P.2d 605  |
| Franchise Tax Bd. of Cal.; Bermite Powder Co. v., Sup. ....                             | 242  | P.2d 9    |
| Franck v. J. J. Sugarman-Rudolph Co., App. ....                                         | 241  | P.2d 1045 |
| Franquelin; People v., App. ....                                                        | 241  | P.2d 651  |
| Frazier Park Playgrounds; Bradley v., App. ....                                         | 242  | P.2d 958  |
| Frederick; People v., App. ....                                                         | 241  | P.2d 1039 |
| Fredrickson v. Superior Court In and For City and County of San Francisco, Sup. ....    | 241  | P.2d 541  |
| Friesleben Estate Co.; Kesterson Lumber Corp. v., App. ....                             | 241  | P.2d 672  |
| Fritz; Lewis v., App. ....                                                              | 242  | P.2d 669  |
| Fujii v. State, Sup. ....                                                               | 242  | P.2d 617  |
| Gantner v. Gantner, Sup. ....                                                           | 242  | P.2d 329  |
| Gantner v. Superior Court In and For City and County of San Francisco, Sup. ....        | 242  | P.2d 328  |
| Girard's Estate, In re, App. ....                                                       | 242  | P.2d 669  |
| Goff v. Solomon, App. ....                                                              | 241  | P.2d 49   |
| Goldberg; People v., App. ....                                                          | 242  | P.2d 116  |
| Gonzales; Reyes v., App. ....                                                           | 242  | P.2d 401  |
| Goodwin v. Lost Key Mines, App. ....                                                    | 241  | P.2d 273  |
| Gould; People v., App. ....                                                             | 241  | P.2d 577  |
| Graham; Brogdon v., App. ....                                                           | 242  | P.2d 76   |
| Graves v. Smolicz, App. ....                                                            | 242  | P.2d 371  |
| Gray; Leeds v., App. ....                                                               | 242  | P.2d 48   |
| Greiner v. Kirkpatrick, App. ....                                                       | 241  | P.2d 564  |
| Griffin v. International Longshoremen's and Warehousemen's Union, Local 1-13, App. .... | 241  | P.2d 552  |
| Griffith v. Kerrigan, App. ....                                                         | 241  | P.2d 296  |
| Gromeeko v. Gromeeko, App. ....                                                         | 242  | P.2d 41   |
| Gunness v. LaMont, App. ....                                                            | 241  | P.2d 584  |
| Hackney; Lee v., App. ....                                                              | 242  | P.2d 933  |
| Hale v. Bohannon, Sup. ....                                                             | 241  | P.2d 4    |
| Hall v. Coyle, Sup. ....                                                                | 241  | P.2d 236  |
| Hallaian v. Collins, App. ....                                                          | 242  | P.2d 58   |
| Hamilton; Lost Key Mines v., App. ....                                                  | 241  | P.2d 273  |
| Hampton v. Superior Court In and For Los Angeles County, Sup. ....                      | 242  | P.2d 1    |
| Hansen v. Bernstein, App. ....                                                          | 242  | P.2d 368  |
| Harris; People v., App. ....                                                            | 242  | P.2d 663  |
| Hart v. Briskman, App. ....                                                             | 242  | P.2d 341  |
| Hart; Hume v., App. ....                                                                | 241  | P.2d 25   |
| Hayward Lumber & Inv. Co. v. Construction Products Corp., App. ....                     | 241  | P.2d 1054 |
| Haywood; People v., App. ....                                                           | 241  | P.2d 665  |



# CASES REPORTED

|                                                                                             | Vol. | Page      |
|---------------------------------------------------------------------------------------------|------|-----------|
| Healy's Estate, In re, App. ....                                                            | 241  | P.2d 1043 |
| Henderson v. Scudder, App. ....                                                             | 242  | P.2d 947  |
| Hernandez v. Hernandez, App. ....                                                           | 242  | P.2d 59   |
| Herring v. Fisher, App. ....                                                                | 242  | P.2d 963  |
| Hicks v. Barnes, App. ....                                                                  | 241  | P.2d 648  |
| Hollywood Turf Club; Orloff v., App. ....                                                   | 242  | P.2d 660  |
| Holmberg v. Marsden, App. ....                                                              | 242  | P.2d 911  |
| Holme; Silva v., App. ....                                                                  | 241  | P.2d 21   |
| Hopkins v. Carter, App. ....                                                                | 241  | P.2d 1063 |
| Hostetter v. Alderson, Sup. ....                                                            | 241  | P.2d 230  |
| Howard v. Triangle Freight Lines, App. ....                                                 | 241  | P.2d 35   |
| Hugony v. La Guardia, App. ....                                                             | 242  | P.2d 893  |
| Hume v. Hart, App. ....                                                                     | 241  | P.2d 25   |
| Hurst; People v., App. ....                                                                 | 242  | P.2d 106  |
| Hutton v. Hutton, App. ....                                                                 | 241  | P.2d 53   |
| Industrial Acc. Commission; Aetna Life Ins. Co. v., Sup. ....                               | 241  | P.2d 530  |
| Industrial Acc. Commission; California-Western States Life Ins. Co. v.,<br>Sup. ....        | 242  | P.2d 13   |
| Industrial Acc. Commission; Commercial Cas. Ins. Co. of Newark, N. J.<br>v., App. ....      | 242  | P.2d 13   |
| Industrial Acc. Commission; Commercial Cas. Ins. Co. of Newark, N. J.<br>v., App. ....      | 242  | P.2d 20   |
| Industrial Acc. Commission; Fireman's Fund Indem. Co. v., App. ....                         | 241  | P.2d 299  |
| Industrial Acc. Commission; Sutter Butte Canal Co. v., App. ....                            | 241  | P.2d 1008 |
| Industrial Acc. Commission of Cal.; State Compensation Ins. Fund v.,<br>Sup. ....           | 242  | P.2d 311  |
| International Longshoremen's and Warehousemen's Union, Local 1-13;<br>Griffin v., App. .... | 241  | P.2d 552  |
| Isham v. Isham, App. ....                                                                   | 241  | P.2d 295  |
| Jacobs v. Bozzani Motors, App. ....                                                         | 241  | P.2d 642  |
| Jefferson v. Chronicle Pub. Co., Sup. ....                                                  | 241  | P.2d 20   |
| Jenkins v. Overholt, App. ....                                                              | 242  | P.2d 107  |
| Jenkins' Estate, In re, App. ....                                                           | 242  | P.2d 107  |
| J. J. Sugarman-Rudolph Co.; Franck v., App. ....                                            | 241  | P.2d 1045 |
| Johnson; Orella v., Sup. ....                                                               | 242  | P.2d 5    |
| Johnson; Peterson v., App. ....                                                             | 242  | P.2d 678  |
| Jones; McAulay v., App. ....                                                                | 242  | P.2d 650  |
| Joughin v. West, App. ....                                                                  | 242  | P.2d 112  |
| Kardassakis; Rickey v., App. ....                                                           | 242  | P.2d 384  |
| Kelly v. Bank of America, Nat. Trust & Sav. Ass'n, App. ....                                | 242  | P.2d 923  |
| Kentera v. Superior Court, In and For City and County of San Fran-<br>cisco, App. ....      | 241  | P.2d 590  |
| Kerrigan; Griffith v., App. ....                                                            | 241  | P.2d 296  |
| Kesterson Lumber Corp. v. Friesleben Estate Co., App. ....                                  | 241  | P.2d 672  |
| Kilstrom v. Bronnenberg, App. ....                                                          | 242  | P.2d 65   |
| Kirkman Corp.; Blumer v., Sup. ....                                                         | 241  | P.2d 17   |
| Kirkpatrick; Greiner v., App. ....                                                          | 241  | P.2d 564  |
| Kirkpatrick v. Kirkpatrick, App. ....                                                       | 241  | P.2d 555  |
| Kirkpatrick's Estate, In re, App. ....                                                      | 241  | P.2d 555  |
| Klassen; Webster v., App. ....                                                              | 241  | P.2d 302  |
| Klett v. Security Acceptance Co., Sup. ....                                                 | 242  | P.2d 873  |
| Krackov; Mancuso v., App. ....                                                              | 241  | P.2d 1052 |
| Kritt v. Athens Hills Development Co., App. ....                                            | 241  | P.2d 606  |
| Krumsiek; Williams v., App. ....                                                            | 241  | P.2d 40   |
| La Guardia; Hugony v., App. ....                                                            | 242  | P.2d 893  |
| LaMont; Gunness v., App. ....                                                               | 241  | P.2d 584  |
| LaMont's Estate, In re, App. ....                                                           | 241  | P.2d 584  |
| Lassallette v. Parisian Baking Co., App. ....                                               | 242  | P.2d 671  |

# CASES REPORTED

|                                                                           | Vol.     | Page |
|---------------------------------------------------------------------------|----------|------|
| Lawrie v. Lawrie, App. ....                                               | 242 P.2d | 920  |
| Lee v. Hackney, App. ....                                                 | 242 P.2d | 933  |
| Leeds v. Gray, App. ....                                                  | 242 P.2d | 48   |
| Lee Wa Corp.; Cramer v., App. ....                                        | 241 P.2d | 550  |
| Lehmann v. Mitchell, App. ....                                            | 241 P.2d | 573  |
| Leonis v. Superior Court In and For Los Angeles County, Sup. ....         | 241 P.2d | 253  |
| Lerner v. Superior Court In and For San Mateo County, Sup. ....           | 242 P.2d | 321  |
| Levy v. Martin, App. ....                                                 | 241 P.2d | 563  |
| Lewis v. Fritz, App. ....                                                 | 242 P.2d | 669  |
| Lingenfelter's Estate, In re, Sup. ....                                   | 241 P.2d | 990  |
| Lobdell v. Miller, App. ....                                              | 241 P.2d | 30   |
| Los Angeles Turf Club; Orloff v., App. ....                               | 242 P.2d | 660  |
| Lost Key Mines; Goodwin v., App. ....                                     | 241 P.2d | 273  |
| Lost Key Mines v. Hamilton, App. ....                                     | 241 P.2d | 273  |
| Luigi Consentino & Sons; Wold v., App. ....                               | 241 P.2d | 1032 |
| McAulay v. Jones, App. ....                                               | 242 P.2d | 650  |
| McKee v. Mires, App. ....                                                 | 242 P.2d | 954  |
| McKinney v. City and County of San Francisco, App. ....                   | 241 P.2d | 1060 |
| Magnuson, In re, App. ....                                                | 242 P.2d | 362  |
| Mancuso v. Krackov, App. ....                                             | 241 P.2d | 1052 |
| Manning; Perry v., App. ....                                              | 241 P.2d | 43   |
| Marks; Eads v., App. ....                                                 | 241 P.2d | 582  |
| Marsden; Holmberg v., App. ....                                           | 242 P.2d | 911  |
| Marshall v. State, App. ....                                              | 241 P.2d | 621  |
| Marston; Roth v., App. ....                                               | 242 P.2d | 375  |
| Martin; Levy v., App. ....                                                | 241 P.2d | 568  |
| Martin v. Martin, App. ....                                               | 242 P.2d | 688  |
| Martin Bros. v. City of Concord, App. ....                                | 242 P.2d | 406  |
| Martinez; People v., Sup. ....                                            | 241 P.2d | 224  |
| May; Yost v., App. ....                                                   | 242 P.2d | 73   |
| Miglietta v. Charlan, App. ....                                           | 242 P.2d | 365  |
| Milias v. Wheeler Hospital, App. ....                                     | 241 P.2d | 684  |
| Miller v. Cortese, App. ....                                              | 242 P.2d | 84   |
| Miller v. Lobdell, App. ....                                              | 241 P.2d | 30   |
| Miller v. Republic Grocery, App. ....                                     | 242 P.2d | 396  |
| Mimms; People v., App. ....                                               | 242 P.2d | 331  |
| Mires; McKee v., App. ....                                                | 242 P.2d | 954  |
| Mistrirel; People v., App. ....                                           | 241 P.2d | 1050 |
| Mitchell; Lehmann v., App. ....                                           | 241 P.2d | 573  |
| Mitchell; People v., App. ....                                            | 241 P.2d | 610  |
| Morris v. Municipal Court of City and County of San Francisco, App. ....  | 242 P.2d | 339  |
| Motzer v. Paoli, App. ....                                                | 242 P.2d | 91   |
| Municipal Court of City and County of San Francisco; Morris v., App. .... | 242 P.2d | 339  |
| Murphy; Eli v., App. ....                                                 | 242 P.2d | 902  |
| Nelson v. Department of Corrections, App. ....                            | 242 P.2d | 906  |
| New Zealand Ins. Co. v. Brown, App. ....                                  | 242 P.2d | 674  |
| Nicholas v. Nicholas, App. ....                                           | 242 P.2d | 679  |
| Orella v. Johnson, Sup. ....                                              | 242 P.2d | 5    |
| Orloff v. Hollywood Turf Club, App. ....                                  | 242 P.2d | 660  |
| Orloff v. Los Angeles Turf Club, App. ....                                | 242 P.2d | 660  |
| Overholt; Jenkins v., App. ....                                           | 242 P.2d | 107  |
| Pacific Coast Gasoline Co.; Carlton v., App. ....                         | 242 P.2d | 391  |
| Palermo; Stockton Theaters v., App. ....                                  | 241 P.2d | 54   |
| Paoli; Motzer v., App. ....                                               | 242 P.2d | 91   |
| Parisian Baking Co.; Lassallete v., App. ....                             | 242 P.2d | 671  |
| Park Beverly Corp.; Sanders v., App. ....                                 | 241 P.2d | 597  |
| Parks v. Superior Court In and For Alameda County, Sup. ....              | 241 P.2d | 521  |
| Peerless Laundry Services v. City of Los Angeles, App. ....               | 241 P.2d | 269  |



# CASES REPORTED

|                                                                                      | Vol. | Page      |
|--------------------------------------------------------------------------------------|------|-----------|
| People v. Agnew, Sup. ....                                                           | 242  | P.2d 410  |
| People v. Ansite, App. ....                                                          | 241  | P.2d 1036 |
| People v. Aparicio, Sup. ....                                                        | 241  | P.2d 221  |
| People v. Bass, App. ....                                                            | 242  | P.2d 685  |
| People v. Brownstein, App. ....                                                      | 241  | P.2d 1056 |
| People v. Burnett, App. ....                                                         | 241  | P.2d 616  |
| People v. Burns, App. ....                                                           | 241  | P.2d 308  |
| People v. Burns, Sup. ....                                                           | 242  | P.2d 9    |
| People v. Crews, App. ....                                                           | 242  | P.2d 64   |
| People v. Cuellar, App. ....                                                         | 242  | P.2d 694  |
| People v. Dessauer, Sup. ....                                                        | 241  | P.2d 238  |
| People v. Etter, App. ....                                                           | 242  | P.2d 899  |
| People v. Franquelin, App. ....                                                      | 241  | P.2d 651  |
| People v. Frederick, App. ....                                                       | 241  | P.2d 1039 |
| People v. Goldberg, App. ....                                                        | 242  | P.2d 116  |
| People v. Gould, App. ....                                                           | 241  | P.2d 577  |
| People v. Harris, App. ....                                                          | 242  | P.2d 663  |
| People v. Haywood, App. ....                                                         | 241  | P.2d 665  |
| People v. Hurst, App. ....                                                           | 242  | P.2d 106  |
| People v. Martinez, Sup. ....                                                        | 241  | P.2d 224  |
| People v. Mimms, App. ....                                                           | 242  | P.2d 331  |
| People v. Mistriel, App. ....                                                        | 241  | P.2d 1050 |
| People v. Mitchell, App. ....                                                        | 241  | P.2d 610  |
| People v. Rackley, two cases, App. ....                                              | 241  | P.2d 588  |
| People v. Renoso, App. ....                                                          | 241  | P.2d 628  |
| People v. Robinson, App. ....                                                        | 242  | P.2d 676  |
| People v. Schivo, App. ....                                                          | 241  | P.2d 268  |
| People v. Shannon, App. ....                                                         | 241  | P.2d 1007 |
| People v. Shipman, App. ....                                                         | 242  | P.2d 349  |
| People v. Southack, App. ....                                                        | 241  | P.2d 558  |
| People v. Spring Val. Co., App. ....                                                 | 241  | P.2d 1069 |
| People v. Sullivan, App. ....                                                        | 242  | P.2d 348  |
| People v. Tolson, App. ....                                                          | 241  | P.2d 32   |
| People v. Villegas, App. ....                                                        | 242  | P.2d 657  |
| People v. Vogel, App. ....                                                           | 242  | P.2d 969  |
| People v. Von Mullendorf, App. ....                                                  | 242  | P.2d 403  |
| People v. Wallace, App. ....                                                         | 241  | P.2d 264  |
| People v. Wheeler, App. ....                                                         | 241  | P.2d 276  |
| Perl's Guardianship, In re, App. ....                                                | 242  | P.2d 101  |
| Perry v. Manning, App. ....                                                          | 241  | P.2d 43   |
| Peterson v. Johnson, App. ....                                                       | 242  | P.2d 678  |
| Pig'n Whistle Candy Co.; Riley v., App. ....                                         | 241  | P.2d 294  |
| Polizzi v. Porcaro, App. ....                                                        | 242  | P.2d 949  |
| Porcaro; Polizzi v., App. ....                                                       | 242  | P.2d 949  |
| Potter; Bland v., App. ....                                                          | 242  | P.2d 26   |
| Rackley; People v., App. ....                                                        | 241  | P.2d 588  |
| Realty Bond Service Corp. v. Stafford, App. ....                                     | 242  | P.2d 936  |
| Remillard Brick Co. v. Remillard-Dandini Co., App. ....                              | 241  | P.2d 66   |
| Remillard-Dandini Co.; Remillard Brick Co. v., App. ....                             | 241  | P.2d 66   |
| Renoso; People v., App. ....                                                         | 241  | P.2d 628  |
| Republic Grocery; Miller v., App. ....                                               | 242  | P.2d 396  |
| Retirement Bd. of San Francisco City Emp. Retirement System; Rogers<br>v., App. .... | 241  | P.2d 611  |
| Reyes v. Gonzales, App. ....                                                         | 242  | P.2d 401  |
| Richfield Oil Corp. v. Crawford, App. ....                                           | 241  | P.2d 1020 |
| Rickey v. Kardassakis, App. ....                                                     | 242  | P.2d 384  |
| Riley v. Pig'n Whistle Candy Co., App. ....                                          | 241  | P.2d 294  |
| Robinson; People v., App. ....                                                       | 242  | P.2d 676  |

# CASES REPORTED

|                                                                                            | Vol.     | Page |
|--------------------------------------------------------------------------------------------|----------|------|
| Roche; Danielson v., App. ....                                                             | 241 P.2d | 1028 |
| Rogers v. Retirement Bd. of San Francisco City Emp. Retirement Sys-<br>tem, App. ....      | 241 P.2d | 611  |
| Rosenberg v. Feigin, App. ....                                                             | 241 P.2d | 1043 |
| Roth v. Marston, App. ....                                                                 | 242 P.2d | 375  |
| Roy v. Roy, App. ....                                                                      | 242 P.2d | 388  |
| Rubin v. De Lao, App. ....                                                                 | 242 P.2d | 360  |
| Ruiz; Whalen v., App. ....                                                                 | 242 P.2d | 78   |
| Ruiz; Whalen v., App. ....                                                                 | 242 P.2d | 940  |
| Rush; Cole v., App. ....                                                                   | 241 P.2d | 601  |
| Sanders v. Park Beverly Corp., App. ....                                                   | 241 P.2d | 597  |
| San Jacinto Estates; Ulrich v., App. ....                                                  | 241 P.2d | 262  |
| Sav-On Drugs; Cal-Dak Co. v., App. ....                                                    | 242 P.2d | 333  |
| Schaffer v. State Bd. of Equalization, App. ....                                           | 241 P.2d | 46   |
| Schivo; People v., App. ....                                                               | 241 P.2d | 268  |
| Schnider v. State, Sup. ....                                                               | 241 P.2d | 1    |
| Scudder; Henderson v., App. ....                                                           | 242 P.2d | 947  |
| Security Acceptance Co.; Klett v., Sup. ....                                               | 242 P.2d | 873  |
| Sei Fujii v. State, Sup. ....                                                              | 242 P.2d | 617  |
| Serve Yourself Gasoline Stations Ass'n v. Brock, App. ....                                 | 241 P.2d | 593  |
| Shane; Duprey v., App. ....                                                                | 241 P.2d | 78   |
| Shannon; People v., App. ....                                                              | 241 P.2d | 1007 |
| Shaw v. Board of Administration, App. ....                                                 | 241 P.2d | 635  |
| Shipman; People v., App. ....                                                              | 242 P.2d | 349  |
| Silva v. Holme, App. ....                                                                  | 241 P.2d | 21   |
| Silverstein v. Department of Mental Hygiene, App. ....                                     | 242 P.2d | 101  |
| Slosson; Dragovich v., App. ....                                                           | 242 P.2d | 945  |
| Smith v. Downey, App. ....                                                                 | 241 P.2d | 618  |
| Smolicz; Graves v., App. ....                                                              | 242 P.2d | 371  |
| Solomon v. Goff, App. ....                                                                 | 241 P.2d | 49   |
| Solomon v. Walton, App. ....                                                               | 241 P.2d | 49   |
| Southack; People v., App. ....                                                             | 241 P.2d | 558  |
| Southern Pac. Co.; Conner v., Sup. ....                                                    | 241 P.2d | 535  |
| Southwestern Inv. Corp. v. City of Los Angeles, Sup. ....                                  | 241 P.2d | 985  |
| Spring Val. Co.; People v., App. ....                                                      | 241 P.2d | 1069 |
| Stafford v. Realty Bond Service Corp., App. ....                                           | 242 P.2d | 936  |
| Stansbury; Anderson v., Sup. ....                                                          | 242 P.2d | 305  |
| State; Marshall v., App. ....                                                              | 241 P.2d | 621  |
| State; Schnider v., Sup. ....                                                              | 241 P.2d | 1    |
| State; Sei Fujii v., Sup. ....                                                             | 242 P.2d | 617  |
| State Bd. of Equalization; Schaffer v., App. ....                                          | 241 P.2d | 46   |
| State Compensation Ins. Fund v. Industrial Acc. Commission of Cal.,<br>Sup. ....           | 242 P.2d | 311  |
| Stevens; Calame v., App. ....                                                              | 242 P.2d | 109  |
| Stevenson Properties; Decter v., App. ....                                                 | 241 P.2d | 279  |
| Stockton Theaters v. Palermo, App. ....                                                    | 241 P.2d | 54   |
| Sullivan; People v., App. ....                                                             | 242 P.2d | 348  |
| Sunset Mill. & Grain Co. v. Anderson, App. ....                                            | 242 P.2d | 941  |
| Superior Court In and For Alameda County; Parks v., Sup. ....                              | 241 P.2d | 521  |
| Superior Court In and For Alameda County; Wemyss v., Sup. ....                             | 241 P.2d | 525  |
| Superior Court, In and For City and County of San Francisco; Brock<br>v., App. ....        | 241 P.2d | 283  |
| Superior Court In and For City and County of San Francisco; Fredrick-<br>son v., Sup. .... | 241 P.2d | 541  |
| Superior Court in and for City and County of San Francisco; Gantner<br>v., Sup. ....       | 242 P.2d | 328  |
| Superior Court, In and For City and County of San Francisco; Kentera<br>v., App. ....      | 241 P.2d | 590  |

# CASES REPORTED

|                                                                                    | Vol. | Page      |
|------------------------------------------------------------------------------------|------|-----------|
| Superior Court, In and For City and County of San Francisco; Swift v., Sup. ....   | 241  | P.2d 217  |
| Superior Court In and For Los Angeles County; City of Vernon v., Sup. ....         | 241  | P.2d 243  |
| Superior Court In and For Los Angeles County; Culver City v., Sup. ....            | 241  | P.2d 258  |
| Superior Court In and For Los Angeles County; Hampton v., Sup. ....                | 242  | P.2d 1    |
| Superior Court In and For Los Angeles County; Leonis v., Sup. ....                 | 241  | P.2d 253  |
| Superior Court In and For Los Angeles County; Weisfeld v., App. ....               | 242  | P.2d 29   |
| Superior Court In and For San Mateo County; Lerner v., Sup. ....                   | 242  | P.2d 321  |
| Sutter Butte Canal Co. v. Industrial Acc. Commission, App. ....                    | 241  | P.2d 1008 |
| Swift v. Superior Court, In and For City and County of San Francisco, Sup. ....    | 241  | P.2d 217  |
| Sykes v. City of Los Angeles, App. ....                                            | 241  | P.2d 1004 |
| Tadlock; Wilkin v., App. ....                                                      | 241  | P.2d 1066 |
| Taormina v. Antelope Min. Corp., App. ....                                         | 242  | P.2d 665  |
| Tolson; People v., App. ....                                                       | 241  | P.2d 32   |
| Triangle Freight Lines; Howard v., App. ....                                       | 241  | P.2d 35   |
| Troup; Uren v., App. ....                                                          | 242  | P.2d 895  |
| Tucker; DeArmond v., Sup. ....                                                     | 241  | P.2d 990  |
| Ulrich v. San Jacinto Estates, App. ....                                           | 241  | P.2d 262  |
| United Bldg. Co.; Boosman v., App. ....                                            | 241  | P.2d 58   |
| Uren v. Troup, App. ....                                                           | 242  | P.2d 895  |
| Utz v. Aureguy, App. ....                                                          | 241  | P.2d 639  |
| Vernon, City of, v. Superior Court In and For Los Angeles County, Sup. ....        | 241  | P.2d 243  |
| Veyna v. Veyna, App. ....                                                          | 242  | P.2d 55   |
| Villegas; People v., App. ....                                                     | 242  | P.2d 657  |
| Vogel; People v., App. ....                                                        | 242  | P.2d 969  |
| Von Mullendorf; People v., App. ....                                               | 242  | P.2d 403  |
| Wagnon; Anderson v., App. ....                                                     | 242  | P.2d 915  |
| Wallace; People v., App. ....                                                      | 241  | P.2d 264  |
| Walton; Solomon v., App. ....                                                      | 241  | P.2d 49   |
| Webster v. Klassen, App. ....                                                      | 241  | P.2d 302  |
| Weger; Crofoot v., App. ....                                                       | 241  | P.2d 1017 |
| Weis; West Coast Saw Mills v., App. ....                                           | 242  | P.2d 938  |
| Weisfeld v. Superior Court In and For Los Angeles County, App. ....                | 242  | P.2d 29   |
| Welch v. City of Long Beach, App. ....                                             | 241  | P.2d 26   |
| Welfer, In re, App. ....                                                           | 242  | P.2d 655  |
| Welfer v. Welfer, App. ....                                                        | 242  | P.2d 655  |
| Wemyss v. Superior Court In and For Alameda County, Sup. ....                      | 241  | P.2d 525  |
| West; Claudine v., App. ....                                                       | 241  | P.2d 580  |
| West; Joughin v., App. ....                                                        | 242  | P.2d 112  |
| West Coast Life Ins. Co.; Beck v., Sup. ....                                       | 241  | P.2d 544  |
| West Coast Saw Mills v. Weis, App. ....                                            | 242  | P.2d 938  |
| Western Surgical Supply Co. v. Affleck, App. ....                                  | 242  | P.2d 929  |
| Western United Constructors; Bank of America Nat. Trust & Sav. Ass'n v., App. .... | 242  | P.2d 365  |
| West Los Angeles Mill. Co. v. Brock, App. ....                                     | 241  | P.2d 283  |
| Whalen v. Ruiz, App. ....                                                          | 242  | P.2d 78   |
| Whalen v. Ruiz, App. ....                                                          | 242  | P.2d 940  |
| Wheeler; People v., App. ....                                                      | 241  | P.2d 276  |
| Wheeler Hospital; Miliias v., App. ....                                            | 241  | P.2d 684  |
| Wilkin v. Tadlock, App. ....                                                       | 241  | P.2d 1066 |
| Williams v. Krumsiek, App. ....                                                    | 241  | P.2d 40   |
| Williams' Estate, In re, App. ....                                                 | 242  | P.2d 26   |
| Wilson v. Wilson, App. ....                                                        | 241  | P.2d 281  |
| Wold v. Luigi Consentino & Sons, App. ....                                         | 241  | P.2d 1032 |
| Wood v. Crocker First Nat. Bank of San Francisco, App. ....                        | 241  | P.2d 1043 |
| Yost v. May, App. ....                                                             | 242  | P.2d 73   |







# CALIFORNIA REPORTER

## 241 PACIFIC REPORTER

### SECOND SERIES

---

38 Cal.2d 439

**SCHNIDER et ux. v. STATE.**

**L. A. 21672.**

**Supreme Court of California, in Bank.**

**Feb. 21, 1952.**

Inverse condemnation proceeding by Louis Schnider, and another, against State of California. Plaintiffs appealed from that part of judgment of the Superior Court, Los Angeles County, Jesse J. Frampton, J., which denied them compensation for loss of asserted right of direct access to freeway. The Supreme Court, Gibson, C. J., held that construction of freeway did not create new rights of access in abutting property owner.

Judgment affirmed.

Prior opinion 231 P.2d 177.

#### **1. Highways ⇨85**

Statute authorizing freeways provides for creation of freeway on lands where public way had not existed but does not create rights of direct access in favor of other property which, prior to the new construction, had no right of access. Streets and Highways Code, §§ 100.1 to 100.3.

#### **2. Highways ⇨85**

Statute providing for means of acquiring rights of access upon establishment of freeway refers only to rights existing prior to establishment of freeway. Streets and Highways Code, § 100.3.

#### **3. Eminent Domain ⇨106**

Where property owner had no direct access to highway until, pursuant to resolution, adjoining property was converted into freeway abutting upon his property, he was not entitled to damages for loss of asserted right of direct access because construction of freeway did not create such right. Streets and Highways Code, § 23.5.

241 P.2d—1

Cal.Rep. 241-242 P.2d—1

#### **4. Administrative Law and Procedure ⇨322**

##### **Eminent Domain ⇨6**

Resolution by Highway Commission authorizing Department of Public Works to acquire such rights of access as it determined to be feasible and necessary to promote public safety and preserve usefulness of the freeway was not unlawful delegation of powers as resolution did not purport to give department any powers it did not already have. Streets and Highways Code, §§ 100, 100.1, 102, 104.

#### **5. Highways ⇨85**

Although property owner could pass directly from his property to street for 30 day period during or after construction of freeway on adjoining property, but subsequent to adoption of resolution creating freeway, he could not acquire right to continue such use in absence of circumstances creating estoppel. Streets and Highways Code, §§ 100.1 to 100.3.

---

Reuben Rosensweig and Irl D. Brett, Los Angeles, for appellants.

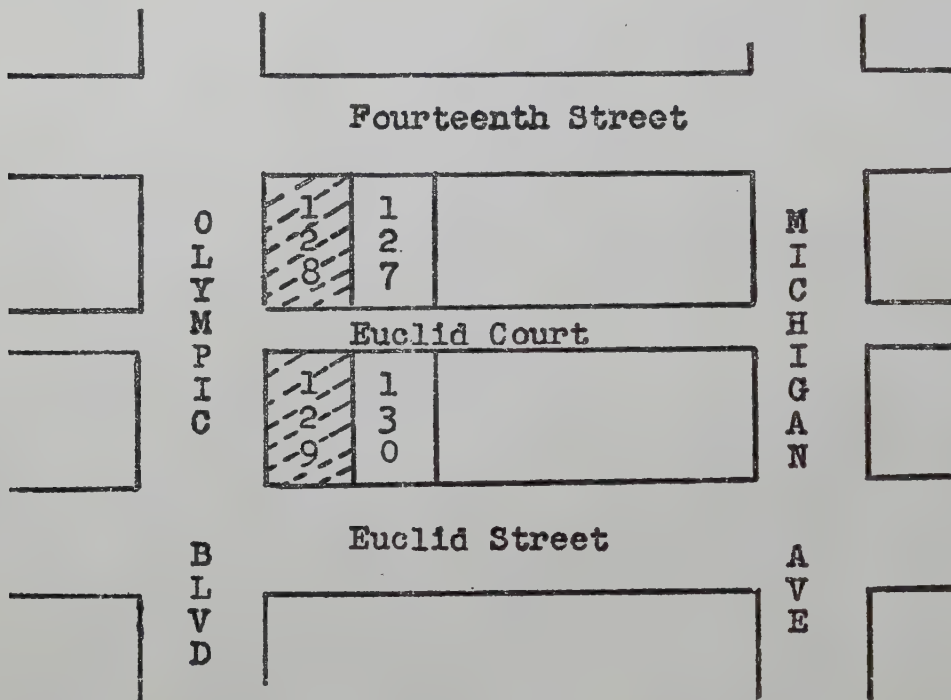
Robert E. Reed, Sacramento, George C. Hadley, John N. McLaurin, Herbert J. Williams, Los Angeles, Harry S. Fenton, Sacramento, and Albert J. Day, Los Angeles, for respondent.

GIBSON, Chief Justice.

This inverse condemnation proceeding was brought by plaintiffs to recover damages for the taking of claimed rights of access to Olympic Boulevard, a state highway in the city of Santa Monica. In 1945 the California Highway Commission adopted a resolution authorizing the reconstruction of a portion of the boulevard as a

limited freeway. The area here involved as it appeared at that time is shown by the accompanying map.

It is clear from the record that there was no right of direct access to Olympic Boulevard from lots 127 and 130 when the resolu-



In 1947 plaintiffs purchased lots 127 and 130, which did not abut on the boulevard until it was subsequently widened for use as a freeway. Prior to that time lots 128 and 129, which were acquired by the state from other persons for highway purposes, intervened between plaintiffs' property and the boulevard. The construction of the freeway was commenced about March 1, 1948, and some time thereafter the state erected a fence along the common boundary line between plaintiffs' property and the freeway, thereby barring direct access from one to the other.

Plaintiffs obtained a judgment for damages due to changes in the grade, which included compensation for loss of access to Olympic Boulevard by way of cross streets bordering upon plaintiffs' lots. The trial court, however, refused to allow plaintiffs compensation for the loss of an asserted right of *direct* access, and they have appealed from the portion of the judgment which denied them such recovery.

tion of the California Highway Commission was adopted. It is also clear that such a right did not arise upon the acquisition of the intervening property by the state for highway purposes. Accordingly, we are not concerned with a situation in which the owner of property abutting upon a conventional highway is deprived of direct access when it is rebuilt as a freeway. Nor does this case involve the question of what rights of access plaintiffs would have acquired if the boulevard had been widened and rebuilt as a conventional highway. The sole issue before us is whether plaintiffs acquired a right of direct access as a result of the construction of the freeway.

[1,2] Freeways are designed to provide rapid transit for through traffic, uninterrupted by vehicles or pedestrians from private roads and intersecting streets, and the word "freeway," as used in the Streets and Highways Code, means a highway with respect to which owners of abutting lands have no rights of access or only

limited rights of access. Sts. & Hy.Code, § 23.5. The Streets and Highways Code furnishes ample authorization for the construction of a freeway on land where no public way existed before without creating rights of direct access in favor of other property which, prior to the new construction, had no such rights of access. Sts. & Hy.Code, §§ 100.1, 100.2, 100.3. The provision of section 100.3 that a declaration creating a freeway "shall not affect private property rights of access, and any such rights taken or damaged within the meaning of Article I, section 14, of the State Constitution \* \* \* shall be acquired in a manner provided by law", plainly refers to rights of access which exist prior to the establishment of the freeway and not to claimed rights which have had no previous existence and which could come into being, if at all, only by virtue of the new construction.

Where a property owner has no right of direct access to a highway before it is converted into a freeway abutting upon his property, nothing is taken from him by the failure to give him such a right when the conversion takes place. The allowance of compensation in such a case would amount to a gift rather than payment for the destruction of a right. Some analogy may be afforded by cases holding that a property owner has no right to compensation on the basis of enhancement of value resulting from the proposed public improvement for which the property is taken or damaged. See *United States v. Miller*, 317 U.S. 369, 377-380, 63 S.Ct. 276, 87 L.Ed. 336; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 74, 20 P. 372, 3 L.R.A. 83.

[3] The resolution adopted by the California Highway Commission in 1945 fully complied with the applicable provisions of the Streets and Highways Code and effectively designated Olympic Boulevard as a freeway within the meaning of section 23.5. The construction of the freeway, pursuant to the resolution, did not create new rights of access in favor of land which did not abut upon the highway

as it formerly existed. Where an ordinary or conventional road is built there may be an intent to serve abutting owners, but when a freeway is established the intent is just the opposite, and a resolution creating a freeway gives adequate notice that no new rights of access will arise unless they are specifically granted. See 3 Stanford L.Rev. [1951] 298, 300, 308.

[4] There is no merit to plaintiffs' contention that the resolution contains an unlawful delegation of powers by reason of the fact that the California Highway Commission authorized the Department of Public Works to acquire such rights of access as in its discretion it may determine to be feasible and necessary in order to promote the public safety and preserve the usefulness of the freeway. The resolution does not purport to give the department any powers which it did not already have. Sts. & Hy.Code, §§ 100, 100.1, 102, 104.

[5] Plaintiffs' position is not aided by their offer to prove that the "newly created and widened Olympic Boulevard abutted plaintiffs' lots 127 and 130 with complete and free access to and from said lots for in excess of 30 days." The offer does not state when this 30 day period occurred, but it must have been after the adoption of the resolution. Plaintiffs make no claim that any rights of direct access existed prior to that time, and, as we have seen, no new rights of access were created by the widening of the highway as a freeway. The fact that it may have been possible for plaintiffs to pass directly from their property to the boulevard during the construction work, or at any time after the resolution was adopted and before the fence was erected, could not give them a right to continue such use in the absence of circumstances which would form the basis of an estoppel. There is no showing that any such circumstances existed here.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



38 Cal.2d 458

**HALE v. BOHANNON et al.**

Sac. 6096.

Supreme Court of California, in Bank.

Feb. 21, 1952.

Action by Roy L. Hale against David D. Bohannon, Dolly Varden Lumber Company, and others, for sums due under a contract. The Superior Court, Humboldt County, Delos A. Mace, J., entered an order denying the named corporate defendant's motion for a change of venue, and the named corporate defendant appealed. The Supreme Court, Edmonds, J., held, inter alia, that the venue statute was not applicable to the action against the corporation.

Affirmed.

**1. Evidence** ⇨384, 397(2)

Parol evidence rule is not rule of evidence but is one of substantive law, and the rule, as applied to contracts, is simply that, as a matter of substantive law, a certain act, the act of embodying complete terms of agreement in writing, becomes the contract of the parties. Code Civ.Proc. §§ 395, 1856; Civ.Code, § 1625.

**2. Appeal and Error** ⇨912

Where motion for change of venue was made and determined upon allegations of verified complaint and affidavits of respective parties, all conflicts would have to be resolved in favor of prevailing party and all reasonable inferences drawn would have to be in support of trial court's order.

**3. Corporations** ⇨503(2)

Where action was for breach of corporate employer's obligation to make payments under contract of employment, place where payments were to be made would be decisive factor insofar as venue was concerned. Const. art. 12, § 16.

**4. Contracts** ⇨208

In suit upon contract of corporation, where no place of performance is expressly stipulated, it ought to be held performable in place where circumstances, viewed in light of pertinent code provisions, indicate that parties expected or intended it to be performed. Const. art. 12, § 16; Civ.Code, §§ 1488, 1489.

**5. Appeal and Error** ⇨931(1), 1010(1)

Question of where contract was to be performed is one of fact, and determination by trial court of that question will not be disturbed if there is any substantial evidence in record to support it, all conflicts being resolved in favor of prevailing party. Civ.Code, §§ 1488, 1489.

**6. Corporations** ⇨503(2)

Where contract of employment did not provide where corporate employer was to make payments, for purpose of determining, in order to establish venue, where breach of corporation's obligation to make such payments occurred, fact that principal performance under contract was to be in particular county and fact that county was also that of employee's residence were relevant as bearing upon intention of parties, though not in themselves conclusive. Const. art. 12, § 16.

**7. Contracts** ⇨209

Where intention, with reference to place of payment, does not appear from contract, general rule is that debtor must seek creditor to make payment.

**8. Corporations** ⇨503(3)

In proceedings on defendant's motion for change of venue of employee's action against corporation for breach of obligation to make payments under contract, evidence did not establish, as matter of law, that place of performance was, as contended by defendant, at corporation's principal place of business.

**9. Payment** ⇨21, 67(1)

The mere giving of a check does not constitute payment, nor does mere acceptance thereof raise presumption that such acceptance constitutes payment, and since a check of itself is not payment until cashed, party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance were in accordance with agreement that it was to be accepted as payment.

**10. Payment** ⇨7

When paid, a check relates to date of its delivery, but time of payment of check

does not necessarily relate to place of its delivery.

**11. Contracts** ⇨208

The rules which make delivery decisive factor in determining place of execution of contract are not relevant in controversy concerning place where performance is to be rendered.

**12. Corporations** ⇨503(3)

On corporate defendant's motion for change of venue of employee's action for sums due under contract, evidence reasonably supported conclusion that payment was to be made in county of plaintiff's residence, as contended by him. Const. art. 12, § 16.

**13. Corporations** ⇨503(2)

Breach of contract occurred in county where performance thereunder was due. Const. art. 12, § 16.

**14. Venue** ⇨7

By venue statute legislature has, in substance, required that all actions arising on contract shall be tried in county in which individual defendant resides, or in which contract was made, unless individual defendant has contracted especially in writing as to county in which its obligation is to be performed, in which event such county is also proper county for trial of action. Code Civ.Proc. § 395.

**15. Corporations** ⇨503(2)

The constitutional provision, authorizing maintenance of transitory action against corporation in county where contract is performable or where breach occurs, was intended to permit action against corporation to be brought in county other than that of its principal place of business, and thus to permit wider venue than is afforded in action against individual defendant. Code Civ.Proc. § 395; Const. art. 12, § 16.

**16. Corporations** ⇨503(2)

The constitutional provision, authorizing maintenance of transitory action against corporation in county where contract is performable or where breach occurs, is of nature of code provision in regard to procedure, but differs from statu-

tory code provision in that it cannot be repealed, nor can its scope and operation be limited by statute, and so far as it conflicts with statute, statute must give way. Code Civ.Proc. § 395; Const. art. 12, § 16.

**17. Constitutional Law** ⇨36

All legislation regulating exercise of constitutional right must be subordinate to constitutional provision and in furtherance of its purpose and must not in any particular attempt to narrow or embarrass it.

**18. Corporations** ⇨503(1)

**Venue** ⇨22(1)

Where a corporation and an individual are properly joined as defendants and action is commenced in county where corporation has its principal place of business, individual defendant may not have action moved to county of his residence, if different, for trial; and in such circumstances, residence of corporation is county where it has its principal place of business. Code Civ.Proc. § 395; Const. art. 12, § 16.

**19. Corporations** ⇨503(2)

The venue statute does not apply to a transitory action against a domestic corporation. Corporations Code, § 6403; Code Civ.Proc. § 395; Const. art. 12, § 16.

**20. Corporations** ⇨503(2)

The purpose of the constitutional provision authorizing maintenance of transitory action against corporation in county where contract was performable or where breach occurred was to provide venue for actions against corporations greatly enlarged over that for actions against other defendants, and it was intention of such provisions to benefit plaintiffs who otherwise would be obliged to travel to corporation's principal place of business to commence their actions. Const. art. 12, § 16.

**21. Contracts** ⇨167

Only applicable laws are incorporated in contract.

**22. Corporations** ⇨503(2)

The Constitution section providing for legislative regulation of corporations conferred no power upon legislature to restrict Constitutional provision authorizing maintenance of transitory action against

corporation in county where contract was performable or where breach occurred. Const. art. 12, §§ 1, 16.

---

McEnerney & Jacobs, Garret McEnerney, II and Justin M. Jacobs, all of San Francisco, Kenneth D. Sevier, Eureka, James Shaughnessy, San Francisco, for appellants.

Woodman, Leddy & Sautter, Eureka, for respondent.

EDMONDS, Justice.

When sued in Humboldt county, Dolly Varden Lumber Company, a corporation, moved the court for a change of venue to the county of its principal place of business. The most important question presented for decision upon the appeal from an order denying that motion is whether section 395 of the Code of Civil Procedure is applicable to an action against a corporation.

Hale's verified complaint alleges that, by the terms of a written contract, the lumber company agreed to pay him compensation for his services and a stated amount for certain personal property. Judgment is asked for the sums which, it is claimed, became due under the contract and have not been paid.

The contract provides for Hale's employment by the lumber company as superintendent of logging operations in Humboldt county. Hale agreed to sell to the lumber company specified personal property. In payment for his services and the purchase price of the property sold, the lumber company promised to pay him 20 per cent of its net profits from operations during the existence of the agreement. Determination of profits is to be made in accordance with a detailed formula in the contract.

As stated in the contract, during its existence the lumber company will pay \$1,000 per month to Hale as a drawing account, chargeable against the profits to which he may be entitled. Provision is made for a final settlement of accounts upon termination of the agreement.

The contract declares that it supersedes an oral agreement under which Hale had

been serving as the lumber company's logging superintendent. Another provision reads: "This instrument contains the entire agreement between the parties hereto and shall supersede and control any and all prior understandings, whether written or oral." The place where the money to become due under the contract shall be paid is not specified.

In support of its motion for change of venue, the lumber company presented the affidavit of its president, David D. Bohannon. He avers that the company's principal place of business at all times material to this action was in San Mateo county. Furthermore, he says, the contract was executed and delivered at the company's principal office in San Mateo county.

Hale's affidavit in opposition to the company's motion states that he is a resident of Humboldt county. He then avers that the contract was made orally between him and the company's agents in Humboldt county and was to be performed there by both parties. The obligations and liabilities of the parties arose in Humboldt county, he says. Payments under the contract were made at a bank in Humboldt county, and it was breached there.

By a supplemental affidavit, the corporation denies that the contract was made orally in Humboldt county. Although the contract was negotiated partially in Humboldt county, Bohannon states, it was not completely negotiated or agreed to at that place. Many of its provisions, he says, were neither mentioned nor agreed to until a meeting was held in San Mateo county for the purpose of finally negotiating the contract. At this meeting, according to the affidavit, Hale was present and a typewritten draft of the contract was discussed and altered by interlineation and initialing and by attaching thereto the inventory of personal property presented for the first time by Hale. This draft, as amended and supplemented, Bohannon avers, then was agreed to by the parties and executed by each of them.

Bohannon further asserts that Hale's affidavit is untrue in stating that payments to him under the contract were made at a bank in Humboldt county. According to



Bohannon, the money was paid by eleven checks of the corporation which were drawn in San Mateo county on bank accounts maintained in Humboldt county. With one exception, these checks were mailed to Hale at his Humboldt county address.

Other averments of Bohannon are that payments to Hale under the prior oral contract were made in the same manner. At no time, it is said, did Hale object to the method of payment under either contract. Hale's statements as to the place where the obligations arose, the place of performance and the place where the breach occurred are characterized as "bare, unsupported conclusions".

Hale's supplemental affidavit reiterates that a completed oral contract was made in Humboldt county "with only a written memorandum made and signed in" San Mateo county. He describes the meeting in San Mateo county as being wholly unrelated to the contract and not called for the purpose of executing it. But while he was there, he says, it was decided to obtain a written record of the oral contract. According to this affidavit, the essential terms of the contract were orally agreed to in Humboldt county, "leaving minor and incidental matters" only to be embodied in the writing. As stated by Hale, any alterations in the draft of the contract had been agreed to in Humboldt county.

It was understood by the parties, he says, that their oral agreement was to be embodied in a written instrument drawn by the lumber company's attorney and forwarded to Humboldt county for execution and delivery. His explanation of why this was not done is that, before the contract was prepared, he happened to be in San Mateo county on other business. The one check which he received in San Mateo county was delivered to him as a matter of convenience. At no time, he adds, did he accept the lumber company's checks "as absolute payment of the amount due", nor was there any agreement that they were so to be accepted. All checks were "accepted in the ordinary course of business".

As grounds for reversal of the order denying the motion for change of venue, the

lumber company contends that under the evidence, as a matter of law, the contract was made in San Mateo county, its performance was to be rendered there, and the breach, if any, occurred there. In addition, it says, section 395 of the Code of Civil Procedure requires that San Mateo county be deemed the place of performance in the absence of a special contract in writing to the contrary.

Hale declares that the court's order is supported by evidence that the contract was performable in Humboldt county and the breach occurred there. He also construes section 395 of the Code of Civil Procedure as not applicable to an action against a corporation.

By its express terms, the written contract superseded any and all prior understandings. Assuming that a prior oral contract identical in all respects to the writing existed between the parties, it was replaced by the specific provisions of the written contract. In addition, Hale's own affidavits show that a complete agreement had not been reached between the parties in Humboldt county. He admits that the negotiations in Humboldt county left certain matters to be disposed of and embodied in a written contract.

[1] Hale now argues that "the written instrument was an integration". As defined by section 228 of the Restatement of Contracts, an "integration" is "the final and complete expression of the agreement". In interpreting a written contract, the writing "supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument". (§ 1625, Civil Code.) It is argued that section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure are not applicable to the question of venue. However, as was said in *Estate of Gaines*, 15 Cal.2d 255, 264-265, 100 P.2d 1055, 1060, "The parol evidence rule \* \* \* is not a rule of evidence but is one of substantive law. \* \* \* The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties.*"



That this is the effect intended by the parties is apparent from the terms of the written contract itself. The situation is not comparable to that where the contract itself is oral but, for the purposes of the Statute of Frauds, has been confirmed by written memorandum. In such case, the oral contract governs and the writing, which does not purport to be an integration, serves only to prevent the contract from being unenforceable. *Taylor v. J. B. Hill Co.*, 67 Cal.App.2d 581, 154 P.2d 926. Concededly, the written contract was executed and delivered in San Mateo county, and in legal effect it was made there.

However, Hale argues that his action may be maintained in Humboldt county under the provisions of section 16 of article XII of the Constitution of California. As the basis for this position, he relies upon evidence which he says is sufficient to support the trial court's finding that the contract was performable and the breach occurred in Humboldt county.

[2] The motion for change of venue was made and determined upon the allegations of the verified complaint and the affidavits of the respective parties. Therefore, "all conflicts must be resolved in favor of the prevailing party \* \* \*; and all reasonable inferences which are to be drawn must be in support of the trial court's order". *Parker Co., Inc., v. Exeter Refining Co.*, 26 Cal.App.2d 610, 611, 79 P.2d 1114; *Gordon v. Perkins*, 203 Cal. 183, 186, 263 P. 231.

[3] The contract does not provide where the lumber company was to make its payments. This being the obligation the breach of which is pleaded as the cause of action, under the constitutional provision, the place where it was to be performed is the decisive factor insofar as venue is concerned. *Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 574, 296 P. 273; *Union Oil Co. v. Basalt Rock Co., Inc.*, 30 Cal.App.2d 317, 320, 86 P.2d 139.

[4] "In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent

code provisions, indicate that the parties expected or intended it to be performed." *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 316, 74 P. 855, 65 L.R.A. 90; *G. W. McNear, Inc. v. Geo-Physical Service*, 90 Cal.App.2d 662, 666, 203 P.2d 550; *Swartz v. Cal. Olive Growers', etc., Corp.*, 56 Cal. App.2d 168, 171, 133 P.2d 20; *Lakeside Ditch Co. v. Packwood C. Co.*, 50 Cal.App. 296, 307-308, 195 P. 284.

[5] "It is the rule that the question of where the contract was to be performed is one of fact, and the determination by the trial court of that question will not be disturbed if there is any substantial evidence in the record to support it, and all conflicts must be resolved in favor of the prevailing party." *Gallo v. Boyle Manufacturing Co., Inc.*, 35 Cal.App.2d 168, 169, 94 P.2d 1010, 1011; *Swartz v. Cal. Olive Growers', etc., Corp., Inc.*, supra, 56 Cal.App.2d at pages 170-171, 133 P.2d 20.

[6-8] The lumber company argues that, there being no conflict in the evidence, the question of place of performance may be determined as a matter of law. The record does not support this contention. The principal performance under the contract was to be in Humboldt county, which also is Hale's residence. These facts are relevant as bearing upon the intention of the parties, *G. W. McNear, Inc. v. Geo-Physical Service*, supra, 90 Cal.App. at page 665, 203 P.2d 550; *Swartz v. Cal. Olive Growers', etc., Corp.*, supra, 56 Cal.App. at pages 169-170, 133 P.2d 20; *Lakeside Ditch Co. v. Packwood C. Co.*, supra, 50 Cal.App. at page 307, 195 P. 284, although not in themselves conclusive.

In addition, the circumstances must be viewed in the light of pertinent statutes. *Burr v. Western States Life Ins. Co.*, supra; *Bank of Yolo v. Sperry Flour Co.*, supra. Sections 1488 and 1489 of the Civil Code state the rules as to the place of performance in the payment of a debt. By their terms, as at common law, if there be no agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, or wherever else he may be found. *Bank of Yolo v. Sperry Flour Co.*,

supra; *Pacific Freight Lines v. Pioneer Exp. Co.*, 39 Cal.App.2d 609, 614-615, 103 P.2d 1056; *Konig v. Associated Almond Growers*, 37 Cal.App.2d 360, 366, 99 P.2d 678. Under ordinary circumstances, it is the duty of the debtor to seek the creditor for the purpose of making payment.

The lumber company contends that none of the foregoing circumstances has any bearing upon the place of performance. It says that the sole evidence upon the question is to be found in the conduct of the parties both before and after the execution of the contract. The mailing of checks from San Mateo county, it argues, was the method of payment acquiesced in by Hale and that procedure established the proper method and place of performance. Its analysis of the rights of the parties is that payment of the checks related back to the time of delivery, and as delivery was accomplished by depositing the checks in the mail, the payment was made in San Mateo county.

[9-11] "The mere giving of a check does not constitute payment (citations), nor does the mere acceptance thereof raise a presumption that such acceptance constitutes payment. (Citation.) And since a check of itself is not payment until cashed the party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance was in accordance with an agreement that it was to be accepted as payment." *Mendiondo v. Greitman*, 93 Cal. App.2d 765, 767, 209 P.2d 817, 818; 70 C.J. S., Payment, §§ 23, 24, pp. 233-234. "When paid, it relates to the date of its delivery". *Drukker v. Howe & Haun Invest. Co.*, 136 Cal.App. 437, 442, 29 P.2d 289, 291; *Hooker v. Burr*, 137 Cal. 663, 668, 70 P. 778; 70 C. J.S., Payment, § 24, p. 235. However, the time of payment of a check does not necessarily relate to the place of its delivery. The rules which make delivery a decisive factor in determining the place of execution of a contract are not relevant in a controversy concerning the place where performance is to be rendered. The receipt of the payments in Humboldt county was as much a part of the past conduct of the parties as

was the mailing of the checks from San Mateo county. The testimony as to what was done does not require the conclusion that placing of checks in the mail was the performance contemplated by the contract.

The lumber company points out that the contract requires monthly payments to Hale who resides 350 miles from San Mateo county. It contends that the frequency of the payments and the distance between the counties compels the conclusion that the deposit of checks in the mail should constitute performance. These facts, however, do not preclude the possibility that the parties placed upon the one making the payments the burden of overcoming any difficulties which might arise in carrying out the requirements of the contract. The mailing of checks was but one of many methods which the lumber company could have used to fulfill the statutory duty of performance by seeking out its creditor.

[12, 13] At most, the action of the lumber company in sending its checks to Hale raises a conflict as to the place of performance. Considering all of the evidence in the light of the surrounding circumstances, it reasonably supports the conclusion that payment was to be made in Humboldt county. If the performance was due in Humboldt county, then the breach also occurred there. *Clark v. Policy-Holders' Life Ins. Ass'n*, 138 Cal.App. 505, 509, 32 P.2d 653.

As additional support for its position, the lumber company calls to its aid section 395 of the Code of Civil Procedure. Since 1939, that statute has provided in part: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." If this provision is applicable to an action against a corporation, San Mateo county,

where the contract was made, is the place in which the obligation was incurred, *Armstrong v. Smith*, 49 Cal.App.2d 528, 534, 122 P.2d 115; *Campbell v. Clifford*, 52 Cal.App.2d 615, 619, 126 P.2d 887, and the county where it is to be performed.

[14] The effect of section 395 in an action against an individual defendant has been stated as follows: "The express condition of the statute is that unless there is a special contract in writing to the contrary the county in which the obligation is incurred is the venue of an action arising out of it. What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action." *Armstrong v. Smith*, supra, 49 Cal.App.2d at page 532, 122 P.2d at page 117.

The lumber company contends that the rule of the code is equally applicable to an action against a corporate defendant. The provisions of section 16 of article XII of the Constitution, it says, are subject to interpretation by the legislature; the statute is merely a reasonable legislative interpretation filling a gap left by the constitutional provision.

[15] The constitutional provision reads in part as follows: "A corporation \* \* may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." As pointed out in *Cook v. Ray Manufacturing Co.*, 159 Cal. 694, 698-699, 115 P. 318, the object of the section is to permit an action against a corporation to be brought in a county other than that of its principal place of business and thus permit a wider venue than is afforded in an action against an individual defendant.

Similarly, the 1933 amendment to section 395 of the Code of Civil Procedure, which is the basis of the 1939 amendment, was described in the Code Commissioners' note as intended to liberalize the venue rules in the plaintiff's favor. Since 1933, there has been a continuing liberalization of the rules of venue by the addition of places other than the defendant's residence for the trial of an action based upon a contract. It is not reasonable to assume that, in thus relaxing the rules of venue as to actions against individuals, the legislature intended to limit the rules formerly applicable to corporations.

The lumber company argues that the statute in no way restricts the constitutional provision. The code section, it says, relates only to the evidence necessary to establish where a contract is to be performed. This argument ignores the plain meaning of the words of the enactment, which allows an action upon an obligation arising out of contract to be tried in any one of three counties. "But the legislature did not stop there. It added a limitation, and the limitation which it added is this: 'the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed.' The effect of the limitation is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made.

"Having set up the limitation, the legislature created an exception to it, providing that if it be specially contracted in writing as to the county of performance, such county is also a proper county for the trial of an action. Under conditions where the exception is effective, the number of proper counties goes back to three." *Armstrong v. Smith*, supra, 49 Cal.App.2d at pages 531-532, 122 P.2d 115; *Wilson v. Hoffman*, 81 Cal.App.2d 664, 666-667, 184 P.2d 951.

Accordingly, under the statute, an action upon a contractual obligation may be tried only in the county of the defendant's residence or in the county where the agreement was made. However, if the contract is in writing and specifically designates the coun-



ty where the defendant's obligation is to be performed, then the action also may be tried in that county. This provision, if applied to an action against a corporation, would be in direct conflict with the Constitution. By its very terms, it would reduce the number of counties for the trial of such action from five to four, except where the contract is written and specifies the place of performance.

[16] The constitutional provision "is of the nature of a Code provision in regard to procedure, and is obviously self-executing, and differs from a statutory Code provision only in that it cannot be repealed, nor can its scope and operation be limited by the statute. So far as it conflicts with a statute, the statute must give way." *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 587, 66 P. 856, 857; *Buck v. James McClatchy Pub. Co., Inc.*, 105 Cal.App. 248, 254, 287 P. 364; 6a Cal.Jur. 1393-1394.

Denying that there is any conflict between the statute and the Constitution, the lumber company argues that the code provision is necessary legislation implementing the administration and interpretation of the Constitution. It cites as analogous to the present question decisions upholding the legislative power to pass statutes providing reasonable regulations and control over the constitutional right to vote, to recover compensation for property appropriated to public use, to exempt property from taxation, and to have a trial by jury.

[17] There is a clear limitation, however, upon the power of the legislature to regulate the exercise of a constitutional right. As stated in *Chesney v. Byram*, 15 Cal.2d 460, 464, 101 P.2d 1106, 1108, "'all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.'" The application of section 395 to actions against corporations would narrow and embarrass the constitutional provision materially by reducing in number the possible counties for trial of the action. The procedural authorization of the Constitution is clear and needs no legislation in its aid

in the way of interpretation of either its meaning or its application to particular actions as they arise.

Section 395 is a venue statute specifying the place where an action may be tried. In no sense is it a rule of evidence comparable to a statute of frauds. It does not provide that all contracts must be in writing, or that all contracts must specify the place for performance, or that the place of performance may not be proved in the absence of a writing. It simply declares that actions based upon certain types of contracts may be brought in the county where performance is due as well as in the other enumerated places. This privilege is far less than the constitutional one to sue a corporation upon any contract in the county where the contract is to be performed. The statute cannot be applied to limit the greater constitutional right.

The lumber company argues that section 395 was applicable to actions against corporations prior to the 1939 amendment and that, therefore, the amendment must also be applicable. The decisions which have considered the question do not support this theory.

One line of decisions originated with *Jenkins v. The California Stage Co.*, 22 Cal. 537, which was decided prior to the adoption of the Constitution of 1879. The court there held that a corporation's residence was its principal place of business under section 20 of the Practice Act, the predecessor to section 395 of the Code of Civil Procedure.

The rule of the *Jenkins* case was challenged in *Cal. S. R. R. Co. v. S. P. R. R. Co.*, 65 Cal. 394, 4 P. 344. However, the decision was rested upon another section of the code. What was said in regard to the venue of an action, other than one of eminent domain against a corporation, is dictum. *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600, 4 P. 641, questioned the "residence" rule of the *Jenkins* case, at least insofar as applied to foreign corporations, but the issue of venue was determined under the nonresident provision of section 395. Although both cases were decided after the adoption of the Constitution of



1879, the constitutional provision was not mentioned.

*Cohn v. Central Pacific R. R. Co.*, 71 Cal. 488, 12 P. 498, in express terms approved the *Jenkins* decision. However, the *Cohn* case turned upon the provisions of section 16, article XII, of the Constitution and the discussion concerning section 395 is dictum. The same observation is applicable to *Fresno National Bank v. Superior Court*, 83 Cal. 491, 497, 24 P. 157, which followed the *Cohn* case.

The language used in *Krogh v. Pacific Gateway, etc., Co.*, 11 Cal.App. 237, 240, 104 P. 698, 699, indicates that section 395 is applicable to an action against a corporation. However, as the court stated, the "plaintiff has not brought himself within the provisions of the Constitution, and defendant is entitled to a change of the place of trial under the last clause of the [constitutional] section." See *Rowe v. Policy Holders', Life Ins. Ass'n*, 131 Cal.App. 339, 342, 21 P.2d 443. Because this was the basis of the decision, the discussion of section 395 is dictum.

Relying upon the *Jenkins* and *Cohn* decisions, in *McSherry v. Penn. C. G. M. Co.*, 97 Cal. 637, 32 P. 711, the court held that a corporation's principal place of business is its residence. It stated that this is the proper county, under section 395, for the trial of an action against a corporation, subject to the provisions of the Constitution. However, the controlling factor in reaching that conclusion was the right of individual defendants, joined with the corporate defendant, to have the action moved to the county of their residence. The discussion of the applicability of section 395 to an action against a corporation is dictum. The same comments are applicable to *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 P. 209, which followed the *Cohn* and *McSherry* cases.

[18] Where a corporation and an individual are properly joined as defendants and the action is commenced in the county where the corporation has its principal place of business the individual defendant may not have the action moved to the county of his residence, if different, for trial.

*Hellman v. Logan*, 148 Cal. 58, 82 P. 848. In such circumstances, under the terms of section 395, the residence of the corporation is the county where it has its principal place of business. *McClung v. Watt*, 190 Cal. 155, 158, 211 P. 17. This application of section 395 now is well settled. Independent *Iron Wks. v. Amer. Pres. Lines*, 35 Cal.2d 858, 221 P.2d 939; *California C. P. Growers v. Corcoran*, 14 Cal.App.2d 264, 57 P.2d 1360; *Nelson v. Marsh*, 100 Cal.App. 578, 581-582, 280 P. 695; *Richmond T. Corp. v. Parr T. Co.*, 96 Cal.App. 152, 273 P. 845; *Winterburn v. Sheriff*, 61 Cal.App. 531, 215 P. 406; *Bloom v. Michigan Salmon Min. Co.*, 11 Cal.App. 122, 104 P. 324. It also has been held that an individual defendant may have an action, not commenced in the county of any defendant's residence, moved to a corporate defendant's principal place of business under section 395. *Walker v. Wells Fargo Bk. & U. T. Co.*, 24 Cal.App.2d 220, 74 P.2d 849.

The basis of these decisions may be found in the line of authority beginning with the *Jenkins* case. However, this application of section 395 involves the right of an individual defendant apart from that of the corporate defendant. A suit brought in the county where the corporation has its principal place of business is one commenced in a proper county under the constitutional provision. The individual defendant joined with the corporation may not secure a change of venue in such circumstances because, under section 395, "some" of the defendants reside in the county where the action was commenced. Where the action is not commenced in the county of any defendant's residence, the individual defendant then is entitled, under section 395, to secure a change of venue to the county where some or all of the defendants reside. This rule is not a holding that section 395 is applicable in determining the venue of an action commenced solely against a corporate defendant.

Section 405 of the Civil Code (now § 6403, Corporations Code) specifies the requirements which a foreign corporation must meet to transact intrastate business in California. Beginning with *Thomas*

v. Placerville G. Q. M. Co., supra, the non-resident provision of section 395 was held applicable to an action brought against a foreign corporation. *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 P. 239; *Ryan v. Inyo Cerro Gordo Min., etc., Co.*, 41 Cal.App. 770, 183 P. 250; *Waechter v. Atchison, etc., Ry. Co.*, 10 Cal.App. 70, 101 P. 41. The reasoning of these cases is that a foreign corporation acquires no "residence" in this state. In none of them was the constitutional provision applied. However, since 1929, section 405 has required such a corporation to register a principal office in this state.

The distinction between foreign and domestic corporations laid down in the early decisions was continued briefly following the adoption of the 1929 amendment to section 405 of the Civil Code. In *Hobson v. Metropolitan Casualty Ins. Co.*, 114 Cal. App. 349, 300 P. 87, the corporation failed to show compliance with section 405 and, therefore, it could not claim a principal place of business in the state. Although the court purported to follow the rule of the earlier decisions, the basis of its holding was that the corporation failed to show facts sufficient to warrant a change of venue under the constitutional provision.

*Long v. General Petroleum Corp.*, 11 Cal.App.2d 708, 54 P.2d 1147, held that the amendment to section 405 effected no change in the prior law; foreign corporations were not thereby placed on an equal footing with domestic corporations under the Constitution. The court again applied the nonresident provisions of section 395.

Section 16, article XII, of the Constitution first was applied to foreign corporations in *Bohn v. Better Biscuits, Inc.*, 26 Cal.App.2d 61, 78 P.2d 1177, 80 P.2d 484. The court disapproved the *Long* case and attempted to distinguish the earlier decisions on their facts. Despite this effort, by the *Bohn* case the earlier rule was terminated, at least as to those foreign corporations which complied with section 405, and foreign and domestic corporations were placed upon an equal footing under the Constitution. See Note, 12 So.Cal.L. Rev. 503.

In the *Bohn* case there is an extensive discussion of section 395, designed primarily to negative the argument that a foreign corporation which has complied with section 405 is a nonresident. Some of the language, here relied upon by the lumber company, is both unnecessary to the decision and overly broad. Without citation of authorities, the court said that section 395 applies "to persons both natural and artificial and whether the corporation is a domestic or a foreign corporation". 26 Cal.App.2d at page 65, 78 P.2d at page 1178. It also stated that "it has never been held that its provisions did not apply to corporations". 26 Cal.App.2d at page 65, 78 P.2d at page 1180.

That these statements are dictum clearly appears from the following paragraph, where the court said: "Whatever may be the provisions of our statutes they are controlled by the provisions of the Constitution. \* \* \* The evidence introduced in the instant case having shown that the plaintiff's cause of action was for breach of contract, that the contract was neither made nor to be performed, nor was it breached in San Francisco, the sole question remaining for determination was where was the principal place of business of the defendant corporation situated." 26 Cal.App.2d at page 65, 78 P.2d at page 1180. The constitutional section could not be restricted to domestic corporations, it was held, and in accordance with the terms of the Constitution, the order denying the corporation's motion for a change of venue to the county of its principal place of business was reversed.

The original rule that a foreign corporation has no "residence" within the state continues to apply to those foreign corporations which have failed to comply with section 405. *Warren v. Ritter*, 61 Cal.App. 2d 403, 142 P.2d 948; *Kane v. Universal Film Exchanges*, 32 Cal.App.2d 365, 89 P.2d 693, 91 P.2d 577. In the *Kane* case, however, the affirmance of the old rule as to such corporations is dictum, the basis of the decision being the corporation's failure to show sufficient cause for the issuance of a writ of supersedeas. As to complying foreign corporations, the present rule is the

same as that for domestic corporations and the constitutional provision governs. *Ellis v. National Casualty Co.*, 99 Cal.App.2d 77, 221 P.2d 127; *G. W. McNear, Inc. v. Geo-Physical Service*, supra.

In actions against certain public corporations, venue has been determined in accordance with section 395. *Gallup v. Sacramento, etc., Drainage Dist.*, 171 Cal. 71, 151 P. 1142; *Buck v. City of Eureka*, 97 Cal. 135, 31 P. 845; *Yedor v. Ocean Acc. & Guar. Corp.*, 85 Cal.App.2d 698, 194 P.2d 95; *De Campos v. State Comp. Ins. Fund*, 75 Cal.App.2d 13, 170 P.2d 60. These decisions are of no assistance in determining the present question because such actions are not governed by the constitutional provision.

The record of the proceedings of the constitutional convention clearly indicates that the provision there adopted, and not the Code of Civil Procedure, was intended to govern the venue of an action against a corporation. Eugene Fawcett, introducing a proposed provision which became section 16 of article XII, argued as follows: "Under our system, corporations have a legal residence at their principal place of business. The result is that corporations in this State are legally resident, nearly all of them, at the City and County of San Francisco, and that under our rules of practice, those who have litigation with such corporations must go to the City and County of San Francisco to sue \* \* \*. That operates unjustly and unfairly. I think that the rule ought to be, that a person having a cause of action against a corporation should be entitled to meet at the place where the cause of action has arisen, where the obligation or liability arises, or the breach occurs \* \* \*. The effect of this amendment will be to authorize them to sue at the place where the cause of action arises, or at the principal place of business of the corporation \* \* \*. Perhaps it may be said that it more properly belongs to the Code of Civil Procedure, but it is quite as important to the rights of the people as many of the provisions contained in this report." 1 Debates and Proceedings of the Constitutional Convention 452-453.

The constitutionality of art. 12, section 16 under the Federal Constitution as applied to personal or transitory actions repeatedly has been upheld. *Cook v. Ray Manufacturing Co.*, supra; *Lewis v. S. P. C. R. Co.*, 66 Cal. 209, 5 P. 79. The early decisions under the new Constitution impliedly recognized the inapplicability of section 395 to such actions against domestic corporations by refusing requests for change of venue to the county where the corporate defendant had its principal place of business. *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 P. 918; *Trezevant v. Strong Co.*, 102 Cal. 47, 36 P. 395; *Lewis v. S. P. C. R. Co.*, supra.

These cases laid the foundation for a second line of decisions holding section 395 inapplicable to a personal or transitory action against a domestic corporation. *Cook v. Ray-Manufacturing Co.*, supra, collected the earlier decisions and applied to them the constitutional purpose as disclosed by the convention proceedings. The rule there stated, that a corporate defendant must show some sufficient ground for a change of the place of trial other than the mere fact that its "residence" is in another county, consistently has been followed. *Walker v. Wells Fargo Bank, etc., Co.*, 8 Cal.2d 447, 65 P.2d 1299; *Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15, 247 P. 894. At least since the decision in the *Cook* case, the constitutional provision, and not section 395, has controlled the venue of an action against a corporation. *Hefferman v. Bennett & Armour*, 63 Cal.App.2d 178, 186, 146 P.2d 482; *Buck v. James McClatchy Pub. Co., Inc.*, supra; *Lakeside Ditch Co. v. Packwood C. Co.*, supra; *Raphael v. People's Bank of Benicia*, 45 Cal.App. 115, 187 P. 53.

*Swartz v. Cal. Olive Growers', etc., Corp.*, supra, which arose after the 1939 amendment to section 395, concerned a contract in writing which did not specify the place of its performance. The evidence established that the contract was executed in Tulare county. Suit was begun in Los Angeles county and the trial court denied a motion for a change of venue to Tulare county, which also was the location of the cor-



poration's principal place of business." The court said: "Inasmuch as the contract specifies no place of performance it was performable in the county in which the circumstances attendant upon the execution of the writing indicate that the parties intended as the theater of its performance." 56 Cal.App.2d at page 171, 133 P.2d at page 22. The court found the evidence sufficient to support an implied finding that the contract was to be performed in Los Angeles county and affirmed the order. In so doing, the court held that section 395 "does not apply to domestic corporations but is applicable only to actions against natural persons". 56 Cal.App.2d at page 172, 133 P.2d at page 22.

The holding that section 395 is "applicable only to actions against natural persons" has been criticized as dictum. *De Campos v. State Comp. Ins. Fund*, supra, 75 Cal. App. at page 18, 170 P.2d at page 63. However, the *De Campos* case recognized as in accord with the authorities the holding that section 395 does not apply to a transitory action against a private corporation. Although the limitation of section 395 to natural persons was dictum, the conclusion that it is inapplicable to an action against a domestic corporation was the basis of the decision in the *Swartz* case. Had section 395, as amended in 1939, been applicable, the statute would have required the court to grant the motion for change of venue.

The only other case concerning venue as determined by place of performance in a contract action against a corporation which has arisen since the 1939 amendment is *G. W. McNear, Inc. v. Geo-Physical Service*, supra. The contract there involved did not specify the place of performance. It was not executed in the county where the action was commenced. Affirming an order denying a change of venue to the county of the corporation's principal place of business, the court found from the evidence that the contract was to be performed in the county where the action was commenced. In so doing, the court refused to apply section 395.

In *Konig v. Associated Almond Growers*, supra, 37 Cal.App.2d at page 363, 99 P.

2d at page 679, the court held: "This is a personal or transitory action wherein the sole defendant is a California corporation, therefore, section 395 of the Code of Civil Procedure does not apply and resort must be had to the provision of the Constitution which governs the venue in such actions." *McDuffie v. California Tehama Land Corp.*, 138 Cal.App. 245, 249, 32 P.2d 385, is to the same effect. Applying the same rule to foreign corporations, it was said in *Ellis v. National Casualty Co.*, supra, 99 Cal. App.2d at page 79, 221 P.2d at page 129, that the constitutional provision, "rather than the provisions contained in section 395 of the Code of Civil Procedure, is applicable to corporations in transitory actions".

[19] In summary, both before and after the 1939 amendment, the courts consistently have held that section 395 does not apply to a transitory action against a domestic corporation. The apparent exceptions to this rule since the adoption of the Constitution in virtually all instances have been dicta.

Insofar as section 395 affects the right of an individual defendant to a change of venue, a corporation's principal place of business is its "residence". However, this application of section 395 does not determine the venue of the action against the corporate defendant, it having been commenced in one of the counties specified by the Constitution.

Where the plaintiff fails to bring his action in any of the counties specified by the Constitution, the corporation then is entitled to a change of venue to the county of its principal place of business under the last clause of the constitutional provision. However, where the plaintiff has brought himself within the terms of the Constitution, the corporation may not secure a change of venue to its "residence" as may other defendants under section 395.

Although section 395 has been applied to an action against a foreign corporation, it cannot be said that the same rule governs when a domestic corporation is sued. Prior to the *Bohn* case, the two were treated separately for the purposes of venue. By that decision the constitutional provision



first was held applicable to a foreign corporation. As to those foreign corporations now coming within the constitutional provision, section 395 consistently has been held inapplicable, despite dictum in the Bohn case to the contrary. Neither may the application of section 395 to governmental agencies be said to broaden the statute to include a private corporation, because the venue as to a public corporation is not determined by the Constitution.

[20] The purpose of the constitutional provision was to provide a venue for actions against corporations greatly enlarged over that for actions against other defendants. As shown by the proceedings of the constitutional convention, the intention of the section was to benefit the plaintiff, who otherwise would be obliged to travel to the corporation's principal place of business to commence his action. To uphold the application of section 395 for which the lumber company here contends would be to defeat, in large measure, the expressed purpose of the Constitution.

Large corporations generally so conduct their affairs that their contracts, in a great number of instances are entered into at the corporation's principal place of business. In addition, corporate contracts generally are drawn by the corporation, especially where the other contracting party is an individual.

If the argument here advanced by the lumber company is accepted, by the simple device of neglecting to mention the place of performance in its contracts, any corporation effectively could limit the venue of actions upon those contracts to its principal place of business. In general, the place of performance also is the place where the breach occurs. Likewise, the place where the contract is made generally is the place where the obligation or liability arises. If the place where the contract is made is to

be deemed the place where it is to be performed, then in most instances all of the places specified by the Constitution would become one, the corporation's principal place of business. Such a result would render the constitutional provision a virtual nullity. A plaintiff again, as before the adoption of the Constitution, would be obligated, at considerable expense and hardship, to search out a corporation at its principal place of business in order to enforce a claim against it. Such a patently unjust result could not have been intended by the legislature when it adopted the 1939 amendment liberalizing venue provisions in regard to all other defendants.

[21] The lumber company also contends that the disputed portion of section 395 is an implied term of the contract because the laws of the state are as much a part of a contract as though set forth at length among its provisions. This argument overlooks the fact that only applicable laws are so incorporated. The issue here is whether the statutory provision is applicable.

[22] It also is suggested that section 1, article XII, of the Constitution has returned to the legislature certain powers of which it was deprived by section 16, article XII. Section 1 provides for legislative regulation of corporations. Nothing therein can be read as affecting the rights of plaintiffs to bring actions against corporations in the places designated by section 16. Section 1 is a regulatory, and not a venue, provision. It confers no power upon the legislature to restrict the provisions of section 16.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

TRAYNOR and SCHAUER, JJ., concur in the judgment.

38 Cal.2d 480

**BLUMER v. KIRKMAN CORP. et al.**  
**S. F. 18461.**Supreme Court of California, in Bank.  
Feb. 21, 1952.

A. M. Blumer brought action against the Kirkman Corporation and Kirkman Nurseries, a corporation, to recover the purchase price of fertilizer sold by plaintiff to defendants. The Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., entered an order denying defendants' motion for change of venue, and they appealed. The Supreme Court, Edmonds, J., held that the venue statute was not applicable to the action against the corporations and that venue was properly laid in San Francisco, where the evidence established that the contract was to be performed.

Affirmed.

Prior opinion 233 P.2d 34.

**1. Corporations** ⇨503(2)

If corporate buyers' obligation under fertilizer sale contract was to be performed in San Francisco, seller's action to recover purchase price was properly filed there. Const. art. 12, § 16.

**2. Payment** ⇨8(1)

Payment is not effectuated, by sending amount due to creditor by mail or other public carrier, until remittance gets into hands of creditor, unless he expressly or by implication directs or consents that payment be so made, and a mere general direction by creditor to his debtor to remit money to him ordinarily does not constitute a direction or consent that remittance be made by mail at creditor's risk.

**3. Corporations** ⇨503(3)

In proceedings on corporate buyers' motion for change of venue of seller's action against them, evidence sustained trial court's finding that contract was to be performed in San Francisco and that Superior Court in and for City and County of San Francisco was proper court for action for breach of contract. Const. art. 12, § 16; Civil Code, §§ 1489, subd. 1, 1500.

**4. Appeal and Error** ⇨912

Where corporate defendants' motion for change of venue was heard and de-

termined on allegations of verified complaint and affidavits and counter affidavits of parties, all conflicts were required to be resolved on appeal in favor of plaintiff, as prevailing party.

**5. Corporations** ⇨503(2)

In suit upon contract of corporation, where no place of performance is expressly stipulated, it ought to be held performable in place where circumstances, viewed in light of pertinent code provisions, indicate the parties expected or intended it to be performed. Const. art. 12, § 16; Civil Code, § 1500.

**6. Contracts** ⇨209

Where intention, with reference to place of payment, does not appear from contract, general rule is that debtor must seek creditor to make payment.

**7. Payment** ⇨21

The giving of a check does not, under all circumstances, constitute performance; nor does its payment necessarily relate to place of check's delivery.

**8. Corporations** ⇨503(1)

The venue statute does not apply to an action against a corporation. Code Civ. Proc. § 395; Const. art. 12, § 16.

**9. Pleading** ⇨205(1)

In action by seller against corporate buyers of fertilizer to recover purchase price of fertilizer, allegations, that buyers had promised to pay seller certain sum for fertilizer when buyers marketed their next peach crop and that they had marketed such crop on certain date, that buyers were indebted to seller and that seller had frequently demanded payment and buyers had refused and neglected to pay such sums or any part thereof, were sufficient, as against general demurrer, to show nonpayment.

**10. Pleading** ⇨45

In action by seller against corporate buyers to recover purchase price of fertilizer, allegations in complaint that seller had complied in all respects with provisions of law contained in certain divisions in chapter of Agricultural Code were sufficient for purpose of venue. Agricultural Code, § 1010 et seq.; Code Civ. Proc. § 459.

Mason Bailey, Madera, Walker Peddick, San Francisco, Alfred Nelson, Piedmont, for appellants.

William H. MacKay, San Francisco, for respondent.

EDMONDS, Justice.

Kirkman Corporation and Kirkman Nurseries, each of which is a corporation, have been sued to recover the purchase price of goods sold and delivered. The appeal is from an order denying their motion for a change of venue.

By his verified complaint, filed in the City and County of San Francisco, A. M. Blumer charges that, in Madera county, he sold and delivered to the two appellants certain quantities of fertilizer for an agreed amount. Payment was to be made to him at his San Francisco office when the Kirkmans next peach crop was marketed. At the time of filing the complaint, the crop had been sold.

By other allegations of the complaint, it is claimed that the corporations are indebted to Blumer for the purchase price of the fertilizer, and although he "has frequently demanded payment thereof defendants and each of them have refused and neglected to pay said sum or any part thereof". The seller pleads that the sale "in all respects complied with all of the provisions of law contained in division 5, chapter 7 of the Agriculture Code".

The corporations filed a general demurrer to the complaint and, at the same time, a notice of a motion for change of venue. The stated grounds for the motion are: (1) Neither corporation is a resident of the City and County of San Francisco; (2) Each of them has its principal place of business in San Joaquin county; and (3) The alleged obligation was entered into in Madera county, and that is the place of performance. The affidavit of William T. Kirkman, Jr., president of both corporations, in support of the motion, states the same facts as are pleaded in the notice.

The affidavit of Karl Snow in opposition to the motion asserts that Blumer is a resident of San Mateo county with his office and place of business in San Francisco.

Kirkman, it is said, knew this fact. The shipment of fertilizer was specified and agreed upon by the parties in a letter written by Blumer, mailed to Kirkman, and received by them.

According to the affidavit, the letter reads in part: "For sake of office record I hereby confirm having last week booked your order to commence shipping Agricultural Mineral Flue Dust \* \* \* to your peach orchard near Madera \* \* \*."

"It is understood that you will pay for above at the latest in the course of next year as you market your peach crop, and that you may possibly send in a payment on account in the course of this winter."

As grounds for reversal of the order, the corporations contend that: (1) The contract, as a matter of law, was made in Madera county, performance was to be rendered there, and the breach, if any, occurred there; (2) Section 395 of the Code of Civil Procedure requires that Madera county be deemed the place of performance in the absence of a special contract in writing to the contrary; and (3) The complaint fails to state a cause of action permitting the action to be retained in San Francisco. Blumer takes the position that there is evidence sufficient to support the implied finding that the contract was both made and to be performed in San Francisco. He construes section 395 of the Code of Civil Procedure as being inapplicable to an action against a corporation.

The complaint alleges that Blumer "sold and delivered to defendants at a place near Madera" certain merchandise. In Kirkman's affidavit, he declares that the contract was entered into in Madera county. Blumer's affidavit does not deny that fact; as he relates the situation, the shipment was made in accordance with his letter. However, by the terms of the letter, it is not a contract but a confirmation of a previous agreement. This evidence, and Blumer's allegation in the complaint as to the place of sale, conclusively show that the contract was made in Madera county.

[1] However, if Kirkman's obligation was to be performed in San Francisco, the



action was properly filed there. § 16, Art. XII, Constitution; *Hale v. Bohannon*, Cal. Sup., 241 P.2d 4; *Walker v. Wells Fargo Bank etc. Co.*, 8 Cal.2d 447, 449-450, 65 P.2d 1299; *Cook v. W. S. Ray Manufacturing Co.*, 159 Cal. 694, 696-697, 115 P. 318. The corporations assert that the language of the letter, "you may possibly send in a payment", amounts to a designation by Blumer that performance is to be rendered by mailing a remittance from any place which Kirkman might select. This, they say, is a direction of the place for performance under section 1489(1) of the Civil Code. They also argue that under section 1500 of the same code, they had a right to perform the contract by depositing the amount due in any reputable bank in the state and notifying Blumer of the deposit.

The construction placed upon the letter by Kirkman means that the payment of money required under the contract could be made at any place in the state. Carrying this construction to its logical conclusion, under section 16 of article XII of the Constitution, an action upon the contract might be commenced in any county. Under such reasoning, the corporations cannot object to venue being retained in San Francisco, it being one of the places specified for performance by the letter.

[2] There is no reasonable basis for reading the letter to that effect. Even a construction of it as directing performance by mailing remittances from either Madera county or San Joaquin county is not compelled by the language used. "Payment is not effectuated by sending the amount due to the creditor by mail or other public carrier until the remittance gets into the hands of the creditor, unless he expressly or by implication directs or consents that payment be so made \* \* \*. A mere general direction by a creditor to his debtor to remit money to him ordinarily does not constitute a direction or consent that remittance be made by mail at the creditor's risk \* \* \*." 70 C.J.S., Payment, § 7, p. 218.

[3, 4] A more reasonable construction is that the letter expresses an understanding that Kirkman will make a payment on ac-

count during the winter, performance being effected when such payment is received at Blumer's office in San Francisco. At most, there is a conflict in the inferences to be drawn from the evidence and they must be resolved in support of the trial court's order. *Hale v. Dolly Varden Lumber Co.*, supra; *Gordon v. Perkins*, 203 Cal. 183, 186, 263 P. 231; *Parker Co., Inc., v. Exeter Refining Co.*, 26 Cal.App.2d 610, 611, 79 P.2d 1114.

[5, 6] The implied conclusion of the trial court also is sustained by viewing the circumstances in the light of pertinent code provisions. *Hale v. Dolly Varden Lumber Co.*, supra; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 316, 74 P. 855, 65 L.R.A. 90. Section 1500 of the Civil Code, upon which the corporations rely, provides that an offer extinguishes an obligation for payment of money if designated additional steps are taken. It does not specify where the offer is to be made. That provision is found in section 1489, and for the reasons stated in *Hale v. Dolly Varden Lumber Co.*, supra, in the absence of any agreement to the contrary, it was the debtors' duty to pay Blumer in San Francisco or at least offer payment there.

The corporations also argue that "send in payment" must be interpreted in accordance with the principles applicable to the law of negotiable instruments. The record does not support that position. Blumer alleges that payment has been refused, and there is no evidence of an offer of performance at any place. The letter does not specify that payment may be by negotiable instrument; the obligation could have been performed by other means.

[7] Under the rules stated and applied in *Hale v. Dolly Varden Lumber Co.*, supra, the giving of a check does not, under all circumstances, constitute performance, nor does its payment necessarily relate to the place of the check's delivery. By the language of the letter, the trial court reasonably could have concluded that the parties intended payment to be made to Blumer in San Francisco.

[8] The argument that, under section 395 of the Code of Civil Procedure, Madera



county must be deemed to be the place of performance also is answered by the decision in the Dolly Varden case. As there held, the statute does not apply to an action against a corporation.

[9, 10] The last ground for attacking the order is that the complaint does not state a cause of action permitting retention of venue in San Francisco because of its failure to allege nonpayment. The corporations also challenge the complaint upon the ground that it does not show compliance with certain sections of the Agricultural Code.

Blumer alleges a sale and delivery, a promise to pay upon the happening of a certain event, and the occurrence of that event. He then pleads indebtedness, demand, and refusal and neglect to pay. Although these allegations might be subject to special demurrer, *Milstein v. Sartain*, 56 Cal.App.2d 924, 929, 133 P.2d 836, they imply the fact of nonpayment and are sufficient as against a general demurrer. *Lincoln County Bank v. Fetterman*, 170 Cal. 357, 359-360, 149 P. 811; *Fancher v. Brunger*, 94 Cal.App.2d 727, 730, 211 P.2d 633; 20 Cal.Jur. 947-948. The seller specifically declares that he has complied with all of the provisions of division 5, chapter 7, of the Agricultural Code, which includes the sections referred to by the corporations. That form of pleading is expressly authorized by section 459 of the Code of Civil Procedure. *Ley v. Babcock*, 118 Cal.App. 525, 527, 5 P.2d 620; *Bank of America v. McLaughlin etc. Co.*, 40 Cal.App.2d 620, 635, 105 P.2d 607.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

## JEFFERSON v. CHRONICLE PUB. CO.

Supreme Court of California.

March 3, 1952.

Hearing Denied.

Prior opinion, 238 P.2d 1018.

PER CURIAM.

Hearing denied.

SCHAUER, Justice (dissenting).

As pointed out in my dissent in *Pridonoff v. Balokovich* (1951), 36 Cal.2d 788, 798, 228 P.2d 6, the United States Supreme Court has not yet passed on the validity of section 48a of the Civil Code of California.

The question was raised in *Werner v. Southern Cal., etc., Newspapers* (1950), 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252, but after an appeal to the United States Supreme Court was filed (19 U.S. Law Week 3074) and probable jurisdiction noted, 71 S.Ct. 81, the cause was dismissed in the United States Supreme Court on motion of the plaintiff, 340 U.S. 910, 71 S.Ct. 290, presumptively for a consideration paid by the defendants.

My views as to the invalidity of section 48a are expressed in the dissents of Justice Carter and myself as reported in *Werner v. Southern Cal., etc., Newspapers* (1950), supra, 35 Cal.2d 121, 137, 150, 216 P.2d 825, and in *Pridonoff v. Balokovich* (1951), supra, 36 Cal.2d 788, 793, 798, 228 P.2d 6.

For the reasons therein stated I would grant a hearing and reconsider the questions raised.

CARTER, J., concurs.

109 Cal.App.2d 461

**SILVA v. HOLME et al.**

Civ. 14774.

District Court of Appeal, First District,  
Division 2, California.

Feb. 27, 1952.

Action by Frank A. Silva, an individual doing business under the firm name and style of J & S Liquor Company, against C. G. Holme, Jr., and others on a promissory note. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Nourse, P. J., held that the evidence was insufficient to disclose discharge of promissory note by accord and satisfaction or novation.

Judgment affirmed.

**1. Accord and Satisfaction** ⇨26(3)

**Novation** ⇨12

In action on promissory note, evidence was insufficient to disclose discharge of note by accord and satisfaction or novation.

**2. Appeal and Error** ⇨1011(1)

Upon appeal by makers from judgment rendered on promissory note, District Court of Appeal was bound by factual decision of trial court on conflicting evidence.

**3. Bills and Notes** ⇨49, 96

Where promissory note was signed by individuals, who were corporate directors, and one individual claimed he signed without consideration and without personal liability in belief that note represented a corporate obligation, detriment of making loan was sufficient consideration, whoever received loan, and if individuals were not principal debtors, they were liable as accommodation makers. Civ.Code, § 3110.

**4. Evidence** ⇨418

In action upon promissory note signed by individuals, who were corporate directors, where note did not show any evidence of intention of individuals to represent corporation, extrinsic evidence as to such intent should not have been admitted.

**5. Appeal and Error** ⇨1010(1)

**Contracts** ⇨99(1)

Presumption that written instrument deliberately executed expresses the inten-

tion of parties should prevail unless the evidence offered to show contrary contention is clear and convincing, and it is for trial court to determine if evidence is sufficient to overcome presumption.

**6. Licenses** ⇨39.17

Fact that loan secured by promissory note, which did not disclose intent of executing directors to act for corporation, violated purpose of statute which prohibited taking subscriptions for stock of corporation prior to having applied for and secured permit of Corporation Commissioner, did not invalidate obligation of directors who executed promissory note, in view of fact that payee, who did not take initiative in transaction, was not in *pari delicto* with directors. Corporations Code, § 25500.

**7. Licenses** ⇨18½(3)

The inhibitions of the Corporate Securities Act against the sales of securities to public without permits are meant to protect public from imposition and deception, not primarily to benefit seller. Corporations Code, § 25500.

**8. Licenses** ⇨39.17

The seller and the purchaser are not normally in *pari delicto* where statutory provision against taking subscriptions for stock of corporation prior to having applied for and secured permit of Corporation Commissioner is violated. Corporations Code, § 25500.

---

J. LeRoy Wehr, Cloverdale, for appellant  
H. Bicklehaupt.

Lewis H. DeCastle Santa Rosa, Leslie Price, Oakland, for appellants C. G. Holme, Jr., C. F. Phelps, Lester A. High, R. J. Mulcahy and Frank E. Cox.

Harold F. Sawallisch, Richmond, Timothy Crowley, Santa Rosa, of counsel, for respondent.

NOURSE, Presiding Justice.

This is an appeal by the six defendants from a judgment in favor of plaintiff, Frank A. Silva, doing business under the name J & S Liquor Company, in an action on the following promissory note:

"\$5,000.00 Oakland, California, May 29, 1946. Six months after date, for value received, we jointly and severally, promise to pay to J & S Liquor Co. or order, at Richmond, California the sum of Five Thousand Dollars, in lawful money of the United States, with interest thereon in life lawful money from date hereof until paid, at the rate of six (6) percent per annum, said interest payable at maturity; and in case of default in the payment of said interest as the same shall become due, then such interest so in default shall be added to and become a part of the principal and thereafter bear the same rate of interest; and at any time during default in the payment of said interest as the same shall become due, the whole amount of said principal sum and interest, shall at the option of the holder of this note, become immediately due and payable without notice.

C. G. Holme, Jr.  
H. Bicklehaupt  
C. F. Phelps  
Lester A. High  
R. J. Mulcahy  
Frank E. Cox

"Witness to signatures:  
M. H. Ezell"

In January, 1946, the defendants were the members of the Board of Directors of Food Facilities, Inc., a California corporation working in the frozen food locker field, hereinafter called the corporation. The corporation needed additional funds for its operations but did not have an authorization from the Commissioner of Corporations for the issue of more stock. Two of the defendants Mr. Mulcahy and Dr. High approached plaintiff to obtain funds from him; they represented that after they would have received permission to issue stock plaintiff would get stock in the corporation for the amount he would provide and in the meantime it would be considered a loan. From plaintiff's confused and contradictory testimony it is evident that he did not form any clear idea who—either the corporation, all defendants or only those who approached him—would be considered to have received the loan, but he testified repeatedly that

it was represented to him that the loan would be secured by a promissory note signed by "all the persons interested", "all the persons whose names now appear on it." In a similar manner funds were obtained from others not involved in this suit, the total amount obtained being approximately \$30,000. Plaintiff provided \$5000; on January 3, 1946, he gave a check for that amount payable to defendant High on which plaintiff had written "Adv[ance] for investment for Locker Company, Food Facilities, Inc." The receipt signed for High by the witness Ezell, secretary of the Corporation, stated that it was a temporary receipt for \$5000 received for the use of the corporation, a regular instrument to be furnished as soon as the lawyer would have it typed. According to the testimony of defendant High "things happened—didn't go right"; those who had provided funds were called in and given personal notes by the members of the Board of Directors. Plaintiff received his note, on which the action was brought, in a letter dated June 4, 1946, of Ezell as secretary of the corporation in which it is said that the note was in accordance with the agreement of May 31, 1946, which agreement is not further explained. In June, 1946, Dr. High and the members of the Board of Directors approached the witness Kelso to help them work out a reorganization or rehabilitation of the corporation which they said "had hit a snag." Kelso testified that the plan of rehabilitation on which he and the Board of Directors worked was that said old Board of Directors would make good a deficit of \$25,000 in the assets of the corporation, if they were freed from the personal obligation of the notes signed by them in an amount of some \$29,000. Accordingly the holders of the notes were asked whether they would be willing to surrender the notes in consideration of a participation in bonus stock which the corporation commissioner would permit the corporation to issue as part of the reorganization and also to furnish some new capital by taking new common stock of the corporation. One holder who refused to give up his note was paid off.



It is the contention of all appellants that respondent agreed to surrender his note against participation in the bonus stock which was authorized by the corporation commissioner and that therefore the note was discharged by accord and satisfaction or novation. It is moreover contended by the appellant Bicklehaupt, who filed a separate brief, that so far as he was concerned the note was signed without consideration, that he signed the note after having been told and in the belief that it represented an obligation of the corporation for which he signed as director without personal liability, and that the note was void as part of an illegal transaction circumventing the prohibition of taking subscriptions for stock of a corporation prior to having applied for and secured a permit of the Corporation Commissioner. See section 25500, Corporations Code.

The court below found for plaintiff and against all the defenses stated, finding specifically that the defendants signed the note in their individual capacity and not as directors of the corporation and that there was no mention of this transaction in the records of the corporation. The court also made conclusions of law that the corporation had not assumed the personal liability of the defendants and that there was no accord and satisfaction nor novation.

[1] Appellants' contention that there was as a matter of law discharge of the promissory note by accord and satisfaction or novation cannot be sustained. The evidence as to respondent's assent to the surrender of his note as part of the rehabilitation of the corporation is in substantial conflict. Appellants rely on the testimony of the witness Kelso to the effect that after the rehabilitation plan had been explained to respondent he consented to it and promised to mail \$2000 and the note and that he mailed the \$2000 but failed to surrender the note, and further, on the fact that on December 10, 1946, respondent together with twelve other persons signed an agreement consenting to abide by an allotment of the bonus stock among them to be made by Mr. Kelso and that in May, 1947, respondent with the other authorized

bonus participants signed, in accordance with a condition imposed by the corporation commissioner, a waiver of right to distribution of assets and to dividends until common share holders would have received certain specified dividends and/or distribution of assets. However, respondent testified that his negotiations with Kelso related only to the furnishing of \$2000 new capital for which he was to receive and did receive common stock, that he did not agree to cancel the \$5000 note for participation in bonus stock and that the promise of Mr. Kelso that respondent would participate in the bonus stock was in connection with his taking \$2000 worth of common stock. The agreements signed by respondent with respect to bonus stock do not indicate what consideration entitled him to participate. Appellants also stress the fact that respondent according to his own testimony all along wished to receive stock for his \$5000. However, it is a reasonable inference from all the evidence that in accordance with the original plan respondent wished to obtain common stock for the \$5000 he contributed but that that plan had to be abandoned, that Kelso's rehabilitation plan differed essentially from the original plan and that respondent was free to accept it or not. It is not inherently improbable that common stock would be acceptable to respondent as consideration for the \$5000 furnished but not participation in bonus stock on which the rights to dividend and distribution of assets had been greatly restricted.

[2] Respondent further points out that if the only consideration which respondent has given is the payment of money, the amended permit authorizing the issue of bonus stock does not authorize the issue of any bonus stock to him, because the permit authorizes it only "in consideration for services rendered", although the application for the amended permit had asked that it be authorized "for services and expenses." It is argued that according to section 1109, Corporations Code, "Money paid" and "Services actually rendered" are distinct types of consideration and that if stock would be issued for another type of consideration other than the one pro-



vided for in the permit the issue would be void, citing among other cases *Mannion v. Baldwin*, 217 Cal. 600, 20 P.2d 678 and *Blank v. Olcovich Shoe Corp.*, 20 Cal.App. 2d 456, 462, 67 P.2d 376. Appellants do not offer any refutation of this argument. However we need not decide the point as we are bound at any rate by the factual decision of the trial court on the above conflicting evidence.

[3] None of the contentions urged by appellant Bicklehaupt alone is meritorious. Similar defenses were proposed and rejected in *Crocker Nat. Bank of San Francisco v. Say*, 209 Cal. 436, 288 P. 69. In that case the Crocker National Bank agreed to give a loan to the Valley Bank provided a note for the amount of the loan was signed by responsible directors of the Valley Bank. Defendants, stockholders and directors, signed the note. It was delivered and the Valley Bank received the amount of it. When defendants were sued after default, their defense that they personally did not receive any consideration was rejected on the ground that the detriment of the plaintiff in giving the money to the Valley Bank was adequate consideration. In our case also the detriment of plaintiff was sufficient consideration whoever was considered to have received the loan. If defendants were not the principal debtors they were liable as accommodation makers. § 3110, Civil Code; *Bank of America Nat. Trust & Savings Ass'n v. Goldstein*, 25 Cal.App.2d 37, 42, 76 P.2d 545.

[4,5] Next it was held in the Crocker case, that where the instrument did not show that defendant executed it for and in behalf of a principal (The Valley Bank), no extrinsic evidence was admissible to avoid the personal liability of the makers by showing that they signed as agents for the bank. Here as there the instrument does not show any evidence of an intention to represent the corporation and no extrinsic evidence as to such intent should have been admitted. It must here be pointed out that in the Crocker case, as in our case, plaintiff was the payee of the unnegotiated note. Even if under these

circumstances evidence that appellant Bicklehaupt had signed induced by misrepresentation of third parties or excusable mistake was admissible, such cannot avail him. The court permitted introduction of such evidence and found against the defense, after defendant Bicklehaupt had testified that he thought he was signing the note as a director for the company as security until the time that stock would be issued and had only vaguely indicated that somebody in a meeting of some of the members of the Board of Directors, probably Mr. Ezell, explained that that was the meaning of the note. It is not true that said testimony stands uncontradicted and was binding on the court. The clearly worded note itself causes a conflict. "The presumption is that a written instrument deliberately executed expresses the intention of the parties. [Citations.] This presumption should prevail unless the evidence offered to show a contrary contention is clear and convincing. [Citation.] It is for the trial court to determine if this presumption has been overcome. 2 Cal. Jur. 933, 934. Evidently the trial court was not of the opinion that this presumption had been overcome by the evidence of the appellant, and as this question was for the determination of the trial court, its decision must be considered final." *Kayser v. Gormann*, 3 Cal.2d 478, 486, 44 P.2d 1041, 1044.

[6-8] Finally the fact that the transaction between the parties violated the purpose of section 25500, Corporations Code, does not invalidate the obligation of defendants. "The inhibitions of the Corporate Securities Act [citation] against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense *in pari delicto* where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller." *Eberhard v. Pacific Southwest Loan & Mortg. Corp.*, 215 Cal. 226, 228, 9 P.2d 302, 303; *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 744.

24 P.2d 971, 88 A.L.R. 1271. It is true that the buyer may be considered *in pari delicto* and not entitled to recovery where he is not induced to make the purchase, but is the one who takes the initiative notwithstanding knowledge of the illegality, *Miller v. California Roofing Co.*, 55 Cal. App.2d 136, 130 P.2d 740, but the evidence in this case shows clearly that members of the Board of Directors, because of the need of the corporation, took the initiative and invented the scheme used, whereas there is no indication that respondent knew that even with the device of a loan the transaction remained illegal. Respondent as a person intended to be protected and not considered *in pari delicto* will not be denied the aid of the court.

Judgment affirmed.

GOODELL, J., and PATTERSON, Justice pro tem., concur.



109 Cal.App.2d 614

**HUME v. HART et al.**

Civ. 8072.

Sac. 6205.

District Court of Appeal, Third District,  
California.

March 5, 1952.

Hearing Denied May 1, 1952.

Irene P. Hume sued F. B. Hart, individually and doing business under the fictitious name and style of F. B. Hart Company, for injuries sustained when plaintiff, at 2 A.M., fell into a grease pit located on defendant's used truck and sales lot. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that defendant was not chargeable with anticipating the presence of plaintiff and owed her no duty to maintain a fence around his lot, or to keep the lot lighted, or to post signs or to refrain from maintaining the grease pit.

Affirmed.

241 P.2d—24

# 1. Negligence $\Rightarrow$ 134(3)

In action for injuries sustained when plaintiff fell into grease pit on defendant's used truck and sales lot at night, evidence supported finding that plaintiff was a trespasser.

## 2. Negligence $\Rightarrow$ 33(1), 51, 52

Possessor of used truck and sales lot was not chargeable with anticipating trespasser's presence on such lot at 2 A.M. and owed no duty towards such person to maintain fence around lot, to keep lot lighted, to post warning signs or to refrain from maintaining the grease pit, and therefore was not liable to trespasser for injuries sustained when trespasser fell into grease pit.

Edward E. Craig, Berkeley, for appellant.

Elliott, Atkinson & Sitton, Sacramento, for respondent.

ADAMS, Presiding Justice.

[1] Plaintiff brought this action, seeking damages for injuries suffered by her when she fell into a grease pit on defendant's premises, which premises were used by him for the purpose of selling and servicing trucks. At the conclusion of the trial, by the court without a jury, findings were filed which recite:

"That on the 8th day of November, 1949, and prior and subsequent thereto, defendants operated a used truck and sales lot on the Southeast corner of 16th and North 'C' Streets, in the City of Sacramento; that there was a grease pit located thereon used by defendants in the conduct of their business; that said lot was operated by defendants as a private enterprise; that there was no road, trail or path through or over said lot over which the public had travelled and no license or permission had been given, expressly or impliedly, to the public or any person to enter said lot, except those persons doing so on business with defendants during business hours; that said lot was covered by trucks and other vehicles which faced the adjoining streets, and any one entering the same from the 16th Street

side would be required to go between said trucks to get to the interior of said lot.

"That plaintiff attempted to traverse said lot in the early morning hours in the dark, to-wit: shortly after 2 A.M. of November 8, 1949, after having indulged in drinking intoxicating liquors during the evening and until she fell into said grease pit; that at the time plaintiff fell into said pit, it was partially covered by a truck, though the Court finds that it was not necessary for defendants with respect to plaintiff to place any guard over said pit.

"That said plaintiff was a trespasser and had no license or consent to enter said lot; that plaintiff through her own sole negligence entered the said lot and through her own sole negligence fell into said grease pit; that the defendants were not, nor were either of them, guilty of any negligence in any manner relating to or causing plaintiff's injury."

These findings are amply supported by the evidence.

[2] Plaintiff has appealed from the judgment rendered for defendant. She concedes that she was a trespasser, but urges that nevertheless her presence on defendant's lot should have been anticipated by defendant and that he should have maintained a fence around his lot, kept same lighted, posted warning signs and refrained from maintaining the grease pit which she designates as a "pitfall" or "trap." Her own testimony shows that it was so dark that she could not see and that she had crossed the lot once before and knew of the grease pit.

In Prosser on Torts, page 610, the rule of law applicable to the case is stated as follows: "The possessor of land has a legally protected interest in the exclusiveness of his possession. In general, no one has any right to enter without his consent, and he is free to fix the terms on which that consent will be given. Intruders who come without his permission have no right to demand that he provide them with a safe place to trespass, or that he protect them in their wrongful use of his property. When they enter where they have no right or privilege, the responsibility is theirs, and they assume

the risk of what they may encounter, and are expected to look out for themselves." Also see *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal.2d 499, 501, 50 P.2d 803; *Fernandez v. American Bridge Co.*, 104 Cal.App.2d 340, 345, 231 P.2d 548; *Wilson v. City of Long Beach*, 71 Cal.App.2d 235, 238, 162 P.2d 658, 163 P.2d 501; *Yamauchi v. O'Neill*, 38 Cal.App.2d 703, 709, 102 P.2d 365; *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal.App.2d 91, 97, 219 P.2d 73; *Kirkpatrick v. Damianakes*, 15 Cal.App.2d 446, 449, 59 P.2d 556; *Gianini v. Campodonico*, 176 Cal. 548, 550, 169 P. 80; *Puchta v. Rothman*, 99 Cal.App.2d 285, 291, 221 P.2d 774; *Peters v. Bowman*, 115 Cal. 345, 348, 47 P. 113.

Plaintiff's appeal borders on the frivolous. The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



109 Cal.App.2d 561

**WELCH et al. v. CITY OF LONG  
BEACH et al.**  
Civ. 18492.

District Court of Appeal, Second District,  
Division 1, California.  
March 4, 1952.

Hearing Denied May 1, 1952.

Action by Francis P. Welch, and others, against City of Long Beach, and others, for declaratory relief wherein plaintiffs requested court to determine that they had acquired civil service status as police inspectors. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to show that plaintiffs had not acquired status of police inspectors and that the city manager was under no legal duty to make such appointments.

Affirmed.

**I. Municipal Corporations** ¶168

City manager of City of Long Beach, as administrative head of city, must exer-



cise discretionary powers in management of city affairs, and he is not a mere ministerial figure-head. St.1921, p. 2088, § 88.

## 2. Declaratory Judgment ⇨207

### Municipal Corporations ⇨184(1)

City manager of City of Long Beach has right to determine if a condition exists which requires appointment of additional police inspectors, and in absence of abuse of this discretion, court should not question city manager's determination. St.1921, p. 2088, § 88.

## 3. Declaratory Judgment ⇨345

In action against city by patrolmen for declaratory relief, wherein patrolmen, who had been assigned as "acting inspectors", alleged that they should have been appointed as inspectors in police department, fact that 80 inspector positions had been authorized and only 36 positions had been filled by city manager did not establish that an actual vacancy existed in position of inspector which city manager should have filled.

## 4. Municipal Corporations ⇨184(1)

Under charter of City of Long Beach giving city manager exclusive power to make appointments to fill positions in police department, transfer of patrolmen to detective bureau by police chief as acting inspectors did not give patrolmen status of police inspectors in view of fact that there could be no legal occupancy of such a position without actual appointment by some one having legal authority to appoint. St. 1921, pp. 2092, 2104, §§ 105, 158.

## 5. Declaratory Judgment ⇨345

In action against City of Long Beach by patrolmen for declaratory relief, wherein patrolmen alleged that they had acquired civil service status as police inspectors, evidence was sufficient to show that patrolmen, who had been assigned as "acting inspectors," had not acquired status of inspectors and that city manager was under no legal duty to make such appointments. St.1921, pp. 2088, 2092, 2104, §§ 88, 105, 158.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

DORAN, Justice.

The appellants filed this action for declaratory relief and requested the court to determine that appellants had acquired civil service status as Inspectors in the Police Department of the City of Long Beach and were entitled to the salary attached to that rank. The trial court found against such contentions.

Under Civil Service regulations appellants had qualified for and had been employed by the City as patrolmen in the Police Department. Each of the appellants had, on July 31, 1947, taken and passed a promotional examination for the position of Inspector, which examination resulted in a promotional eligible list upon which appellants' names were given, respectively, the 12th, 14th, 15th and 17th places. All promotions to the position of Inspector were required to be filled by the appointment of the person next in line therefor on this list.

The trial court found that "under the terms of the salary ordinance then in force and effect, eighty (80) positions of Inspector were created, but the City Manager at no time authorized the filling of more than thirty-six (36) positions of Inspector; that under the provisions of the City Charter \* \* \* the sole power of making appointments to fill positions in the Police Department \* \* \* was vested in the City Manager".

It was further found that in 1947-48 the Chief of Police had "assigned plaintiffs and each of them to work in the Detective Bureau of the Police Department", and that "thereafter plaintiffs were referred to as 'Acting Inspectors'; that the salary ordinance did not create any position designated as 'Acting Inspector'; that the foregoing assignments and each of them were necessary to carry on the work load of the Detective Bureau; that at the time of their respective assignments, plaintiffs were then respectively next in line for appointment to the position of Inspector upon the promotional eligible list for said position, assum-

Kenneth Sperry, Long Beach, for appellants.



ing that a sufficient number of appointments had been made to carry on the work load of the Detective Bureau; that after said assignments, plaintiffs and each of them performed substantially the same type of work and duties as were performed by the regularly appointed inspectors while working on the same shifts".

It appears, and the trial court so found, that the Chief of Police had informed the City Manager that additional inspectors were necessary but that the City Manager failed and refused to appoint more than thirty-six inspectors, the reason given being an alleged lack of funds, although "in truth and in fact there existed, and has continued to exist at all times, sufficient funds \* \* \* to have defrayed the expense of such additional appointments as were necessary to carry the work load of the Detective Bureau", but that "the City Manager was under no legal duty to make said appointments."

It is contended by appellants that "the essential facts as found by the trial court are contrary to the conclusions drawn therefrom and hence provide no support for the judgment"; that the trial court erred in determining that the City Manager was under no legal duty to make a sufficient number of promotional appointments to the position of inspector to carry on the work load; and that "Plaintiffs' right to appointment being solely dependent upon their standing upon the promotional eligible list may not be defeated by the failure of the city manager to perform his ministerial duties in this regard".

As phrased by respondents, appellants' position is that "actual vacancies existed in the position of Inspector \* \* \* for the reason that sufficient Inspectors had not been appointed"; and that "had the City Manager appointed sufficient Inspectors to perform the work load \* \* \* the names of the appellants would have been reached for certification from the eligible list, and that appellants would have been appointed"; that since appellants had worked as "Acting Inspectors" for more than six months, "appellants had acquired permanent status as Inspectors and were entitled to the pay fixed for said position. The respondents

submit that the trial court correctly held that appellants had not acquired civil service status as Inspectors; that the City Manager was not required to appoint appellants to fill such positions, and that appellants have been paid in full for their services."

Appellants' contention that the trial court's findings are contrary to and fail to support the judgment is without merit. As set forth in respondents' brief, it is evident that the appellants have not correctly analyzed the findings or the issues involved. The trial court did not find that any actual vacancies existed in the position of Inspector, and expressly found that appellants "were never appointed to the position of Inspector by the City Manager"; "that the sole power of making appointments \* \* \* was vested in the City Manager"; that notwithstanding assignments by the Chief of Police to the Detective Bureau and the use of the term "Acting Inspector" in reference to duties performed by appellants, no such position having been created by the salary ordinance, appellants "did not acquire the status of an Inspector", and were not entitled to any additional salary. The trial court's material findings are entirely consistent with the conclusions reached and the judgment rendered.

[1] Section 88 of the Charter of the City of Long Beach, Stats. 1921, page 2088, provides that "The city council shall appoint a city manager who shall be the administrative head of the municipal government, and shall be responsible for the efficient administration of all departments, except the city auditor, city attorney, police court, and the board of education." As administrative head of the City, the City Manager must of necessity exercise discretionary powers in the management of city affairs, and is not, as appellants seem to contend, a mere ministerial "figure-head".

[2] As stated in respondents' brief, "The City Manager certainly has the right to determine if a condition exists which requires the appointment of additional Inspectors. \* \* \* In the absence of abuse of discretion, for a court to hold that additional Inspectors shall have been appointed, would be for said court to take over the administration of the City of Long Beach and to

replace the City Manager as administrative head of the City". In this respect it may also be noted that the present proceeding is not one of mandamus but merely an action for declaratory relief.

Appellants' argument is based upon two erroneous propositions; first, that an actual vacancy existed in the position of Inspector; and second, that because appellants had been assigned to the Detective Bureau and for more than six months had performed duties similar to those of an Inspector, the City Manager was under a duty to appoint appellants as inspectors.

[3] The proposition that an actual vacancy existed is predicated upon the assertion that more inspectors were needed to carry the work load. No pertinent authority has been cited to sustain such proposition, and its approval would, as respondents say, amount to unwarranted judicial interference with city administration. The fact that 80 inspector positions had been authorized and that some 36 positions had been filled at the time in question in no manner strengthens appellants' position. There was no showing that any position which had formerly been filled by an inspector had become vacant or that any of the appellants had been assigned to fill any such vacancy.

[4] The position taken in appellants' brief, that "plaintiffs are actually occupying the positions (of inspectors) in question", and that such occupancy "establishes rather conclusively that a vacancy in the position did exist", is clearly untenable. It is, moreover, inconsistent with the accompanying statement that "We are not contending that the Chief of Police had the power of appointment or that the assignments in question constituted appointments". Without actual appointment by someone having the legal authority to appoint, it is obvious that there can be no legal occupancy of such a position. There is nothing in the record to indicate that the appellants ever legally occupied any other position than that of patrolmen.

Under Section 158 of the City Charter, the Chief of Police had "the exclusive control of the stationing and transfer of all patrolmen \* \* \*, under such rules and

regulations as the city manager may prescribe." Appellants' transfer to the Detective Bureau, a practice which, under the evidence, had been in existence for twenty years, carried with it no preferential benefit. It was, at best, in the nature of a training school for those who might later receive appointments as inspectors, but nothing more.

There was no such position as "Acting Inspector", nor was there any appointment to a "temporary position" as an actual Inspector; hence such cases as *McGillicuddy v. Civil Service Commission*, 133 Cal.App. 872, 24 P.2d 942, in which employees sought to acquire a permanent civil service status after an actual "temporary appointment" for more than six months, are inapplicable. Likewise Section 105 of the Long Beach Charter, providing that "An appointment or promotion shall not be deemed complete until a period of probation not to exceed six months has elapsed", can afford appellants no relief since there were no appointments or promotions in the instant case, and no probationary period was involved.

[5] By whatever name appellants may erroneously have been designated, the duties performed appear to have been within those fixed for patrolmen, namely, "to apprehend violators of laws and ordinances, and to assist in the prosecution of such violators, to prepare written reports of work done, and to perform related work as required". (Italics added.) Nor is it helpful to appellants' case that there may have been some overlapping of duties between the work of actual inspectors and patrolmen assigned to duties in the Detective Bureau. Likewise, appellants cannot rightly be said to have been working "out of classification", in violation of Section 1 of Civil Service Rule XVII.

The well known maxims that "The law looks to substance rather than to form", and "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due", Civil Code, Sec. 3529, helpful in many situations, can afford no authority in the instant case for "a court to step in and become the administrative head of the city", as phrased in the respondents'

brief. Appellants have cited no pertinent cases, either in California or elsewhere, which would justify such action under the factual situation here presented.

Decisions such as *Ballf v. Civil Service Commission*, 43 Cal.App.2d 211, 110 P.2d 478, holding that the commission was obliged to certify appellant's name which was first on an eligible list rather than that of the person whose name stood ninth on the list, and others dealing with entirely dissimilar facts, are not authorities in support of the position here urged by appellants.

The record contains evidence in support of the findings and judgment; and no prejudicial errors appear to have been committed by the trial court. Appellants' contentions are without merit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 628

**MILLER et al. v. LOBDELL et al.**

**LOBDELL et al. v. MILLER et al.**

Civ. 4448.

District Court of Appeal, Fourth District,  
California.

March 6, 1952.

Action by William B. Miller and others against Victor A. Lobdell and his wife to foreclose a chattel mortgage. Action by Victor A. Lobdell and his wife against William B. Miller and others to rescind a contract of sale and exchange of property. The actions were consolidated for trial. The Superior Court, Orange County, Kenneth E. Morrison, J., entered a judgment of rescission for defendants and the plaintiffs appealed. The defendants moved to dismiss the appeal. The District Court of Appeal, Mussell, J., held that the vendor's action with reference to the property was not such a voluntary acceptance of a benefit of the judgment as to bar an appeal.

Motion denied.

### 1. Appeal and Error ⇨161

Voluntary acceptance of benefit of a judgment or order is a bar to prosecution of an appeal therefrom.

### 2. Appeal and Error ⇨162(1)

Exception to general rule that voluntary acceptance of benefit of judgment bars appeal therefrom is recognized where payments on a judgment are made under compulsion of threatened serious financial loss.

### 3. Appeal and Error ⇨161

Where purchasers' letter to vendor clearly indicated abandonment of property and intent to hold vendor responsible for maintenance of property and under terms of judgment purchasers were not required to deliver or convey property until judgment against vendor had been paid and vendor refused to accept deed and bill of sale and promptly notified purchasers that he would operate property for benefit of purchasers and vendor made material changes in property and it could not be determined whether acts were done in ordinary maintenance of property, acceptance of possession of property did not constitute such voluntary acceptance of benefit of judgment as would bar prosecution of appeal from judgment.

James E. Pawson, Long Beach, and Head, Jacobs & Corfman, Santa Ana, for appellants.

Tobias & Bernard and E. J. Marks, Santa Ana, for respondents.

MUSSELL, Justice.

Respondents move the dismissal of the appeal herein on the ground that appellants have voluntarily accepted substantial benefits of the judgment and therefore are estopped and barred from the right to appeal.

#### Statement of Facts.

On July 2, 1947, respondents purchased from appellant William B. Miller, a hotel, bathhouse, cabins and real property situated in Orange county. On July 21, 1949, Miller filed an action against the Lobdells to foreclose a chattel mortgage given by them as security for payment of a promissory note



in the sum of \$29,000. The Lobdells, on August 14, 1949, filed an action in the same court against William B. Miller, his agent, Frank O'Farrel, and Orange County Title Company to rescind the contract of sale and exchange. This action was based upon alleged fraud, misrepresentation and concealment practiced by appellants prior to the exchange agreement. The two actions were consolidated for trial and on February 5, 1951, judgment was rendered that Miller take nothing against the plaintiffs by reason of his complaint in the foreclosure action; the agreement of sale was adjudged to be null and void, rescinded and canceled; the promissory note for \$29,000, the trust deed and the chattel mortgage were canceled and the title company was ordered to reconvey the Orange county property. It was further decreed that the Lobdells recover judgment against Miller for \$37,772.90 and that Miller, upon the payment of this sum, is entitled to have the personal property described in the chattel mortgage conveyed to him; that upon payment of said judgment and within 30 days thereafter the Lobdells shall convey to Miller the personal property described in the mortgage and the Orange county real property, he to become the owner thereof.

The judgment was not paid and on February 9, 1951, the Lobdells tendered and delivered to Miller a deed to the Orange county real property and also a bill of sale of the personal property and demanded payment of the judgment. This tender and demand was made by letter to Miller, written by the attorneys and agents of the Lobdells, which letter stated, among other things, that the properties were being transferred and returned to Miller pursuant to the terms of the judgment. Miller was advised that the sole responsibility and liability for the safe-keeping, maintenance and care of the properties would henceforth be his; that Mr. and Mrs. Lobdell no longer had any interest in or responsibility for such property; that their personal effects and belongings had been removed, employees and agents had been discharged; that all keys to the premises were turned over to Miller's agent and attorney and that from February 19, 1951, damage or loss to said property

would be entirely Miller's responsibility and concern. On the same date the attorney for Miller wrote to attorneys for the Lobdells and in his letter stated that Miller had submitted to him their letter of February 9th enclosing a grant deed and bill of sale covering the real and personal property involved; that "pursuant to the information contained therein this will advise you that Mr. Miller is not accepting the deed or bill of sale to the personal property tendered thereby. However, pursuant to the notice that you have left and abandoned said property they will place caretakers and maintenance persons upon said property for the purpose of preserving the same and operating them for your client's use and benefit pending the ultimate determination of the case." Following the exchange of these letters, attorneys for the Lobdells, on February 13, 1951, advised the attorney for Mr. Miller that the properties were not being abandoned but were being turned over to him in accordance with the order of the court; that any and all caretakers and maintenance persons brought upon the property would not be at the instance of Mr. and Mrs. Lobdell or for their use and benefit but will be solely for the use and benefit of Mr. Miller; that the keys to the property had been turned over to Mr. Frank O'Farrel and his receipt obtained for them.

It was shown by affidavits that Miller entered into possession of the property and still retains it; that no part of the judgment in favor of respondents has been paid; that Miller and his agent have made many material alterations, changes and improvements in the property and have disposed of some items of personal property; that changes have been made in the name of the hotel and in the hotel advertisements; that Miller has entered into a number of agreements with his employees permitting them to operate the hotel and bathhouse and dividing the profits from such operation; that Miller advertised the property for sale; that he has treated such property as his own and kept and retained all the rentals, issues and profits from the operation thereof.

On February 16, 1951, appellants moved for a new trial and on April 25, 1951, gave notice of appeal from the judgment which

affected both actions and an appeal bond in the sum of \$56,000 was filed on May 7, 1951.

[1-3] The general rule is that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. *Schubert v. Reich*, 36 Cal.2d 298, 299, 223 P.2d 242. However, under the circumstances disclosed by the record before us, the rule announced is not applicable. The letter of February 9th from the attorneys for the Lobdells to Miller clearly indicates that their clients had abandoned the property involved; that they disclaimed all interest therein and intended to hold Miller responsible for its safekeeping, maintenance and care. Under the terms of the judgment, the Lobdells were not required to deliver the property or convey it to Miller until the judgment had been paid. It is apparent, therefore, that the property was not being delivered to Miller pursuant to the terms of the judgment as stated by the Lobdells in their letter. Miller refused to accept the deed and bill of sale and promptly advised the Lobdells of this fact. He also gave notice that in view of the abandonment of the property, he would place caretakers and maintenance persons upon the property for the purpose of operating it for the use and benefit of the Lobdells pending the ultimate determination of the case. The Lobdells put Miller in a position where he was required to preserve and operate the property pending his appeal from the judgment. It is conceded by respondents that if Miller had merely put a caretaker in charge of the property, a dismissal of the appeal would not be urged. The respondents contend, however, that Miller took possession of the property, not as the caretaker, but as owner; that by making material alterations, changes and improvements to the property, by attempting to sell it and by disposing of some of the items of personal property, he treated the property as his own and that he thereby accepted the benefit of the judgment. However, it cannot be determined on the record before us whether or not such acts were necessarily done in the ordinary and proper maintenance and operation of the business. To close the property and place a caretaker

in charge might well have resulted in a serious financial loss to the business being conducted on the premises. An exception to the general rule that a voluntary acceptance of the benefit of a judgment bars an appeal therefrom is recognized where payments on a judgment are made under compulsion of threatened serious financial loss. *Greenspot Desert Inns, Inc., v. Roy*, 63 Cal. App.2d 54, 60, 146 P.2d 39; *Alamitos Land Co. v. Shell Oil Co.*, 217 Cal. 213, 215, 17 P.2d 998.

Under the circumstances here disclosed, we conclude that the appeal should not be dismissed, and that it should be considered on its merits.

Motion to dismiss appeal denied.

BARNARD, P. J., and GRIFFIN, J., concur.



109 Cal.App.2d 579

PEOPLE v. TOLSON.

Cr. 2330.

District Court of Appeal, Third District,  
California.

March 4, 1952.

Rehearing Denied March 18, 1952.

Hearing Denied April 3, 1952.

Defendant was convicted in the Superior Court, Warren Steel County, Yuba, J., for rape and he appealed. The District Court of Appeal, Adams, P. J., held that the evidence sustained the conviction.

Affirmed.

#### 1. Criminal Law ☞371(9)

In rape prosecution, evidence of defendant's conduct toward three other women on the same day as the alleged offense against prosecutrix was admissible for purpose of showing frame of mind or a design or common purpose on part of defendant in connection with offense charged. Pen. Code, § 261.

#### 2. Criminal Law ☞351(2)

In rape prosecution, statements and denials made by defendant just after arrest,

which were inconsistent with defendant's testimony at trial, were admissible as tending to show consciousness of guilt. Pen. Code, § 261.

### 3. Criminal Law §728(2)

In rape prosecution, statement of district attorney in argument to jury as to sincerity of testimony of prosecutrix and as to nature of testimony which would have been given by state's witnesses who allegedly failed to appear, was not prejudicial in absence of objection or request for an instruction to jury to disregard it. Pen. Code, § 261.

### 4. Rape §51(1)

Evidence sustained conviction for rape. Pen. Code, § 261.

Gray & Hewitt, Marysville, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., Sacramento, for respondent.

ADAMS, Presiding Justice.

Appellant Tolson was charged with and convicted by a jury of a violation of section 261 of the Penal Code, in that, with force and violence, and against her will, he accomplished an act of sexual intercourse with a Mrs. S. who was not then his wife. He admitted the act of intercourse, but contends that it was accomplished without force or violence, and with the consent of Mrs. S., which she denied.

As grounds for reversal appellant asserts that prejudicial error was committed by the trial court in allowing testimony of the conduct of defendant toward three other women in a bar in the afternoon just prior to the offense against Mrs. S.; that there was reversible error in the introduction by the district attorney and the allowance by the court of statements made by defendant shortly after his arrest; and that the district attorney, in his argument to the jury, made a statement that was prejudicial to defendant.

[1] The evidence shows that the offense of which appellant stands convicted

occurred about 5:30 p. m.; that around three o'clock of that day appellant entered the Forest Club in Forbestown where he seated himself beside a Mrs. G., a total stranger, began a conversation with her, and asked if he could not take her home, and when she refused asked her to take a ride with him, which she also refused. He then approached two other strange women, asking each one of them if she would not go with him. To avoid him the three women finally moved to a corner table, together, but he followed them and continued his attentions, during which time he pinched one of them on the buttocks. The bartender ordered him to leave, which he did about 4:30 or 5 p. m., after some expostulation.

Defendant's counsel objected to evidence of the aforesaid circumstances, but the objection was overruled, at which time the court instructed the jury that such testimony was admitted solely and only for the purpose of showing, if it did show, the frame of mind or a design or a common purpose on the part of defendant in connection with the offense with which he was charged. On a motion by defendant to strike the foregoing testimony the court again said: "\* \* \* If your argument is sound, the Jury will agree with you. You admit that he had an act of sexual intercourse with the complaining witness, and as you say, the sole issue is whether it was accomplished by mutual agreement between them or whether it was accomplished by the use of force. That is the issue as I take it; however, I see no harm in this testimony, and I think it is material to show possibly a design or common purpose or something of that sort."

Obviously defendant's conduct toward the women in the Forest Club was suggestive of purpose and design on his part, and we are of the opinion that it was not inadmissible. See *People v. Peete*, 28 Cal. 2d 306, 314, 315, 169 P.2d 924; *People v. Nye*, 38 Cal.2d 34, 237 P.2d 1; *People v. McMonigle*, 29 Cal.2d 730, 743-744, 177 P.2d 745; *People v. Dabb*, 32 Cal.2d 491, 499, 197 P.2d 1; *People v. Zatzke*, 33 Cal. 2d 480, 483, 202 P.2d 1009; *People v. Coefield*, 37 Cal.2d 865, 236 P.2d 570;



People v. O'Brand, 92 Cal.App.2d 752, 754, 207 P.2d 1083; People v. Torres, 98 Cal. App.2d 189, 192, 219 P.2d 480; People v. Boyd, 95 Cal.App.2d 831, 833, 213 P.2d 724.

[2] As to the evidence regarding statements of defendant, it shows that after his arrest the evening of the day of the offense, defendant denied that he visited the S. house at all; and after his arrival at Marysville, where he was taken to the sheriff's office, he made a statement, which was written and signed, that he had visited the Forest Club, and after leaving same his car got stuck; that he was drunk and did not know whether he raped a woman or not; that he could not remember because he was drunk; that he did not admit the rape or deny it. But at the trial his memory seemed to clear. He testified that he went to the Forest Club and there saw Mrs. G. and some other women, all of whom were strangers; that after leaving the Club his car became stuck in the mud, and that he went to the S. house where Mrs. S. was standing in the yard near two dogs; that he asked her if there was anyone there that could help get his car out, and she said there was not; that they then discussed sexual intercourse; that a child in the house started to cry and he followed Mrs. S. into the house; and that after that they had intercourse. He stated that he did not use force, did not tell her he would kill her, and did not strike her. He admitted that he told the sheriff the things contained in the statement he made to the sheriff.

Under these circumstances it cannot be said that it was error to admit testimony regarding the prior statements and denials made by defendant. They were admissible as tending to show consciousness of guilt, under the authority of People v. Walker, 99 Cal.App.2d 238, 243, 221 P.2d 287; People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25; and People v. Turner, 86 Cal.App.2d 791, 801, 195 P.2d 809.

[3] As for appellant's third assignment of error, the statement of the district attorney to which exception is now taken

related to the testimony of Mrs. S. It was: "Now ladies and gentlemen, I feel that her testimony was sincere, it has been checked out and double checked. These cases are very, very thoroughly investigated, you don't just issue a rape complaint against a man because you are putting a black mark on his character when you do so. You don't accuse an adult of a sex act until you are sure. I can't offer you any other eye witness, that is for sure. All you can do is take the evidence as it has been presented here today. We had other witnesses but they didn't show up. Of course they would be regarding what happened in the afternoon in the bar. Now ladies and gentlemen, on the basis of the testimony given here, I do not feel that this was a voluntary act and I do feel that he used the force, he used the threats."

No objection to the argument of the district attorney was made nor was it charged as misconduct, nor was any request made for an instruction to the jury to disregard it.

In People v. Sampsell, 34 Cal.2d 757, 763, 214 P.2d 813, 817, wherein the prosecutor went rather far afield, in affirming the conviction and death sentence the court said: "The defendant, however, made no attempt to object to these remarks during the course of the trial, nor was the court requested to admonish the jury concerning them. It would appear that such an objection and request should have been made".

And in People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881, 884, the court said: "Moreover, defendant made no attempt to correct these alleged improprieties at the trial; and it is the general rule that any objectionable remarks or argument of the prosecuting attorney must be opposed at the time they are made, and the court requested to admonish the jury concerning them, before they can be made a ground for appeal." Also see People v. Shears, 133 Cal. 154, 65 P. 295; People v. O'Brand, supra; People v. Harmon, 89 Cal.App.2d 55, 61, 200 P.2d 32; People v. Tucker, 88 Cal.App.2d 333, 334, 198 P.2d 941; People v. Hunter, 49 Cal.App.2d 243, 250, 121 P.

2d 529; *People v. Dozier*, 35 Cal.App.2d 49, 94 P.2d 598; *People v. Davidson*, 23 Cal.App.2d 116, 72 P.2d 233.

[4] The testimony of Mrs. S. regarding defendant's use of force and threats in accomplishing his act was clear and convincing, and amply supports the verdict. It was for the jury, and the trial court on motion for a new trial, to weigh the evidence and resolve the conflict between her testimony and that of defendant, and this court finds no reason for a different conclusion.

The judgment and the order denying a new trial are affirmed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



109 Cal.App.2d 620

HOWARD et al. v. TRIANGLE FREIGHT LINES.  
Civ. 4342.

District Court of Appeal, Fourth District,  
California.  
March 6, 1952.

Action by Oliver Wendell Howard and others against Triangle Freight Lines and another for personal injuries to plaintiffs when automobile in which they were riding collided with rear end of trailer truck of defendant freight lines when air brake line on trailer broke and caused truck to come to abrupt stop. The Superior Court of Kern County, Warren Stockton, J., entered judgment against all defendants and granted new trial as to defendant driver and denied motions of defendant owners for new trial, and defendant owners and plaintiffs both appealed from portions of decision adverse to them. The District Court of Appeal, Barnard, P. J., held that evidence was insufficient to support plaintiffs' allegation that defective brake equipment had been furnished and that defendants knew or should have known that such defective condition existed.

Order granting new trial to defendant driver affirmed, judgment against defendant owners reversed.

#### 1. Automobiles ⇨243(8)

In action for personal injuries to plaintiffs when automobile in which they were riding collided with rear end of trailer truck of defendants when air brake line on trailer broke and caused truck to come to abrupt stop, wherein it was contended that truck had been furnished with defective equipment, admission of testimony that there was air line fitting on market which was superior to one used on truck at point at which break occurred was improper, since issue was whether defective equipment had been used and not whether superior device was on market.

#### 2. Automobiles ⇨244(33)

In action for personal injuries to plaintiffs when automobile in which they were riding collided with rear end of trailer truck of defendants when air brake line on trailer broke and caused truck to come to abrupt stop, wherein it was alleged that truck had been furnished with defective equipment and that such defective condition should have been known to defendants, evidence was insufficient to support allegation that equipment was so defective as to make it probable that such break would occur, and there was no evidence which would support finding that defendants knew or should have known that such defective condition existed.

#### 3. Automobiles ⇨246(18)

In action for personal injuries to minor plaintiffs when automobile in which they were riding collided with rear end of trailer truck of defendants when brake line on trailer broke and caused truck to come to abrupt stop, wherein it was contended that truck had been furnished with defective equipment, instruction that sole defense of defendants was that they were without negligence, and that if jury believed from preponderance of evidence that defendants were in any manner negligent, even though such negligence be only in slight degree, and that such negligence proximately contributed to accident, then plaintiffs were entitled to verdict, was error.

**4. Automobiles** ⇨244(12)

In action for personal injuries to minor plaintiffs when automobile in which they were riding collided with rear end of trailer truck driven by one of defendants, when air brake line broke on truck and caused truck to come to abrupt stop, evidence would not have warranted finding that driver of truck was guilty of negligence which contributed to plaintiffs' injuries.

---

Johnston, Baker & Palmer, Bakersfield, for appellants.

Werdell & Di Giorgio, Bakersfield, for respondents.

BARNARD, Presiding Justice.

The plaintiffs were injured in a collision between an automobile in which they were riding and a truck and trailer owned by Triangle Freight Lines, a partnership, and driven by Walker, an employee of the firm. The accident occurred on the night of May 20, 1949, on Highway 99, a few miles north of Bakersfield. At that point there were two north-bound lanes and two south-bound, separated by a barrier 20 feet wide. Just prior to the accident both vehicles were traveling north in the easterly or outer lane, the truck at 30 to 35 miles an hour and the Howard car at 40 to 45 miles. A copper air line on the truck, which ran to the trailer, suddenly broke and the loss of air locked the brakes on the trailer but not those on the truck. Walker immediately turned his equipment toward the right-hand or east shoulder. While the equipment was partly on the shoulder and partly on the highway the Howard car crashed into the left rear corner of the trailer.

The complaint in this action alleged that Walker, without warning, operated the truck in such a negligent and reckless manner as to cause it to suddenly stop on the highway, thereby causing the plaintiffs to run into it. The next paragraph alleged that the braking and signaling equipment on the truck was so defective and unsafe as to render it "possible and probable that \* \* \* the braking system would suddenly lock and stop said motor truck without warning or signal to vehicles behind"; and

that each of the defendants knew, or should have known, of this defective condition.

There is little, if any, conflict with respect to the facts of the case. Mr. Howard testified that as he was driving north he saw this equipment in front, in the easterly lane, with clearance lights burning at the rear; that he had it in mind to pass the truck when he got close enough; that "just about that time" he noticed he was rapidly gaining on the truck; that he decided that the truck had stopped and whirled his car to the left to miss it, hitting his brakes at the same time; that he did not know whether or not the truck was stopped when the impact occurred; that "I had made up my mind that the truck equipment had stopped when I was three or four car-lengths behind it"; that the passing lane to his left was clear; that the lights on the rear of the truck did not change; and that there was no other vehicle between his car and the truck at any time after he saw the truck a quarter of a mile ahead.

The driver of the truck testified that he had driven trucks for many years, and had never known an air line to break suddenly before; that he made a routine check of the equipment at Bakersfield and everything was normal and the air gauge and brakes were working perfectly; that the air line suddenly broke, locking the brakes on the trailer which slowed the equipment down fast; that this happened two or three seconds before the impact; that he pulled over toward the shoulder, figuring with the power of the motor and the momentum he could get the truck off the highway; that from the time the air line broke he got to a stop in about 55 feet; that he got the truck partly on the shoulder when the impact occurred; that there was no other vehicle near except the Howard car; and that the passing lane to the left was entirely clear. He further testified that the break occurred where the copper tubing is joined to the air gauge on the dash by a fitting; that the break occurred in this fitting, and was "right inside" of the nut and behind the instrument panel; that in repairing the break he cut off an inch at the end of



the tube and just dropped the part he cut off; that he then flared the end of the tube and fastened it back into the gauge by tightening the nut which holds it tight; that this fitting which he used was the flare type and was a part of the air gauge on the instrument panel; that there was also a ferrule type fitting in the tool box but he did not use this except as a temporary plug in releasing the brake, so he could get the equipment completely onto the shoulder; that this particular air line is a standard fitting; and that a GMC has its own instrument panel and the instruments are a part of the truck.

One of the owners of the truck testified that he arrived at the scene of the accident about four hours after it happened; that in 1948 he had had a new cab put on the truck at a garage in Fresno; that when this was done a new engine was put in and the air brake lines were changed, and everything overhauled "from stem to stern"; that there had been no breaks or leaks in the brake system since the overhaul job; that they had Bendix-Westinghouse air brakes which are standard equipment on 90% of the trucks; that they have a mechanic and the truck was given a routine checkup once a week and the braking equipment was mechanically perfect just before the accident; that in some twelve years' experience as a trucker he had never heard of a copper line breaking; that the braking system was inspected within a week of the accident; that standard Westinghouse brakes were on this system; and that to the best of his knowledge "all the fittings on this truck were standard Westinghouse Bendix fittings." He was shown the ferrule type Westinghouse fitting, which was admitted as Exhibit 4. He testified that he was not a parts man and did not know the number of standard fittings made by Westinghouse; that there were different types of connections and two different fittings; that there is a slight difference between these; and that there was a fitting on the instrument gauge of the truck which was "similar" to the one shown him.

A state traffic officer testified that he arrived at the scene a few minutes after

the accident occurred; that the vehicles had stopped about 20 feet apart; that there were no discernible skid marks up to the point of impact; that he determined the point of impact, which was between five and six feet east of the center line dividing the north-bound lanes; that the closest part of the truck and trailer was at least 15 feet from the point of impact; and that there were lights on the truck and trailer, but none on the Howard car.

A Mr. Deibel, called by the plaintiffs, testified that he was the manager of a brake and supply company and had had experience with brake lines and air brakes on trucks for 12 years. When asked "Are breakages in air-line systems rare occurrences or otherwise?" he replied, "I would say otherwise." He was shown the ferrule type fitting, Exhibit 4, and testified that it was a standard Bendix-Westinghouse air brake fitting and that the one on this truck was an SAE fitting; that normally a truck equipped with standard Westinghouse brakes uses the ferrule type fitting; and that where a normal Westinghouse setup was being used an SAE fitting would not be used because it would not be furnished. He was then asked "What is the reason why they don't furnish this type." The defendants' objections were overruled and the witness replied: "The reason why they don't furnish the SAE fitting is because this type of fitting holds the tube more rigid and it will have less chance of the tube breaking, it has got more suppleness to the tubing than the SAE fitting does." A motion to strike this answer was denied.

At the request of the plaintiffs, the court instructed the jury that the defendant driver was the agent of the defendant owners, and that it followed "that if one is liable, all are liable." During its deliberation the jury sent a message to the judge asking whether it could find a verdict for the defendant driver and still hold the defendant owners liable. The bailiff reported that the judge had said that he could not answer that question, but that he would have court opened and read the instructions on that. However, this was not done. The jury then brought in a ver-

dict in favor of all of the plaintiffs and against all of the defendants. The court granted a new trial to the defendant driver, without mentioning insufficiency of the evidence, and denied a new trial to the defendant owners. They have appealed from the judgment, and the plaintiffs have appealed from the order granting a new trial as to the defendant driver.

On the appeal of the defendant owners it is first contended that the verdict against them was based upon the court's instruction "that if one is liable, all are liable"; that they are liable only on the principle of agency; that there was no evidence of negligence on the part of the driver; and that the granting of a new trial to him legally exculpates them. There was no evidence of negligence on the part of the driver but it does not follow that the owners could not be liable, since they were also charged with negligence in knowingly permitting this equipment to be operated with such defective and unsafe brakes that a sudden stop would probably result.

It is next contended that it was prejudicial error to permit the witness Deibel to testify to the effect that a Westinghouse ferrule type fitting is superior to an SAE type fitting; that this is the only evidence of any negligence on the part of the owners; and that the evidence is not sufficient to show negligence on their part.

The issue was whether or not the owners had failed to use due care in furnishing this equipment, rather than whether or not a superior type of fitting was on the market. This testimony by Deibel should not have been admitted, and it was prejudicial, in the absence of further evidence making it material, and showing knowledge on the part of the owners. The evidence indicates that a Westinghouse brake system had been originally installed on this equipment; that when a GMC cab was later installed the copper air tube was connected with the air gauge on the GMC instrument board; and that the SAE flare type fitting was a part of that air gauge. There is no evidence that the flare type fitting which was a part of the air gauge already installed, was not customarily used or that it was not a standard type of fitting fur-

nished by manufacturers of such equipment. While Deibel was permitted to testify to the effect that he considered the ferrule type fitting superior to the other, there was no evidence that this opinion was generally shared by qualified persons and none that this fact, if true, was known or should have been known to the owners.

The plaintiffs argue that since there was evidence that the ferrule type fitting was normally furnished on Bendix-Westinghouse brake systems, and since the owners' maintenance mechanic was not called as a witness, the jury was entitled to infer either that the owners were negligent in not requiring their mechanic to see that such a fitting was installed on this truck, or were negligent in employing a mechanic who was so incompetent that he did not know that this fitting was not the usual Westinghouse fitting. This particular fitting, by which the copper tube was attached to the air gauge, was a part of the air gauge installed on the GMC instrument board and, so far as disclosed by the evidence, was a part of the regular GMC equipment placed there for that purpose. There is no evidence that the defendants had any knowledge as to the merits of selections made by different manufacturers. While there is evidence that a ferrule type fitting is normally furnished with Westinghouse brake equipment, there is no evidence indicating that it would normally be used to attach that equipment to an instrument board in a GMC cab, where a flare-type fitting is already provided and installed as a part of the air gauge. Moreover, this new cab was installed on the truck and the air brake system attached thereto in connection with a general overhaul at a public garage, and not by the owners' regular maintenance man. There is no evidence that the owners knew that this installation was not normal and usual, or that it was in any way inferior or unsafe.

[1,2] The break, whatever caused it, occurred inside of a fitting installed by an outsider, and apparently furnished by the manufacturer of a large part of the equipment. It would be unreasonable to expect that this maintenance mechanic, in making ordinary checks of the truck, would

question the type of fitting furnished by one of the manufacturers or that he would take the various fixtures apart and search for such latent defects as the one which here developed. The break in the line occurred in a hidden place inside the nut on this fixture and behind the instrument board, and no ordinary or reasonable inspection would have disclosed it. There is no evidence in the record that the defendants knew that the ferrule type fixture was better than the flared type fixture, if this be true. The owner who testified said that he was not familiar with the number of standard fittings made by Westinghouse, and that he had thought the whole brake installation was a Westinghouse product. The only evidence in the record that the ferrule type fitting is superior is the opinion expressed by Deibel, based on the reason that it "holds the tube more rigid" and "has got more suppleness." He did not attempt to explain how a more rigid holding of the tube could make it more supple, or how this could make any difference within the fixture itself where, in each type, the end of the tube is firmly held for the purpose of making it air tight. There was no evidence that the SAE type of fitting is not in common use, and no evidence that breaks in air lines have occurred any more often where they have been used. The plaintiffs alleged that this braking equipment was so defective as to make it probable that such a break would occur, and that this defective condition was, or should have been, known to the defendants. The evidence is insufficient to support the first of these allegations, and there is no evidence at all which would support a finding that the defendants knew or should have known that such a defective condition existed. The testimony of Deibel to the effect that he considered one of these devices better than the other should not have been admitted under the circumstances and, in any event, it is not sufficient to sustain the burden of proof resting on the plaintiffs.

[3] It is contended that the court erred in giving an instruction which stated that the sole defense of the defendants as against the claims of the minors was that

the defendants were without negligence; and that "if you believe from a preponderance of the evidence that the defendants were in any manner negligent, even though such negligence be only in the slightest degree, and that such negligence proximately contributed to the accident" then the minor plaintiffs are entitled to a verdict. Different standards of care are required, under varying circumstances, but there are no different degrees of negligence so far as material here. This instruction should not have been given, and it may have been prejudicial in view of the nature of the evidence as disclosed by the record.

It is further contended that the court erred in communicating with the jury, as above described, since this was done without the knowledge of the defendants or their attorneys. That this was irregular may be conceded, but no prejudice appears. The court had already erroneously instructed the jury in that regard, and the jury apparently acted upon that instruction.

[4] On the plaintiffs' appeal it is contended that the court obviously thought there was sufficient evidence of negligence on the part of the driver, since the order granting him a new trial did not mention insufficiency of the evidence; that the only other ground the court could have had in mind was the irregularity in the communication between the court and the jury; and that this irregularity was so slight as not to justify a new trial for the defendant driver. It is argued that there is ample evidence of the negligence on the part of the driver; that he was inconsistent in saying that when the break occurred he hit his brakes to keep the truck from jackknifing, whereas there was other evidence that the truck would not have jackknifed anyway; that he was confused between flare type and ferrule type fittings; that although he testified that such breaks as this were very uncommon he happened to have a tube-cutting tool in the truck; and that he tossed away the broken end of the tube after he cut it off, which would have been material evidence to show whether the break was a new or old one. We see nothing in this evidence which would have supported a finding that



the driver of the truck was guilty of negligence which contributed to the plaintiffs' injuries. Aside from the irregularity as to the communication between the judge and the jury, the erroneous instructions were sufficient to support the court's action in granting a new trial as to the defendant driver.

The order granting a new trial to the defendant driver is affirmed. The judgment against the defendant owners is reversed.

GRIFFIN and MUSSELL, JJ., concur.



109 Cal.App.2d 456

**WILLIAMS et al. v. KRUMSIEK.**

Civ. 4325.

District Court of Appeal, Fourth District,  
California.

Feb. 26, 1952.

Ruel G. Williams and another, real estate brokers, sued Irene A. Krumsiek, principal, for the commission which would have been due to plaintiffs from the other party to a contract for exchange of property if defendant had not refused to consummate the agreement. The Superior Court, Kern County, Norman F. Main, J., sustained defendant's demurrer to the complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held, *inter alia*, that parol evidence would be admissible to show whether plaintiffs and the other party intended by their independent agreement that payment of commission sued for should be conditional upon successful crop, and that such question could not be determined on general demurrer.

Reversed.

See also 102 Cal.App.2d 541, 227 P.2d 889.

#### **I. Evidence** ⚡420(3)

##### **Pleading** ⚡216(1)

Where contract for property exchange provided that defendant and other party should each pay broker \$1,500, and inde-

pendent agreement between other party and broker provided that other party would pay commission from first crops of 1949 and/or before June 1, 1949, and that such payment, if made from proceeds of crops before June 1, 1949, would be from crops grown on certain property, the intent of the parties to the independent agreement as to whether payment was conditional or absolute could be shown by parol evidence at the trial and could not be determined by ruling on general demurrer of defendant sued by broker for commission which allegedly would have been due from other party if defendant had not refused to consummate the exchange contract.

#### **2. Damages** ⚡6, 24

Damages which are purely speculative, fanciful and imaginary cannot be recovered, but if benefits claimed were reasonably certain to have been realized but for wrongful act of opposing party recovery should be allowed.

#### **3. Brokers** ⚡63(2)

Where agreement for exchange of property provided that each party would pay \$1,500 to broker, it was within contemplation of parties that principal would be liable for all of the commission if principal prevented consummation of exchange agreement.

#### **4. Pleading** ⚡79

The defense of splitting causes of action is affirmative and must be pleaded by defendant.

#### **5. Judgment** ⚡592

##### **Pleading** ⚡406(1)

Splitting of actions is not jurisdictional and may be waived, and if defendant does not object the judgment is binding upon him.

#### **6. Pleading** ⚡205(2)

A complaint by broker seeking recovery from defendant of commission which would have been due from the other party to property exchange contract if defendant had not refused to consummate contract, which provided that defendant and the other party thereto would each pay \$1,500 to broker, was not subject to general demurrer without leave to amend in that broker had

split cause of action by theretofore suing defendant for the \$1,500 which contract provided defendant should pay broker, since the defense of splitting cause of action is affirmative defense which must be pleaded.

---

West, Vizzard, Howden & Baker, Bakersfield, for appellants.

Burum, Young & Wooldridge, Bakersfield, for respondent.

MUSSELL, Justice.

Plaintiffs appeal from a judgment entered on motion of defendant after a demurrer to plaintiffs' first amended complaint was sustained without leave to amend. It was alleged in said complaint that on or about July 9, 1948, defendant, Irene Krumsiek, entered into an agreement in writing with O. A. and Lola B. Sanders for the exchange of real properties in Kern and Los Angeles counties; that the exchange agreement was secured through the efforts of plaintiffs as real estate brokers, who fully performed their part of the agreement; that the exchange agreement provided, among other things, for the payment of \$3,000 to plaintiffs as commission for the sale and exchange of the properties, \$1,500 to be paid to plaintiffs by defendant Krumsiek and a like amount by Sanders and his wife; that on or about July 13, 1948, an independent agreement in writing was executed by plaintiffs and Sanders and his wife wherein it was provided that the Sanders would pay their share of the commission from the first crops of 1949 and/or before June 1, 1949, and that said payment, if made from proceeds of crops before June 1, 1949, would be from crops grown on the Kern county property; that defendant refused to perform the exchange agreement; that as a direct and proximate result of her failure to do so, Sanders and his wife were never placed in possession of the Kern county property and were unable to produce crops therefrom and, therefore, did not become obligated to pay their share of the commission, to the damage of plaintiffs in the sum of \$1,500.

The complaint herein apparently is drawn on the theory that in addition to the sum of

\$1,500 recoverable from defendant Krumsiek on her agreement to pay that amount as commission, plaintiffs were entitled to recover a like amount as damages for the loss of commission which would be payable by Mr. and Mrs. Sanders had the agreement of exchange been performed by defendant Krumsiek. This theory is supported by the decisions in *Coffman v. Crookshank*, 140 Cal.App. 192, 34 P.2d 1067, and *Traxler v. Katz*, 116 Cal.App. 226, 2 P.2d 553. In the *Coffman* case plaintiff secured the acceptance of an agreement whereby defendant and his wife offered to exchange their property for property belonging to W. L. Rohrer and wife. Defendant agreed to pay plaintiff the sum of \$1,500 upon acceptance of the proposition to exchange the properties and Rohrer in his acceptance agreed to pay plaintiff the sum of \$1,000 for his services as agent. Defendant refused to perform his part of the agreement and plaintiff sued to recover the commission due from the defendant and also for damages caused by the loss of the Rohrer commission by reason of defendant's refusal to perform his part of the exchange agreement. The sole question on appeal was whether the sum of \$1,000 awarded as damages was properly entered in the judgment. The court there said, 140 Cal.App. at page 194, 34 P.2d at page 1068: "\* \* \* The measure of damages in such case is the amount which will compensate 'for all the detriment proximately caused thereby,' whether considered as the breach of an obligation arising from contract (section 3300, Civ.Code), or a breach not so arising (section 3333, Civ.Code). It hardly needs argument to support the proposition that under the evidence here the proximate damage caused by appellant's failure to complete his agreement of exchange with Rohrer was the commission Rohrer agreed to pay upon completion; and being familiar with the commission agreements connected therewith, appellant must have known that if Rohrer was willing to complete his part of the exchange and he (appellant) was not, such damage would necessarily result from his failure so to do. The case of *Traxler v. Katz*, 116 Cal.App. 226, 230, 2 P.2d 553, is on all-fours with the present case, and a

hearing thereof was refused by the Supreme Court. See, also, *Calkins v. F. W. Woolworth Co.* [8 Cir.], 27 F.2d 314."

[1] The amended complaint herein is sufficient against the general demurrer. The defendant argues that it was properly sustained because no liability attached to the promise of the Sanders to pay commission to the plaintiff since their duty to pay was conditional; that the Sanders had no duty to pay any commission until the first crops were harvested according to the terms of the independent agreement and payment was to be made from these crops. As noted, the agreement provides that the Sanders would pay their share of the commissions from the first crops of 1949 and/or before June 1, 1949, and that said payment, *if made from proceeds of crops before June 1, 1949* (italics ours) would be from the crops grown on the Kern county property. This language indicates that payment by the Sanders was to be deferred until June 1, 1949, or to such earlier date as proceeds from crops would be available. While the language used is somewhat ambiguous as to whether the Sanders would be obligated to pay the commission only from the proceeds from the crops raised, the intent of the parties may be shown by parol evidence at the trial of the action and such intent cannot be determined by a ruling on a general demurrer.

[2,3] Defendant next contends that no cause of action was stated by the plaintiffs since the damages set forth were not within the contemplation of the parties at the time of the making of the contract. This contention is without merit. While damages, which are purely speculative, fanciful and imaginary cannot be recovered, it is also true that if the benefits claimed were reasonably certain to have been realized but for the wrongful act of the opposing party, recovery should be allowed. *Meyers v. Nolan*, 18 Cal.App.2d 319, 324, 63 P.2d 1216; *Rilovich v. Raymond*, 20 Cal.App.2d 630, 644, 67 P.2d 1062; *Caspary v. Moore*, 21 Cal.App.2d 694, 699, 70 P.2d 224. In the instant case the amount of damages were definitely fixed in the sum of \$1,500, which said sum would have been payable by Mr. and Mrs. Sanders had the defendant

performed her part of the exchange agreement. Defendant was a party to this agreement and was familiar with its terms and conditions. Under the circumstances shown by the record, defendant must have known that if the Sanders were willing to complete their part of the contract and she was not, she then would be obligated to pay the plaintiffs all of the commission provided for in the agreement of exchange.

It appears that the complaint in the instant matter grew out of the same facts and circumstances as set forth in *Williams v. Krumsiek* (Sanders v. Krumsiek), 102 Cal.App.2d 541, 227 P.2d 889. In that action Ruel G. Williams and E. R. Dickerson, plaintiffs here, recovered judgment against Irene A. Krumsiek, the present defendant and respondent, in the sum of \$1,500 upon the breach of her agreement to exchange the properties in question. The trial court rendered judgment therein in favor of O. A. Sanders and Lola B. Sanders, and the judgment has become final.

[4-6] Defendant argues that the trial court properly sustained the demurrer without leave to amend because plaintiffs were attempting to split a cause of action; that plaintiffs are, in this action, bringing a claim which should have been adjudicated in the prior action; that since the action is one on contract, but one cause of action may arise in favor of appellants from the single breach by defendant. This court held in *McCaffrey v. Wiley*, 103 Cal.App.2d 621, 623, 230 P.2d 152, 154, that "\* \* \* a party may not split a single cause of action, using the same obligation as the basis of separate suits, and that where this is done the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim which could have been presented in the first action." (Citing cases.) This defense (splitting causes of action) is an affirmative one, which must be pleaded by a defendant. *Paladini v. Municipal Markets Co.*, 185 Cal. 672, 674, 200 P. 415. Splitting of actions is not jurisdictional and may be waived; if the defendant does not object, the judgment is binding upon him. *Mather v. Mather*, 22 Cal.2d 713, 723, 140 P.2d 808; *Cohn v. Cohn*, 7 Cal.2d 1, 6, 59 P.2d 969.



As was said in *Commercial Standard Insurance Co. v. Winfield*, 24 Cal.App.2d 477, 478, 75 P.2d 525, 526: "Prohibition against splitting a cause of action is for the benefit of the defendant and he may waive or renounce it by agreement." It follows that the general demurrer herein should not have been sustained without leave to amend.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



109 Cal.App.2d 557

**PERRY v. MANNING et al.**

Civ. 18608.

District Court of Appeal, Second District,  
Division 1, California.

March 3, 1952.

Action by Ida Mae Perry against Mary Gladys Manning, and others, to impose constructive trust on certain realty which had been paid for in part by defendant Simon Perry, who was plaintiff's husband, from community property without plaintiff's consent. The Superior Court of Los Angeles County, James H. Pope, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that when property had been conveyed to defendant by third party for use by defendant as home for son born by defendant of plaintiff's husband, prior to marriage of plaintiff and husband, plaintiff was not entitled to subject property to constructive trust, since assistance by husband had been pursuant to his statutory duty to provide for support of such child.

Judgment affirmed.

#### I. Trusts ¶94

Where property conveyed to defendant by third party for use by defendant as home for son, born of defendant by plaintiff's husband prior to marriage of plaintiff and husband, had been paid for in part by plaintiff's husband from community

property without plaintiff's consent, plaintiff was not entitled to subject property to constructive trust in hands of defendant, since it was husband's statutory duty to provide for support of such child. Civ.Code §§ 143, 196a.

#### 2. Trusts ¶373

Where property conveyed to defendant by third party for use by defendant as home for son, born by defendant of plaintiff's husband prior to marriage of plaintiff and husband, had been paid for in part by plaintiff's husband from community property without plaintiff's consent, findings in action by plaintiff to impose constructive trust that no portion of contribution of husband had become asset of defendant, was not inconsistent with finding that defendant claimed and asserted interest adverse to plaintiff and that such claims were just and right, when considered in relation to decree stating that money was paid by husband in performance of his obligation to furnish such minor child with necessities of life.

#### 3. Appeal and Error ¶931(1)

Findings should be so construed, if reasonably possible, as to support conclusions and judgment.

#### 4. Appeal and Error ¶219(2), 293

Party who has been unsuccessful in trial court will not be permitted to criticize findings entered therein as being ambiguous when he made no objection to them, either before they were signed, or later on motion for new trial.

Edward S. Hardwick, Los Angeles, for appellant.

Afue McDowell, Los Angeles, for respondents.

DRAPEAU, Justice.

The complaint herein alleges that plaintiff and defendant Perry are husband and wife having been married on May 25, 1942. That during such marriage, defendant husband with the use of community earnings and without the consent of plaintiff, agreed to purchase jointly with defendant Manning

two unimproved lots by means of a written installment contract. That on or about February 9, 1950, defendant Perry assigned all of his interest under said contract to defendant Manning, whereupon defendant Reeves, the seller, executed a grant deed of the lots to defendant Manning, alone.

Defendant Manning answered admitting the purchase of the lots, performance by her of the terms of the contract; the execution of the deed to her alone, and alleged that "afterward" defendant Perry transferred his interest in the property to her.

Evidence was presented that \$350 was paid down on the contract by defendant Manning and that the balance of \$1100 was payable in monthly installments of \$25, some of which were paid by defendant Perry.

The contract of purchase was not produced at the trial, but an undated modification of the contract signed by defendants Perry and Manning was introduced which provided that the deed from seller should be made to defendant Manning alone.

By an amendment to her answer to conform to proof, defendant Manning alleged that the entire transaction was undertaken to provide for the care, maintenance, education and support of the paralyzed minor son of herself and defendant Simon Perry; that said child, a victim of poliomyelitis, was born before the marriage of plaintiff and defendant Simon Perry; that said Perry signed the contract and paid money on the purchase price of the property in consideration of the mother's promise to build a house on the lots where she could care for and maintain the child and thus relieve the father from providing a home, care, maintenance and support for said child. It was also alleged that the mother had complied with her promises and all that was done by the father was done in furtherance of his promise to help toward the support, education, care and maintenance of said minor child.

The trial court found, among other things, that the defendant Perry paid \$200 on the purchase price of the lots from his earnings which were the community prop-

erty of him and plaintiff; that the defendant Manning paid the entire balance of said purchase price; that defendant Perry conveyed his interest to her and she now owns said lots free and clear of any claim of defendant Perry, who received full and valuable consideration for the transfer.

Further, that said defendant Perry is the father of the minor child and is obligated to support him; that he did so for a time, giving the mother sums of money at regular intervals which, together with her earnings, provided the necessities of life for such child. That during infancy the boy was stricken with poliomyelitis and for six years was crippled needing constant care; that this was provided by the mother, who gave up most of her employment in order to care for him.

It was also found that the \$200 paid by the father on the purchase price was done for the benefit of the child and to assist the mother in obtaining reasonable shelter for him; that it was the mother's intention to build a small dwelling on the lots where the child could live and she could be with him to help him; that "it is reasonable and necessary that the child have shelter and that the same which is intended to be provided is in keeping with the limitations of the child himself, his mother and the ability of Simon Perry to pay, and that no portion of the contribution of Simon Perry has become an asset to Mary Grace Manning."

It was also found that the plaintiff "has no interest" in the lots; that defendant Manning asserts an interest therein adverse to plaintiff; that such claims are "just and right. The court finds that she is the owner thereof."

Based upon such findings, the court concluded:

1. That plaintiff has no interest in the lots.
2. That the sum of \$200 paid by the father to assist the mother to obtain the property was paid in performance of an obligation on his part to furnish his minor child with the necessities of life.
3. That the transfer by the father of his interest in the lots to the mother should be confirmed.

4. That a constructive trust should not be imposed upon the property.

5. That plaintiff take nothing.

From the judgment which followed, plaintiff appeals.

Appellant here urges that (1) the judgment is contrary to the law and the evidence; (2) the findings of fact are inconsistent and contradictory.

In connection with her first point, appellant contends that the conveyance by Mr. Perry to Mrs. Manning, without the consent of Mrs. Perry "was in clear violation of Section 172a of the Civil Code."

[1] In the first place, it was proved and found by the court that respondent Perry paid \$200 toward the purchase of the property here in question. Secondly, the record discloses that the child, James Perry, was born in 1938 was brought to California in 1941 and that his father contributed to his support before his marriage to appellant. While it is true that respondent Perry did not discuss with appellant wife his plans for his son, nonetheless, it was his legal duty to support him. *Sweet v. Hamilothor* is 84 Cal.App. 775, 783, 258 P. 652; section 196a Civil Code.

As stated in *Myers v. Harrington* 70 Cal.App. 680, 683, 234 P. 412, 413, prior to the adoption of section 196a, supra, "there was no legal obligation resting upon the father of an illegitimate child to furnish it support or give it an education. In 1913, however, the Legislature of this state added this section to the Code and thenceforth it became the mutual obligation of both the father and mother."

Section 143, Civil Code, provides that in divorce actions "The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just."

And, in *Turner v. Metropolitan Life Ins. Co.*, 56 Cal.App.2d 862, 866, 133 P.2d 859, 861, the following appears: "Furthermore, by statutory enactments in this state, illegitimate children have been placed on a full parity with legitimates insofar as their right to support and maintenance is

concerned; and consequently under the Insurance Code an illegitimate child has an insurable interest in the life of its father. In this respect section 196a of the Civil Code provides: 'The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances,' which obligation may be enforced by civil suit brought in behalf of the illegitimate child by its mother or guardian; section 270 of the Penal Code declares that if the father 'wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child' he may be prosecuted criminally for such omission; and section 10110 of the Insurance Code, St. 1935, p. 636, provides that 'Every person has an insurable interest in the life and health of: \* \* \* (b) Any person on whom he depends wholly or in part for education or support.'"

In the circumstances here presented, it would be unjust and inequitable to permit appellant to recover from the mother of the unfortunate child, those earnings which it was her husband's legal duty to contribute to the child's support.

[2] It is also urged that the following findings are irreconcilable:

"XII. The court finds that it is reasonable and necessary that the child have shelter and that the same which is intended to be provided is in keeping with the limitations of the child himself, his mother and the ability of Simon Perry to pay, and *that no portion of the contribution of Simon Perry has become an asset to Mary Grace Manning.*

"XIV. The court finds that Mary Grace Manning does claim and assert an interest therein adverse to the plaintiff and that such claims are just and right. The court finds that she is the owner thereof."

The apparent inconsistency is explained by paragraph 7 of the judgment which decrees: "That the \$200.00 paid by said Simon Perry to assist defendant, Mary Gladys Burrell (sued under her former name, 'Mary Gladys Manning') in obtaining said land was paid in performance of his



obligation to furnish his minor child with the necessities of life."

[3,4] Quoting from the very recent case of *Alles v. Hipp*, 108 Cal.App.2d 730, 239 P.2d 451, 453: "It is a familiar rule that, if reasonably possible, findings should be construed so as to support the conclusions and judgment. 24 Cal.Jur., p. 1009; 23 McKinney's Calif. Digest, p. 624. \* \* \* The losing party should not be permitted to criticize the findings as ambiguous when he has made no objection to them, either before they were signed, or later on motion for a new trial."

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 574

**SCHAFFER v. STATE BOARD OF  
EQUALIZATION et al.**

Civ. 8073. Sac. 6208.

District Court of Appeal,  
Third District, California.

March 4, 1952.

Action by David M. Schaffer and another, individually and as partners doing business under the firm name and style of Robert K. Gregory Auction Galleries, against the State Board of Equalization of the State of California and others for refund of taxes. The Superior Court, Sacramento County, John Quincy Brown, J., sustained defendants' demurrer and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that the plaintiffs were entitled to maintain the action to recover the amount of taxes paid.

Reversed and remanded.

**1. Licenses** Ⓒ34

Where taxpayers were declared liable for additional sales taxes and, following exhaustion of administrative remedies, par-

tial payment on account was made and taxpayers filed claim for refund, which was denied, taxpayers could maintain action to recover amount paid. Revenue and Taxation Code, §§ 6451-6591, 6931; Code Civ.Proc. § 1858.

**2. Licenses** Ⓒ34

Though taxpayers, who sought to recover partial payment of sales tax, were not entitled to relief of determination of invalidity of whole tax and restraint of collection which would prevent collection of remainder of tax, relief properly asked, recovery of sum paid, could be granted and if, as indirect result, matters were adjudicated which would be res judicata as between parties in any other proceedings wherein validity of tax was put in issue, that fact would present no obstacle to granting of relief which was properly asked and which statute declared may be given. Revenue and Taxation Code, §§ 6451-6591, 6931; Code Civ.Proc. § 1858.

**3. Taxation** Ⓒ527½

In absence of statutory provisions granting right to make installment payments of taxes due, the right does not exist.

Alfred M. Miller, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Irving H. Perluss, Deputy Attys. Gen., for respondent.

VAN DYKE, Justice.

The plaintiff appeals from a judgment for defendants entered after sustaining a demurrer to plaintiffs' complaint without leave to amend. The complaint alleges that plaintiffs were engaged in the business of selling tangible personal property at retail, possessing the required permit for the exercise of that privilege; that defendant State Board of Equalization, following the procedure outlined for that purpose in the Sales and Use Tax Law, Revenue & Taxation Code, §§ 6451-6591, determined that between November 7, 1941 and August 31, 1945 plaintiffs became liable for additional sales taxes in a sum-

exceeding \$5,000; that plaintiffs' petition for a redetermination was heard and, aside from some minor adjustment in the total amount due, was denied; that having exhausted their administrative remedy the plaintiffs paid to the board \$100 upon account and thereupon filed a claim for refund thereof in accordance with the provisions of the act governing refunds; that their claim of refund was denied and that within the time limited by the act after notice of denial, they brought this action to recover the amount so paid upon the same grounds urged in their claim for refund.

The only contention advanced by respondents in the trial court was that the complaint stated no cause of action, and that is the only contention advanced by respondent here. The argument is that to permit the trial of the cause set forth in the complaint would result, if plaintiffs were successful, in an adjudication that not only was the \$100 erroneously and illegally assessed against plaintiffs, but also that the entire tax was likewise erroneously and illegally assessed; this is so, respondent says, because, as appears from the pleading, all of the transactions held by the board in its determination proceedings to have been taxable transactions theretofore unreported by plaintiffs, were the same kind, so that if one was not taxable none were taxable; the action, therefore, is one to prevent the collection of the taxes assessed, contrary to the provisions of Section 6931 of the act, which reads as follows: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected." Respondent, in support of its position, relies upon the following cases: *Louis Eckert Brewing Co. v. Unemp. Res. Comm.*, 47 Cal.App.2d 844, 119 P.2d 227; *Estate of Schneider*, 62 Cal.App.2d 463, 145 P.2d 90; *Modern Barber Colleges, Inc. v. Cal. Emp. Stab. Comm.*, 31 Cal.2d 720, 192 P.2d 917; and *Casey v. Bonelli*, 93

Cal.App.2d 253, 208 P.2d 723. Only the last of the cited cases was brought under the Sales and Use Tax Act provisions for recovery of taxes erroneously or illegally collected. However, all the cited cases hold in effect that the various actions with which the courts were in those cases concerned if permitted to be tried might result in judgments, and had for their purpose judgments, which inevitably would prevent the collection of taxes under statutes containing like provisions to those contained in Section 6931, *supra*. All of the cited cases differ from the instant case in that in none of them had any part of the taxes involved been paid and the purpose of all of them was to obtain through the various devices adopted by the litigants adjudications of invalidity of the taxes involved without the payment of any part thereof. The researches of counsel and our own research have not disclosed a case where the principle declared in those decisions was sought to be applied where the sum to be recovered had been paid in to the proper governmental agency and a claim for refund had been denied before the suit was brought.

[1,2] The provisions of the Sales and Use Tax Act do not expressly require that the whole tax must be paid before any claim for refund of any part can be made or before any action can be brought for such recovery after the denial of the claim. The act contains no provision that payments on account cannot be made. And of course collection by the recovery of separate amounts at different times and the application of such amounts to the payment of the whole tax must often result if the taxpayer does not pay the tax and the provisions of the act for distraint and other forcible means of collection open to the agency are utilized. Neither does the act contain any provision that taxes thus forcibly collected cannot be the subject of a claim for refund, and suit for recovery thereof if refund be denied. We think that the decisions relied upon by respondent are not applicable here in so far as the right of plaintiffs to maintain this action for money paid is concerned. Respondents are

asking the court to so construe the applicable legislative enactments as to declare that impliedly they do forbid an action for the recovery of partial payments after claim for refund made and denied, or, putting it another way, to so construe the statutes that they impliedly make payment of the full tax involved a condition precedent to the making of a claim for refund or to an action if the claim be denied. We think the court cannot do this. "In the construction of a statute \* \* \* the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted". Code Civ.Proc. § 1858. We think the plaintiffs having made a payment on account, that payment having been accepted, and the plaintiffs' claim for refund having been denied, the plaintiffs may bring an action to recover the amount so paid. It is true that in this case the prayer of the complaint asks for relief which would prevent the collection of the rest of the tax since the prayer is that the court by its judgment declare the whole tax to be invalid and issue its process to restrain the collection thereof. Such relief could not be granted. But the relief properly asked, that is, the recovery of the sum paid, may be granted and if, as an indirect result, matters are adjudicated which would be *res judicata* as between the parties hereto in any other proceedings wherein the validity of the tax was put in issue, that fact presents no obstacle to the granting of the relief which is properly asked and which the statute declares may be given. But if the plaintiffs are able to establish that the taxes with which we are here concerned are invalid then we can have no great concern if that determination actually

results in the inability of respondent board to collect the invalid levy.

[3] Respondent argues further that to permit this action to recover what it calls a mere token payment would also permit such an action to be brought to recover a few cents paid on account for the sole purpose of testing the validity of the tax in advance of payment. Respondent has not referred us to any provision which compels the board to accept installment payments. In the absence of statutory provisions granting the right to make installment payments of taxes due the right does not exist. This is not to say the collector may not legally accept them. 51 Am.Jur. 840. The remedy of the evil feared is in the hands of respondents.

As we said heretofore, the right of plaintiffs to maintain this action without having paid the whole of the tax appears from the record to have been the only issue of law tried out in the court below. It is also the only issue which is discussed on appeal. We think it improper, therefore, to discuss the factual sufficiency of the complaint, and this is particularly so we think since the factual pleading, though deemed insufficient in its present form, might be amended to state a cause of action if it does not do so now, a matter as to which we make no ruling, since it is clear that the case below turned wholly upon the matters herein presented and determined. The only fair disposition to make of the cause, in view of what we have hereinbefore said, is to reverse the judgment and to remand the same to the trial court for further proceedings. It is accordingly so ordered.

ADAMS, P. J., and SCHOTTKY, J.  
pro tem., concur.



109 Cal.App.2d 381

**SOLOMON v. WALTON.****SOLOMON v. GOFF.****GOFF v. SOLOMON et al.**

Civ. 4335-4337.

District Court of Appeal  
Fourth District, California.

Feb. 21, 1952.

Multiple quiet title actions between Aurelia Solomon, as administratrix of the estate of her husband, and two of decedent's daughters, Sally Walton and Sue Ellen Goff. The Superior Court, Kern County, Robert B. Lambert, J., rendered judgment in favor of the administratrix, and the daughters appealed. The District Court of Appeal, Mussell, J., held that the evidence was sufficient to support the trial court's findings that decedent's deeds to his two daughters had been made without intention to pass title and that there had been no delivery of such deeds.

Affirmed.

**1. Deeds ⇨206, 208(1), 210**

In quiet title actions between decedent's administratrix and two of his daughters, evidence was sufficient to support trial court's finding that there had been no consideration for conveyances made by decedent to the two daughters, that deeds to them had been made without intention to pass title of the property, and that there had been no delivery of the deeds.

**2. Appeal and Error ⇨173(2)**

The "unclean hands" doctrine must be raised in trial court to be available as defense and cannot be raised for first time on appeal.

**3. Dismissal and Nonsuit ⇨65**

Where defendant does not set up defense of illegality, but such illegality appears from case as made by either plaintiff or defendant, it becomes duty of court sua sponte to refuse to entertain action.

**4. Appeal and Error ⇨1061(2)**

In quiet title actions between decedent's administratrix and two of his daughters, trial court did not, under evidence, commit prejudicial error, as contended, in failing to dismiss action sua sponte because of fraud or illegality on part of decedent

in transferring property to one of his daughters in order to become eligible for old age pension.

**5. Appeal and Error ⇨931(1), 1010(1)**

The findings of the trial court must be sustained if they are supported by substantial evidence, and all reasonable and legitimate inferences must be indulged toward upholding them.

**6. Quieting Title ⇨47(2)**

On appeal by two of decedent's daughters from adverse judgments in quiet title actions between such daughters and decedent's administratrix, it could reasonably be concluded that term "legal title" as used in trial court's finding that decedent had transferred "legal title" to his daughter was intended as synonymous with term "record title" and to describe a limited transfer of interest in property; and therefore there would be no conflict between such finding and trial court's additional finding that there had been no intention to pass title and no delivery of the deed.

**7. Action ⇨48(1)**

A plaintiff may plead and proceed to trial upon inconsistent causes of action when each arises out of same transaction and when proofs and remedies available in each are substantially the same.

**8. Appeal and Error ⇨1010(1)**

Where judgments in favor of decedent's administratrix, in quiet title actions between administratrix and two of decedent's daughters, was sustained by one of several counts in complaint which was supported by substantial evidence, judgment would not be reversed because of insufficiency of evidence as to other counts of complaint.

---

Miller & Sinclair, Los Angeles, Elizabeth Murray, Santa Barbara, and Max Bergman, Los Angeles, for appellants.

T. R. Clafin, John M. Nairn, Bakersfield, Kline, Barton & Stanley, Los Angeles, for respondent.

MUSSELL, Justice.

Plaintiff, Aurelia Solomon, administratrix of the estate of Gabriel William Solo-

mon, deceased, filed quiet title actions involving two separate parcels of real property in Kern county. Judgments were obtained by plaintiff quieting her title in both properties. Defendant Sally Walton appeals from the judgment in the first action which involves real property described in the briefs as the "Rosedale property" and defendant Sue Ellen Goff appeals from the judgment in the second action. The real property involved therein is referred to in the briefs as the "Buttonwillow property". Subsequent to the commencement of these actions, Sue Ellen Goff filed an action to quiet her title in the Buttonwillow property as against Aurelia Solomon. In this action plaintiff Sue Ellen Goff appeals from the judgment in which it was adjudged that plaintiff take nothing by her action except that a mortgage on the property was declared to be null and void. The three actions were tried at the same time.

Aurelia Solomon, a colored lady now over 69 years of age, is the mother of appellants Sally Walton and Sue Ellen Goff and 10 other living children. She and the decedent were married in Georgia, where they lived together for approximately 25 years and where they acquired 80 acres of land, together with personal property consisting principally of livestock, chickens, ducks and geese. Decedent sold the personal property for approximately \$4,000, moved his family to Oklahoma, then to Imperial Valley in California and finally to Kern county. In 1931 he acquired real property on Oak Street in Rosedale and resided on the premises until 1946. In August of that year, with money obtained from the Oak Street property, decedent acquired the Rosedale property and lived there until his death on April 6, 1949.

On January 20, 1947, Aurelia Solomon and decedent executed a grant deed covering the Rosedale property to appellant Sally Walton. Pursuant to decedent's instructions, this deed was recorded by his attorney, T. R. Clafin, on January 23, 1947. The recorder returned the deed to Mr. Clafin and he retained it in his possession until the time of the trial. At the date of decedent's death, title to the Rosedale property was in the name of appellant Sally Walton.

On June 27, 1939, Miller & Lux, Inc., which was then the owner of the Buttonwillow property, entered into a contract with the decedent, Gabriel Solomon, for the purchase of the property. This contract provided that upon completion of the payments on the purchase price, the property should be taken in the name of Miss Sue Ellen Solomon, which was the maiden name of appellant Sue Ellen Goff. The contract was executed by the decedent, who made the first payment, and signed the agreement "Sue Ellen Solomon, by G. W. Solomon, purchaser". On January 5, 1943, when the total purchase price had been paid by the decedent, Miller & Lux, Inc. executed a deed covering the Buttonwillow property to appellant Sue Ellen Solomon, also known as Sue Ellen Goff, and title to the property remained in her name.

Appellants conceded at the trial that they had only one defense, i. e., that "the defendants furnished the consideration for the two pieces of property either by putting cash money in the deed or because the decedent was indebted to them for the support of other members of the family".

Appellant Sue Ellen Goff testified that she had paid the consideration for the Buttonwillow property through a gift from her paternal grandfather, and that she had loaned her father money at various times. However, she also stated that none of her money had gone into the property and that she held it as "administrator"; that she allowed her father to keep the deed for her; that she was present when the decedent put the deeds to the property in a safe deposit box; that the decedent managed the property, executed the leases, paid the taxes and assessments and received the proceeds from the property. Appellant Sally Walton testified that she had loaned various sums of money to her father. However, she stated that none of her money had gone into the Rosedale property and that she held title to it as "administrator".

Witnesses for Aurelia Solomon testified that both parcels of property were purchased with funds which were community property of decedent and respondent, being derived mainly from decedent's farming activities; that the decedent and respondent

ent lived on the Rosedale property; that the decedent arranged for the leasing of the Buttonwillow property and the sale of the cotton which was received as rent; and that the decedent was in possession of both parcels of property until his death. In appellants' opening brief it is conceded that while there was testimony on behalf of the appellants contradicting some of this evidence, the conflict must be resolved in respondent's favor on appeal.

[1] There was substantial evidence from which the trial court could and did find that there was no consideration for said properties from the defendants Sally Walton and Susie Goff.

The trial court found that the decedent had transferred to defendants by deed the legal title to the property described in the first two actions; that said property was the community property of plaintiff Aurelia Solomon and the said decedent; that the deeds were not made with the intention to pass the title to the property; that there was no consideration for said property from the defendants; and that there was no delivery of said deeds by decedent to defendants.

Appellants contend that the evidence is insufficient to support the trial court's findings that the deeds to them were not made with the intention to pass title to the property and that there was no delivery of the deeds.

In this connection, Aurelia Solomon testified that the decedent stated to her that he had put the Rosedale property in his daughter's name "because he was getting old, and because he was afraid of getting sued, and he wanted to get the old age pension".

Charles Solomon testified as to conversations had with his father (the decedent) in which his father expressed the fear of being sued and stated that he wanted to get on the old age pension; that decedent always referred to the properties as his and that "it was always understood that both pieces of property were in my sisters' names because on account of the accidents and so he could get the old age pension".

A supervisor of the County Welfare Department testified that the decedent filed an application for old age pension on February 13, 1947; that the application was denied because the decedent "transferred real property to his daughter in January, 1947, receiving no remuneration. The value of the property was \$13,750, less encumbrances of \$6,500". The record does not indicate that any false statements were made by decedent in the application nor does it show that he concealed the fact that the property here involved was of record in the names of appellants.

On January 12, 1947, decedent wrote a letter to his daughter, Sally, in which he stated he was sending her some papers to sign, including a power of attorney; that he was having the Rosedale place "fixed" in her name just as he had the Buttonwillow farm in the name of Sue Ellen Solomon; that he hoped she would understand; that "all I ask of you if i Should past treat your dear mother Right Keep up ever thing Right and Keep the Lawers out. Never sell this land. I am putting ever thing in your name and Sue Ellen Hands. Should I pass treat the other children Equal Just do under thim as you wood thim do under you. Sign before Notary Public Just you Sally C. Smith. When you have Sign Send papers to me."

There was substantial evidence that the decedent treated the properties involved as his own at all times; that he remained in possession of it until his death; that it was understood by his family that the property was to go to Aurelia Solomon in case anything happened to him; that the deeds to both properties were kept by decedent and not delivered to appellants. While the evidence is in some respects conflicting, it is sufficient to support the findings as to decedent's intention and as to the non-delivery of the deeds.

[2-4] Appellants argue that since the decedent transferred the Rosedale property to appellant Walton to illegally obtain an old age pension and applied for such a pension, it became the court's duty sua sponte to refuse any relief to the parties. This argument is based upon the assump-



tion that the decedent fraudulently and illegally transferred his property. As noted, the evidence does not show that the decedent made any false statements in his application for a pension or that the Welfare Department was misled in any way. In the opening statement made by appellants' counsel it was stated that appellants intended to prove that the decedent "was not a dishonest man who would convey his property away for the purpose of getting the old age pension." This statement, with the further statement by appellants' counsel at the beginning of the trial that "There is only one defense, that is, that there was consideration" indicates clearly that appellants did not contend that the properties involved were illegally or fraudulently conveyed by decedent. Moreover, this issue was not presented to the trial court, was not involved at the trial and no findings were made on it. The "unclean hands" doctrine must be raised in the trial court to be available as a defense, and cannot be raised for the first time on appeal. *Scannell v. Murphy*, 82 Cal.App.2d 844, 849, 187 P.2d 790. It has been held that where a defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court sua sponte to refuse to entertain the action. *De Leonis v. Walsh*, 140 Cal. 175, 182, 73 P. 813. However, the evidence presented in the instant case does not justify the conclusion that the trial court committed prejudicial error in failing to dismiss the action on such ground.

[5,6] Appellants next contend that the finding that legal title was transferred to appellant Walton is in conflict with the findings that there was no intention to pass title and no delivery of the deed. This contention is without merit. Unquestionably, the evidence is that deeds were executed by the decedent to the appellants herein and there is substantial evidence supporting the findings that the deed was not delivered to appellant Walton and that the deed was not made with the intention to pass title to the property. The term "legal title" has been defined as "one cog-

nizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being equitably entitled thereto; in either case, the antithesis of 'equitable title'." (*Black's Law Dictionary*, 3rd Edition, p. 1734.) In *Tobin v. Gartiez*, 44 Nev. 179, 191 P. 1063, 1064, it is said: "The term 'legal title' does not have a strict legal meaning. A party may have the legal title to property although he is not the absolute owner in fee. In a broad sense it signifies title in fee as well as any inferior estate that may be carved out of an estate in fee." It seems reasonable to conclude that the term "legal title" as used in the findings was intended as synonymous with the term "record title" and to describe a limited transfer of interest in the property. The findings of the trial court must be sustained if they are supported by substantial evidence and all reasonable and legitimate inferences must be indulged toward upholding them. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773.

[7,8] Appellants' final argument is that the court erred in failing to make findings as to the issues raised by the allegations in the complaint that appellant Walton promised to hold the property in trust; that the said promise was made with intent to deceive and did deceive the decedent and that decedent had confidence in the appellant Walton and in making the deed to her relied upon such confidence and upon the representations and promises made by appellant Walton. Six causes of action were set forth in the complaint and amendments thereto; all arose out of the same transactions and concerned the same property. It is well settled that a plaintiff may plead and proceed to trial upon inconsistent causes of action when each arises out of the same transaction and when the proofs and remedies available in each are substantially the same. *Figlietti v. Frick*, 203 Cal. 246, 249, 263 P. 534; *Royal Ins. Co. v. Mazzei*, 50 Cal.App.2d 549, 554, 123 P.2d 586. There was no substantial evidence presented to the effect that appellant Walton promised

to hold the property in trust, or that she deceived the decedent in any manner which would sustain a finding of fraud or undue influence. The evidence was sufficient to support judgments for Aurelia Solomon on the cause of action to quiet title and where, as here, the judgments are sustained by one of several counts in the complaint which is supported by substantial evidence, it will not be reversed because of the insufficiency of the evidence as to other counts of the complaint. *Gogo v. Los Angeles Etc. Flood Control Dist.*, 45 Cal.App. 2d 334, 342, 114 P.2d 65.

Judgments affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



109 Cal.App.2d 567

**HUTTON v. HUTTON.**

Civ. 18815.

District Court of Appeal, Second District,  
Division 2, California.

March 4, 1952.

Wife's divorce action wherein husband cross-claimed for divorce on grounds of desertion. The Superior Court, Los Angeles County, William R. McKay, J., entered judgment denying a decree of divorce on the cross-complaint, and defendant appealed. The District Court of Appeal, Fox, J., held that the evidence sustained the finding that plaintiff had not deserted and abandoned defendant.

Affirmed.

Divorce ☞ 133(1)

In wife's divorce action, wherein husband cross-claimed for divorce on grounds of desertion, evidence supported finding that wife had not deserted and abandoned husband. Civ.Code §§ 98, 130.

Marin T. Kristovich, Los Angeles, for respondent.

FOX, Justice.

This is an appeal by the defendant husband from that part of the judgment denying a decree of divorce on his cross-complaint on the ground of desertion.

On April 30, 1949, plaintiff left the home of the parties with their two minor children and moved to the home of her parents in San Bernardino County because of the alleged extreme cruelty of defendant. She then filed an action there for separate maintenance on that ground. In due course the case was transferred to Los Angeles County for trial. In addition to his answer defendant also, after the expiration of one year from the time of plaintiff's departure from their home, filed a cross-complaint seeking a divorce upon two grounds: desertion and cruelty. At the trial defendant abandoned his alleged cause of action for cruelty and relied only on the ground of desertion. Plaintiff amended her complaint to seek relief by way of divorce instead of separate maintenance. The court, however, denied her a divorce apparently because of insufficient corroboration. She does not appeal.

The court found that defendant's allegations in his cross-complaint, that plaintiff "willfully and without cause, deserted and abandoned" him on April 30, 1949, and "ever since said date has and still continues to so willfully and without cause desert and abandon" him, are not true. Defendant contends that the evidence does not support the findings and judgment, and that the court abused its discretion in denying him a divorce on the ground of desertion. His theory is that since plaintiff was denied a divorce on the ground of cruelty her leaving was not justified by any misconduct on his part and hence constituted desertion by her.

Plaintiff testified that defendant "was never at home"; that he would not come in for several hours after he was due to be off work, which he explained by saying he had worked overtime, "yet his pay check was never any larger"; also, that he came home intoxicated on occasions. She fur-

Daniel Thomas Hutton, appellant, in propria persona.

ther testified he would fly into "temper tantrums" and would leave notes around the house threatening suicide by turning on the gas. This caused her great anxiety and fear for her own and the children's safety. The court may well have believed this testimony and therefore concluded she was justified in leaving the home of the parties, —certainly that she did not willfully and without cause desert and abandon the defendant. Civil Code, sec. 98. Such testimony furnished ample support for the court's findings and consequent judgment.

The refusal of the court to grant plaintiff a divorce does not necessarily mean that the court disbelieved her testimony. Before such relief could be granted her testimony would have to be sufficiently corroborated. Civil Code, sec. 130. From the remarks of the trial judge it appears that he felt the corroboration was not sufficient. The findings are in harmony with this theory. Hence the denial of a decree to plaintiff.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



109 Cal.App.2d 616

**STOCKTON THEATERS, Inc. v.  
PALERMO et al.**

Civ. 8139.

Sac. 6243.

District Court of Appeal, Third District,  
California.

March 5, 1952.

Action by Stockton Theaters, Inc., against Emil Palermo and Forrest E. Macomber for an accounting and for restitution of certain theater premises owned by Palermo and leased to plaintiff, wherein Palermo filed a cross-complaint. From a decree of the Superior Court, San Joaquin County, George F. Buck, J., providing that plaintiff have judgment for its costs against Palermo, that Palermo take nothing on his cross-complaint against plaintiff, that plaintiff take nothing

as against defendant Macomber, and that Macomber have judgment for his costs, plaintiff appealed and Palermo cross-appealed. The District Court of Appeal, Peek, J., held that plaintiff, by accepting payment of the costs awarded to him under judgment appealed from, did not thereby waive his right of appeal.

Motion to vacate attachment denied and motion to dismiss plaintiff's appeal deferred.

**1. Appeal and Error ☞161**

In general, a party who accepts benefits of a judgment waives his right of appeal.

**2. Appeal and Error ☞162(3)**

Where appeal by party who has accepted benefits of judgment appealed from is such that the review is limited to question whether appellant is entitled to additional relief, appellant has not waived right of appeal, and fact that adverse party has also appealed cannot alter rights of appellant.

**3. Appeal and Error ☞801(4)**

Where plaintiff received judgment for portion of amount claimed to be due from defendants and also accepted costs awarded to plaintiff, defendants' motion to dismiss plaintiff's appeal on ground that plaintiff waived his right of appeal by accepting costs, would be deferred to be determined together with appeal on the merits, it appearing that the relief which plaintiff was seeking by appeal might be given by a modification of judgment instead of reversal of judgment for new trial.

**4. Appeal and Error ☞446**

**Attachment ☞184**

Where plaintiff was prevailing party in trial court by virtue of a judgment for portion of amount claimed, the lien of attachments levied at plaintiff's request on property owned by defendants merged with judgment, and hence defendants' motion to terminate and discharge attachments on ground that plaintiff's appeal was not filed within time permitted by statute providing that an appeal does not continue in force an attachment, unless appeal be perfected within five days after written notice of entry of order appealed from, would be dismissed since statute was inapplicable. Code Civ.Proc. § 946.



Freed, Gebauer & Freed, San Francisco, for appellant.

Smith & Zeller, Stockton, for respondents.

PEEK, Justice.

This is a motion by defendant and cross-appellant Palermo (1) to dismiss plaintiff's appeal on the ground that plaintiff by accepting the costs awarded to it in a judgment against said defendant has waived its right of appeal, and (2) to terminate and discharge certain attachments levied at plaintiff's request on certain property owned by Palermo on the ground that plaintiff's appeal was not filed within the time permitted by Section 946 of the Code of Civil Procedure.

The present proceeding is the outgrowth of an action instituted by the theater corporation against Palermo and his attorney, the defendant Macomber, for an accounting and for restitution of certain theater premises owned by Palermo and leased to plaintiff. From the record before us it appears that the court in considering the accounting made by Palermo took testimony on approximately 35 separate items of account; that during the course of said hearing the parties conceded some of said items to be proper charges; that Palermo conceded portions of other items to be improper and that as to the remaining items the court upon highly conflicting evidence determined them to be as found. Thereafter, on April 27, 1951, the court entered judgment for a portion of the amount plaintiff claimed to be due it from defendants. The decree provided that plaintiff have judgment for its costs against Palermo and that Palermo take nothing on his cross-complaint against plaintiff, that plaintiff take nothing as against the defendant Macomber, and that said defendant have judgment for his costs. On May 1, 1951 plaintiff served and filed its memorandum of costs and disbursements. Defendants then moved to tax costs and on May 16, 1951 the court made its order taxing costs in the sum of \$122.50. On May 18, 1951 Palermo's counsel drew their check in favor of plaintiff's counsel in said sum and mailed the same to the latter who thereafter deposited said check

in their trustee account. On May 7, 1951 plaintiff filed its notice of intention to move for a new trial and on June 5, 1951 the same was denied. On June 7, 1951 plaintiff filed its notice of appeal from said judgment and on June 25, 1951 defendant Palermo filed his notice of appeal therefrom.

[1] While it is true that a party is held to have waived his right of appeal by acceptance of the benefits of a judgment, *County of San Bernardino v. Riverside*, 135 Cal. 618, 67 P. 1047, the rule is not without exception. See *Reitano v. Yankwich*, 38 Cal.2d 1, 237 P.2d 6.

[2] Thus it has been held where the appeal by the accepting party is such that the review is limited to the question of whether appellant is entitled to additional relief, the appellant is not held to have waived his right of appeal. *Estate of Clark*, 190 Cal. 354, 212 P. 622. We think the fact that Palermo has also appealed cannot alter the rights of appellant.

[3] In *Walnut Irrigation District v. Burke*, 158 Cal. 165, 110 P. 517, 518, the court was presented with a problem quite similar to the present proceeding, both on the facts and issues raised. The trial court therein had determined that both the plaintiff and defendants were entitled to portions of the water diverted from the San Gabriel River and specified with particularity the manner by which the parties might use the waters so diverted. In addition it adjudged that defendants recover their costs from plaintiff. Subsequently, the plaintiff paid and the defendants accepted the costs so awarded by the judgment. Following defendants' appeal plaintiff moved to dismiss the same on the ground that defendants by their acceptance of benefits of the judgment were estopped from prosecuting the appeal. In denying the motion the court said: "If the judgment should be reversed for a new trial, the judgment for the costs which defendants have received would be vacated, and their ultimate right thereto would depend upon the result of the new trial. The appeal, in that event, would directly affect their right to that which they have ac-

cepted, they would be estopped from prosecuting it, and the court would necessarily refuse such relief or dismiss the appeal. But this would not be true, if the relief which the defendants seek by their appeal can be given by a modification of the judgment, eliminating therefrom the part which was erroneously adjudged against them, leaving the remainder in force. A reversal for that purpose would not require a new trial nor affect their right to the costs already received. No injustice would thereby be done to the plaintiff. It will have paid that which it should have paid, and no more. Under the rules above stated there would be no estoppel, and the appeal may be retained, unless upon an examination of the merits it appears that a new trial must be ordered."

The court then concluded to defer consideration of the motion to dismiss the appeal until such time as the same could be determined together with the appeal on its merits. Since the instant case presents a situation wherein the possibilities noted by the Supreme Court in the above-cited case might likewise arise, it would appear that a like conclusion is equally applicable to the problem presented in this proceeding.

[4] Defendants' second motion, which is predicated upon their interpretation of said Section 946 of the Code of Civil Procedure as to its applicability to the situation here presented, does not appear to be well founded. In the instant case plaintiff was the prevailing party in the trial court. Had the situation been reversed, that is, if the judgment had been in favor of Palermo, and had plaintiff sought to appeal, then the situation would have come squarely within the statute cited and relied upon by defendants. However, such is not the case, and since the lien of attachment has now merged with the judgment said section has no applicability.

The motion to vacate the attachments is denied, and, as previously noted, the motion to dismiss plaintiff's appeal is deferred, to be considered and determined together with the appeal on its merits.

VAN DYKE, J., and SCHOTTKY, J.  
pro tem., concur.

109 Cal.App.2d 611

**FILIAN et al. v. CITY OF LONG  
BEACH et al.**

Civ. 18677.

District Court of Appeal, Second District,  
Division 2, California.

March 5, 1952.

Action by Thelma M. Filian, etc., and others against City of Long Beach and others to compel payment of dependent's pension. From that portion of judgment of Superior Court of Los Angeles County, Percy Hight, J., directing that a peremptory writ of mandate issue compelling defendants to enter an order granting dependent's pension to minor children of deceased fireman, defendants appealed. The District Court of Appeal, Fox, J., held that upon remarriage of deceased fireman's widow, his unmarried children under 18 years of age were entitled to same pension benefits they would have received if widow had died.

Judgment affirmed.

**1. Municipal Corporations**  $\S$ 200(6)

The purpose of Long Beach city charter provision for payment of annual pension to widow, children or dependent parents of any member of fire department dying as a result of injury received during performance of his duty was to provide for support of dependents of deceased firemen who come within terms of pension provision and relationship and dependency were the basic factors in determining who was entitled to pension benefits.

**2. Parent and Child**  $\S$ 14

A stepfather is under no legal obligation to support minor children of his wife by a former marriage. Civ.Code,  $\S$  209.

**3. Municipal Corporations**  $\S$ 200(6)

Under Long Beach city charter provision for payment of annual pension to widow of any member of fire department, dying as a result of injury received during performance of his duty, during lifetime of widow and thereafter to surviving children until they attain the age of 18 and providing that if such widow or child remarries, the pension paid to the person so marrying shall cease, unmarried children of deceased fireman under 18 years of age

were entitled to the same pension benefits upon remarriage of widow that they would have received if widow had died.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondents.

FOX, Justice.

Defendants are appealing from that portion of the judgment directing that a peremptory writ of mandate issue commanding them to make and enter an order granting to petitioners Diane M. Filian and Ronald K. Filian the dependent's pension provided by section 187, subdivision (4) of the Long Beach City Charter.

The only question raised by the appeal is the interpretation to be given said charter provision, the pertinent parts of which read as follows: "(4) Whenever any member of the \* \* \* Fire Department shall die as a result of an injury received during the performance of his duty, \* \* \* then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents, in an amount equal to one-half ( $\frac{1}{2}$ ) of the salary attached to the rank or position which such deceased person held in such department at the time of his death. \* \* \* Said pension shall be paid to the widow during her lifetime, and thereafter to any child or children surviving her, or to his child or children should there be no widow, until such child or children shall have attained the age of eighteen years, or to his dependent parent or parents during their lifetime or during such dependency, should there be no widow or child. Provided, however, that no widow of a pensioner shall be entitled to a pension unless she shall have been married to such deceased pensioner at least one year prior to the date of his death; and provided further, that if such widow, child or children, shall marry, then the pension paid to the person so marrying shall cease; and provided further, that should the depend-

ency of such parent or parents terminate, then the pension paid to such dependent parent or parents shall cease."

Elmer J. Filian, a member of the Fire Department of the City of Long Beach, while performing his duties as a fireman received injuries which caused his death on October 9, 1946. Respondent Thelma M. Filian is his widow and respondents Ronald K. Filian and Diane M. Filian are their minor children. Thelma remarried on December 9, 1948.

Appellants are not disputing the right of the former Mrs. Filian to a pension as the widow of Elmer J. Filian from October 9, 1946, to the date of her remarriage on December 9, 1948. They point out, however, that the said charter provision contains no express authority for the payment of a pension to the minor children upon the remarriage of the widow. Appellants concede the general rule to be that all pension laws shall be liberally construed to carry out their beneficent purposes. However, they assert that even the rule of liberal construction does not permit an interpretation of said charter which would give these minor children pension benefits; that such an interpretation would in effect rewrite the provision and confer benefits not contemplated by the charter framers.

[1-3] These contentions are not well founded. It is obvious that the purpose of the section is to make provision for the support of the dependents of deceased firemen who come within its terms. The first sentence fixes the amount of the pension, names the relationships that are entitled to benefits, and fixes the order of their participation therein. Contingencies and limitations are then provided. First, the pension is to be paid to the widow during her lifetime and thereafter to any child or children surviving her until they have reached eighteen years of age. But in the event there is no widow or child the pension shall be paid to his dependent parent or parents. If, however, the widow remarries she is no longer entitled to the pension for she is no longer a dependent. If a child marries before reaching eighteen



he is no longer eligible for benefits since presumably there is no longer dependency. If the dependency of a parent terminates he then ceases to receive benefits. This pattern demonstrates that relationship and dependency are the basic factors in determining who is entitled to pension benefits. When the widow of a deceased fireman remarries she acquires the right to support from her new husband and hence loses any claim for further pension benefits. But the fireman's children are not so fortunate for their stepfather is under no legal obligation to provide for them. Civil Code, sec. 209; *Ex parte Carpenter*, 21 CalApp.2d 658, 70 P.2d 227. They are still the dependent children of the deceased fireman and entitled to the same pension benefits they would have received if their mother had died. Thus to construe the section gives it a practical and reasonable operation in line with its obvious purpose.

It is further to be noted that if the widow or a child marries "then the pension paid to the person so marrying shall cease." If there are two minor children receiving benefits (the widow having passed on) and one of these children marries at seventeen she loses any right to further pension payments but that part of the pension is not wiped out. The benefits are simply paid to the other minor child. So, upon the widow's remarriage the pension previously paid to her "shall cease." But the pension is not necessarily ended. Only payments "to the person so marrying shall cease." If there are others who come within the designated relationship and meet the other specifications, such as unmarried children under eighteen, they should have the pension benefits just as the remaining minor children would if one of their number married under age. This gives a uniform and harmonious interpretation to the provision that upon the marriage of the widow or a minor child "the pension paid to the person so marrying shall cease," and it enables any eligible children to be treated the same upon the happening of either event.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

109 Cal.App.2d 486

**BOOSMAN et ux. v. UNITED BLDG.  
CO. et al.  
Civ. 18378.**

District Court of Appeal, Second District,  
Division 3, California.

Feb. 27, 1952.

Hearing Denied April 24, 1952.

Franklin C. Boosman and Ruth Boosman, husband and wife, brought an action against United Building Company, a Nevada corporation, and others, for reformation of agreement for sale of realty by defendants to plaintiffs, and for declaratory relief. The Superior Court of Los Angeles County, Charles E. Haas, J., rendered a take nothing judgment against plaintiffs and denied a motion for a new trial and plaintiffs appealed from the judgment and attempted an appeal from order denying a motion for a new trial. The District Court of Appeal, Vickers, J. pro tem., held that plaintiffs were not entitled under National Housing Act to benefits of trust deed which was insured under the National Housing Act, relative to interest rate and right to make prepayments.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

**1. Declaratory Judgment ⇨342**

In action to have declared illegal or void provisions of agreement for sale of realty to plaintiffs by defendants, burden of proof was on plaintiffs to establish that present controversy existed or that conditions existed which would justify exercise of court's discretionary powers.

**2. Health ⇨20**

The purpose of the National Housing Act was to stimulate the financing and erection of housing in great quantities and in areas where industries were located. National Housing Act, § 1 et seq., as amended, 12 U.S.C.A. § 1701 et seq.

**3. Contracts ⇨123(1)**

Where trust deed upon residence property under which defendants were obligors was insured under National Housing Act, and defendant executed agreement for sale of residence to plaintiffs at a time before Act was amended so as to declare intent of Congress that no sale of dwelling on which mortgage is insured under Act should be financed at interest rate higher than rate

prescribed by Federal Housing Commissioner, and that no such sale should be made on terms less favorable to purchaser than terms contained in mortgage, plaintiffs were not entitled under Act to benefits of insured trust deed loan relating to interest rate and right to make prepayments, and amendment was not retroactive. National Housing Act, § 1 et seq., 2, as amended, 12 U.S.C.A. §§ 1701 et seq., 1703.

#### 4. Appeal and Error ⇐110

Order denying plaintiffs' motion for new trial was not an appealable order.

Culbert L. Olson, John W. Olson and John H. Carter, all of Los Angeles, for appellants.

Gustave L. Goldstein, Los Angeles, for respondents.

VICKERS, Justice pro tem.

Prior to and on March 2, 1945, the defendants, who are the respondents herein, were the obligors and the Bank of America National Trust & Savings Association was the beneficiary under a trust deed upon the single family residence property involved in this proceeding. This trust deed was insured under the provisions of the National Housing Act, 12 U.S.C.A. § 1701 et seq., which will hereinafter be referred to for convenience as the N.H.A. The trust deed provided for a premium charge of one half of 1 per cent per annum for the insurance of the trust deed under the Act, for interest at the rate of  $4\frac{1}{2}$  per cent per annum and for the payment of the principal, interest and charges in monthly installments.

From January 2, 1945 to March 2, 1945, the plaintiffs, who are the appellants herein, occupied the property in question under a rental agreement with defendants providing for a rental of \$50 per month. On March 2, 1945, the plaintiffs and defendants executed an "Agreement for the Sale of Real Estate" whereby the plaintiffs became the vendees and the defendants the vendors of the property in question. This agreement provided for a purchase price of \$6,150, a down payment of \$295, interest at the rate of 6 per cent per annum and amortized monthly payments of \$50. \$40.40 of each

monthly payment was to be credited upon interest and principal and \$9.60 upon taxes, assessments, mortgage-insurance and fire insurance. The agreement also provided that the buyer had no right to make payments in excess of the fixed monthly payments or to make any prepayments without the consent of the vendor and that the vendor would execute and deliver a good and sufficient grant deed upon compliance by the vendee with all the terms and conditions of the agreement.

The complaint is in the form of an action for reformation of the agreement as well as for declaratory relief. However in their briefs on appeal the plaintiffs state that this is not an action for reformation on the ground of fraud or mistake but rather that it is for the purpose of having the court declare certain provisions of the agreement illegal and void and that the contract be read without such provisions. It is plaintiffs' contention that the provisions in question are illegal and void because they are contrary to the purposes and policies of the N.H.A. and that plaintiffs are entitled to all the benefits of the insured trust deed loan to which defendants and the Bank of America National Trust & Savings Association are parties. The plaintiffs contended in the trial court that they were entitled to the following declarations: That the interest rate was  $4\frac{1}{2}$  per cent instead of 6 per cent; that they had the right to make such prepayments on the principal as they desired without the consent of defendants; that title to the property was then in plaintiffs without the necessity of their first complying with all the terms and conditions of the agreement; and that they be substituted in place of the defendants as obligors under the insured trust deed without the consent of the defendants. The plaintiffs also asked the trial court to declare illegal and void a portion of the agreement whereby the plaintiffs agreed "not to permit the occupancy of said property except by one family consisting of no more than four (4) persons." The trial court found plaintiffs were entitled to no relief and gave judgment that they "take nothing by their action."

[1] Appellants complain because the "trial court did not render a decision de-

claring the rights and duties of the parties." However there was no contention that the questioned provisions of the agreement were vague, uncertain or ambiguous or that there was any dispute between the parties as to their interpretation. The court found that the charging allegations of the complaint were not true and against the appellants' contentions that the provisions were illegal or void. It thus disposed of the only real question before it and therefore properly adjudged that appellants take nothing. Respondents assert that no evidence was offered or received to support the allegations of the complaint, which were denied by the answer, that there was a dispute between the parties as to the provision of the agreement which limited the occupancy of the premises to four persons. We find none in the statement on appeal. It therefore does not appear that a present controversy existed in this regard or that conditions existed which would justify the court in exercising its discretionary powers to grant such declaratory relief. The burden of proof was on the plaintiffs to establish such facts. Having failed to carry this burden they have no cause to complain of the lack of declaration thereof by the court. See *Merkley v. Merkley*, 12 Cal.2d 543, 547, 86 P.2d 89.

The validity of provisions of the character complained of when contained in the normal agreement for the sale of real estate, has been firmly established in this state. Appellants' only ground for attack thereon is based on the contention that these provisions "violate the intent, purpose and public policy of the National Housing Act as amended." They assert that it was the intent, purpose and public policy of the Act that the purchaser of the property from the mortgagor was entitled to the same favorable terms and conditions that were contained in the insured mortgage thereon. However they fail to call our attention to any portion of the Act, as it read prior to 1950, that supports this assertion. The N.H.A. was first adopted in 1934 as Public Law No. 479, 73rd Congress. Thereafter the Act was amended from time to time prior to March 2, 1945, the principal amendments being adopted in 1938, 1941 and 1942. The Act is found in U.S.C.A. Title 12, sec-

tions 1701 to 1750 inclusive. Under the Act the term "Mortgage" includes trust deed and the terms "mortgagee" and "mortgagor" include beneficiary and trustor respectively (see secs. 1707 and 1736). Section 1702 provides in part as follows: "The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Administrator (hereinafter referred to as the 'Administrator') \* \* \*." Section 1703 as it read on March 2, 1945, provided in part as follows: "(a) The Administrator is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions, which the Administrator finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to July 1, 1947, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban, or rural real property \* \* \*."

"(g) The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter."

In 1938 section 1709 was amended so as to require that the mortgagor be also the owner and occupant of the property. Subsection (b) (2) (B) of that section provided in part as follows: "Provided, That with respect to mortgages insured under this paragraph the mortgagor shall be the owner and occupant of the property at the time of the insurance and shall have paid on account of the property at least 10 per centum of the appraised value in cash or its equivalent \* \* \*." The mortgage here involved was not insured under this section.

In 1941 the N.H.A. was amended by the addition of subchapter VI entitled "War Housing Insurance". These amendments



are found in 12 U.S.C.A. §§ 1736 to 1743 inclusive. In their brief on appeal the respondents assert that the trust deed in question was insured under section 1738. This is not denied by appellants and being supported by such facts as have been called to our attention we will accept it as true. Section 1738 provided in part as follows: "(a) The Administrator is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage which is eligible for insurance as hereinafter provided and upon such terms as the Administrator may prescribe to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the property covered by the mortgage is in an area or locality in which the President shall find that an acute shortage of housing exists or impends which would impede war activities \* \* \*.

"(b) To be eligible for insurance under this section a mortgage shall—

"(1) have been made to, and be held by, a mortgagee approved by the Administrator as responsible and able to service the mortgage properly;

"(2) involve a principal obligation \* \* \* in an amount not to exceed 90 per centum of the appraised value \* \* \* of a property \* \* \*. Such principal obligation shall not exceed—

"(A) \$5,400 if such dwelling is designed for a single-family residence \* \* \*

"(3) have a maturity satisfactory to the Administrator but not to exceed twenty-five years from the date of the insurance of the mortgage;

"(4) contain complete amortization provisions satisfactory to the Administrator;

"(5) bear interest (exclusive of premium charges for insurance) but not to exceed 5 per centum per annum on the amount of the principal obligation outstanding at any time, or not to exceed 6 per centum per annum if the Administrator finds that in certain areas or under special circumstances the mortgage market demands it;

"(6) provide, in a manner satisfactory to the Administrator, for the application of the mortgagor's periodic payments (ex-

clusive of the amount allocated to interest and to the premium charge which is required for mortgage insurance as herein provided) to amortization of the principal of the mortgage; and

"(7) contain such terms and provisions with respect to insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and other matters as the Administrator may in his discretion prescribe.

"(c) \* \* \* In the event that the principal obligation of any mortgage accepted for insurance under this subchapter is paid in full prior to the maturity date, the Administrator is further authorized in his discretion to require the payment by the mortgagee of an adjusted premium charge in such amount as the Administrator determines to be equitable, but not in excess of the aggregate amount of the premium charges that the mortgagee would otherwise have been required to pay if the mortgage had continued to be insured under this subchapter until such maturity date; and in the event that the principal obligation is paid in full as herein set forth, and a mortgage on the same property is accepted for insurance at the time of such payment, the Administrator is authorized to refund to the mortgagee for the account of the mortgagor all, or such portion as he shall determine to be equitable, of the current unearned premium charges theretofore paid. The Administrator is further authorized to prescribe such procedures as in his judgment are necessary to secure to *war workers occupancy priority* with respect to properties which have not been previously occupied and which are covered by mortgages insured under this section and section 1743 of this title." (Italics ours.)

It appears that the purpose of N.H.A. of 1934 was to stimulate the repair of existing housing and the erection of additional and new housing by encouraging financial institutions to loan the necessary money. The effect of the 1938 amendment to section 1709 was to restrict the benefits of that section to mortgagors who were

owners and occupants of the property in question. This restriction was not imposed by the 1941 and 1942 amendments as contained in subchapter VI. These amendments evidence a continuation of the purpose of stimulating the erection of residential housing, but limited it to areas or localities in which "an acute shortage of housing exists or impends which would impede war activities". At the time of the adoption of these amendments Congress found the country on a war basis, with rapidly expanding war industries which required the services of large segments of our population theretofore engaged in other pursuits. These industries were for the most part centered in localities in which the facilities were wholly inadequate to house the necessary thousands of new employees, most of whom were to be brought from other areas. If the essential war goods were to be produced it was necessary that housing conditions be created that would accommodate these war workers. Congress was primarily interested in the providing of such housing in large quantities and as soon as possible. It was interested in occupancy rather than ownership. It apparently was of little if any interest to it whether the war workers owned, rented or purchased the provided housing. It therefore placed no restrictions on the sale of the property either as to price, the amount of the down payment or the terms and conditions. In 1941 and 1942 Congress may also have had in mind that at the end of the war emergency the operations of the war industries would be greatly curtailed and that most of the occupants of the newly created housing would be forced to move to other localities to seek employment. Further that this would greatly reduce the demand for such dwellings and might well result in those who were occupying them abandoning their contracts of purchase. If the selling organizations, who were mortgagors under insured mortgages, were to be encouraged to sell on small down payments and low monthly installments and thus bring such property within the financial means of war workers it was only fair to permit such organizations to make such terms with the

prospective buyers as would protect their investment. It is apparent from a reading of section 1738 that the purpose of the amendment was to be accomplished by securing mortgagees who were responsible and who could service the mortgages and by securing mortgagor organizations who were capable of subdividing large tracts of land and erecting many houses thereon. Among the organizations who responded were the respondents. They erected 425 or more houses, one of which was sold to the appellants.

It is significant that neither the 1934 Act nor any of the amendments thereto, before that of 1950, makes any reference to the ultimate purchasers or to the terms of purchase and none to the occupiers except in the last part of section 1738 subsection (c) quoted above and in section 1709. The only such reference in section 1738 is to "occupancy priority". Section 1709 contains many provisions similar to those quoted above from section 1703 and section 1738 but was limited to owner occupants.

Section 1742 of subchapter VI of the Act provided as follows: "The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter." Respondents assert in their briefs that the Administrator has made no rules or regulations covering the terms or conditions under which sales of properties covered by insured mortgages could be made. Appellants have not denied this assertion and the record on appeal contains nothing that indicates that the Administrator has done so. The fact that the Administrator has made no such rules or regulations indicates an administrative construction which supports respondents' contention that appellants are not entitled under the Act to the benefit of the terms and conditions of the insured trust deed and to have them substituted in place of the corresponding portions of the agreement for sale of real estate.

[2] Appellants cite the cases of *McAlister v. Drapeau*, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, and *Young v. Hampton*, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R.2d

830, in support of their contentions. However neither of these cases nor the congressional acts construed therein are analogous to the present case or to the N.H.A. In *McAllister v. Drapeau*, supra, the plaintiffs had borrowed a sum of money from the Home Owners Loan Corporation to pay off a trust deed, in favor of defendant's predecessor in interest, under which it was in default, and had been required by defendant's predecessor to secretly execute a second trust deed in its favor for an additional sum. The court held that this second trust deed was void in that it violated the letter and spirit of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq. That Act declares that its purpose is "To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere \* \* \*." Section 1462, U.S.C.A., declares that under the Act "(c) The term 'home mortgage' means a first mortgage on real estate \* \* \* upon which there is located a dwelling \* \* \* which is used in whole or in part by the owner as a home or held by him as his homestead \* \* \*." It is apparent that the purpose of the Home Owners' Loan Act was to protect and assist small home owners who were unable to meet their mortgage obligations and faced the loss of their homes. No such purpose appears in or can be fairly implied from section 1738 of the N.H.A. As we have seen its purpose was to stimulate the financing and erection of housing in great quantities, and in areas where industries were located. The Federal Home Loan Bank Board recognized the purpose of the Home Owners' Loan Act and under the power given it by the Act to "make such by laws, rules and regulations \* \* \* as may be necessary for the proper conduct of the affairs of the corporation" adopted several regulations to protect the mortgagor. One adopted November 3, 1933, provided: "\* \* \* However, such refunding will not be carried through unless such excess indebtedness is placed on a payment basis so that the home owner will have a reasonable opportunity to pay the same and meet his obliga-

tions to this Corporation \* \* \*." Another regulation adopted January 9, 1934, recited: "Whereas second mortgages for excess indebtedness over and above that which the Corporation can refund are permitted only in limited cases and then only on a basis so that the Home Owner will have reasonable probability of being able to pay his full obligation to the Corporation and meet the terms of such second mortgage indebtedness \* \* \*." In the course of its opinion the Supreme Court referred to these regulations and to portions of the Act, including those set out above. It likewise recognized the purpose of the Act. At pages 108 and 109 of 14 Cal.2d, at page 915 of 92 P.2d appears the following: "It is obvious, from a reading of the statute and the rules and regulations above quoted, that the main and controlling purpose of the act was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property. It is to be noted that the act places no compulsion, direct or indirect, on the creditor. The creditor had complete liberty of action. If he refused to accept the offer of the H. O.L.C. as to the amount of bonds and cash it would advance to refund the debt, there was nothing the H.O.L.C. or the debtor could do about it. It was contemplated, however, that many creditors would, and experience under the act proved that many did, accept a reduction in the amount of the existing loan in order to secure liquid assets such as bonds of the H.O.L.C. rather than foreclose on the property and have to hold it until conditions in the real estate market improved. The act provides that such reduction should be passed on to the home owner, the debtor. The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, but such rules and regulations provided that the H.O.L.C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have



a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H.O. L.C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations. This is demonstrated not only by the terms of the statute and the regulations, but also by the language of the agreement above quoted that all creditors were required to sign wherein the creditor represented and agreed that he was accepting the bonds 'in full settlement of the claim of the undersigned'.

"The obtaining of secret second liens by the creditor violates the basic public policy expressed in the act. The act was intended solely for the benefit of home owners who were in financial difficulties—no one else was eligible for its benefits."

In *Young v. Hampton*, supra, 36 Cal.2d 799, 228 P.2d 1, the defendant Hampton, a veteran of World War II, entered into negotiations with the plaintiff, a building contractor, for the erection of a home. The defendant applied for a loan from a bank under the provisions of the Servicemen's Readjustment Act. 38 U.S.C.A. § 694a. The Veteran's Administration appraised the building at \$8,285 and the parties executed a contract whereby plaintiffs agreed to construct the building for that amount with a verbal agreement for the defendant to pay her \$9,000. Shortly thereafter they executed another contract to supersede it whereby defendant agreed to pay plaintiff the cost of construction plus 10 per cent, the total not to exceed \$9,000. The first contract was delivered to the bank with defendant's note and trust deed, but the second one was kept secret from both the bank and the Veteran's Administration. The bank during the course of construction paid four installments to plaintiff in accordance with the original contract. Under defendant's instruction it failed to pay the fifth installment. Plaintiff sued to enforce her mechanic's lien and the court held that the promise to pay the excess above the \$8,285 appraisal figure was void. Section 694a provides as follows: "(a) Any loan

made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home \* \* \* is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:

"(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

"(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

"(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." It is apparent that the purpose of the act was to assist and protect veterans who desired homes for themselves. It specifically protected them from undertaking a financial obligation they could not reasonably meet by prohibiting the price paid or the cost of construction from being more than the appraised value. This purpose, as in the case of that of the Home Owners' Loan Act is quite different from the purpose of the N.H.A. In its opinion the Supreme Court at page 804 of 36 Cal.2d, at page 4 of 228 P.2d quoted from *Diamond v. Willett*, La.App., 37 So.2d 338 as follows: "The acts of Congress herein referred to [Servicemen's Readjustment Act] are designed to give relief to members of the armed forces, of limited means, who honorably served their country during World War II. It was realized by Congress that no greater duty rested upon it than to aid and encourage, in substantial ways, the establishment of homes by those who had loyally served the Government in its hour of peril. One of the several modes adopted to attain this desired end is reflected from the passage of laws that unequivocally insure against financial loss those persons who invest in notes of ex-service men, se-

cured by mortgages on homes acquired by them. Before said insurance can become effective in any given case, inquiry is made concerning the ability of the ex-service man to repay the mortgage debt, and care is exercised to protect him against the assumption of obligations he might default upon eventually. For this reason, it is imperative that the correct sale price of a home be declared in the application for assistance." At page 805 and 806 of 36 Cal.2d, at page 4 of 228 P.2d the Supreme Court said: "By section 694a of that statute, the government endeavors to assure terms of payment which bear a proper relation to the veteran's present and anticipated income and expenses. The requirement of the same section that the price to be paid by the veteran for the cost of construction shall not exceed the reasonable value as established by a designated appraiser was obviously enacted to protect the borrower from acquiring property at an exorbitant price. That this was the legislative intent is manifest from the discussions at the time enactment of the statute was being considered. \* \* \*

"Manifestly, the entire transaction was designed to evade the provisions of the act and also to obtain its benefits. The statute was intended solely to aid the veteran in the establishment of a home. Any benefit to a contractor was incidental. However, if a secret contract for an amount in excess of the appraised value may be exacted from a veteran, the purpose of the act is defeated."

It is apparent from the above recitals and quotations that the facts in *McAllister v. Drapeau*, supra, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, and *Young v. Hampton*, supra, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R. 2d 830, are not analogous to the facts in the present case, that neither of the purposes of the Home Owners' Loan Act and the Servicemen's Readjustment Act was the purpose of section 1738 of the N.H.A., and that considerations which guided the Supreme Court in those cases do not apply to the present case.

241 P.2d—5

Cal.Rep. 241-242 P.2d—5

[3] On April 20, 1950, Congress adopted the following amendment to the N.H.A., 64 Stats. 81, 12 U.S.C.A. § 1701l: "It is the intent of Congress that no sale of a dwelling on which a mortgage is insured under this chapter, shall be financed, while such mortgage is so insured, at an interest rate higher than that prescribed by the Federal Housing Commissioner. It is the further intent of Congress that no such sale shall be made, while such mortgage is so insured, on terms less favorable to the purchaser as to amortization, retirement, foreclosure, or forfeiture than those contained in such mortgage." Appellants contend that by virtue of this amendment Congress "declared what is and has always been the purpose and policy of the \* \* \* National Housing Act." However the opening words of the amendment "*It is the intent of Congress* \* \* \*" clearly speak of the intent as of the date of its adoption. (Italics ours.) The 1950 Congress made no attempt to declare what the intent of the various Congresses had been at the time of the original enactment of the N.H.A. in 1934 or at the times when the various amendments thereto were adopted. In view of the many changes in congressional offices that had occurred during the intervening 16 years the 1950 Congress could hardly have done so even though it assumed it had such power. This amendment did not have or purport to have any retroactive effect nor is it a guide to the discovery of the intent with which the N.H.A. and the prior amendments were adopted.

Our determination in favor of respondents of the principal issues raised by the answer to the complaint makes it unnecessary for us to further consider the issues raised by the affirmative defenses.

[4] The order denying the motion for a new trial being an unappealable order the appeal therefrom is dismissed.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

109 Cal.App.2d 405

**REMILLARD BRICK CO. v. REMILLARD-DANDINI CO. et al.**  
Civ. 14814.

District Court of Appeal, First District,  
Division 1, California.

Feb. 26, 1952.

As Corrected March 26, 1952.

Rehearing Denied March 27, 1952.

Hearing Denied April 24, 1952.

The Remillard Brick Company brought action against Remillard-Dandini Company and others, and against W. S. Stanley and others to recover on behalf of two corporations profits made by certain of the defendants in violation of their fiduciary duties as directors of corporations. The Superior Court, County of Alameda, O. D. Hamlin, J., entered judgment, and plaintiff appealed, and W. S. Stanley and others cross-appealed. The District Court of Appeal, Peters, P. J., held that directors violated their fiduciary duty in entering into contract on behalf of the two corporations with third corporation belonging to directors.

Judgment in accordance with opinion.

**1. Appeal and Error**  $\S$ 158(1)

Where judgment expressly required that certain of the defendant-directors repay certain sum within 60 days from date of judgment or defendants were to be removed from office, fact that the defendants voluntarily satisfied portion of judgment requiring them to pay such sum, did not prevent them from challenging the judgment, and did not require dismissal of their appeal.

**2. Appeal and Error**  $\S$ 158(1)

Generally, voluntary satisfaction of a judgment will foreclose right to have it reviewed on appeal, but such rule only applies where payment of judgment was by way of compromise or with an agreement not to take or prosecute an appeal.

**3. Corporations**  $\S$ 318

Statute providing that transaction between corporation and directors or between corporation and an association in which directors are also directors or financially interested, is not void where fact of common directorship or financial interest is disclosed or known to shareholders, and they approve or ratify contract or transaction in good faith, does not operate to limit

fiduciary duties owed by a director to all stockholders, nor does it operate to condone acts which, without existence of a common directorate, would not be countenanced. Corporations Code,  $\S$  820.

**4. Corporations**  $\S$ 318

Statute providing that transaction between corporation and directors or between corporation and an association in which directors are also directors or financially interested, is not void where fact of common directorship or financial interest is disclosed or known to shareholders, and they approve or ratify contract or transaction in good faith, does not permit an officer or director, by an abuse of his power, to obtain an unfair advantage or profit for himself at expense of corporation. Corporations Code,  $\S$  820.

**5. Corporations**  $\S$ 314(1)

A director of a corporation cannot, by reason of his position, drive a harsh and unfair bargain with corporation, and, if he does so, he may be compelled to account for unfair profits made in disregard of his duty. Corporations Code,  $\S$  820.

**6. Corporations**  $\S$ 318

Even though requirements of statute providing that transaction between corporation and directors or between corporation and an association in which directors are also directors or financially interested, is not void where fact of common directorship or financial interest is disclosed or known to shareholders, and they approve or ratify contract or transaction in good faith, are technically met, transactions that are unfair and unreasonable to corporation may be avoided. Corporations Code,  $\S$  820.

**7. Corporations**  $\S$ 318

Where majority directors of two brick manufacturing corporations used their majority power to have manufacturing corporations enter into contract with a sales corporation, which directors organized, so that manufacturing corporations were stripped of their sales functions, and directors realized through sales corporation large profits which would have gone to manufacturing corporations, contract was void, though approved by majority stockholders



of manufacturing corporations, and though manufacturing corporations also made profit under contract. Corporations Code, § 820.

#### 8. Corporations ⇨307

Directors of a corporation, though not strictly trustees, are fiduciaries and bear a fiduciary relationship to the corporation and to all stockholders, and must administer their duties for the common benefit.

#### 9. Corporations ⇨1, 307

The concept that a corporation is an entity cannot operate so as to lessen duties owed by directors to all of stockholders.

#### 10. Corporations ⇨307

Directors of a corporation, owe a duty of highest good faith to corporation and its stockholders.

#### 11. Corporations ⇨314(1)

It is a cardinal principle of corporate law that a director cannot, at expense of corporation, make an unfair profit from his position.

#### 12. Corporations ⇨316(1)

A director of a corporation is precluded from receiving any personal advantage in his personal dealings with corporation without fullest disclosure to and consent of all those affected. Corporations Code, § 820.

#### 13. Corporations ⇨318

The law zealously regards contracts between corporations with interlocking directorates and will carefully scrutinize all such transactions, and, in case of unfair dealing to detriment of minority stockholders, will grant appropriate relief.

#### 14. Corporations ⇨318

Where transaction between two corporations benefits one corporation at expense of the other corporation, and especially if it personally benefits majority directors, it should be set aside. Corporations Code, § 820.

#### 15. Corporations ⇨318

Though transaction between corporations is not voidable simply because an interested director participated, it will not be

upheld if it is unfair to minority stockholders. Corporations Code, § 820.

#### 16. Corporations ⇨318

Fact that when first contracts were entered into between manufacturing corporations and sales corporation belonging to majority directors of manufacturing corporations to disadvantage of manufacturing corporations, it was not known whether sales corporation would realize profits, did not justify court in refusing to invalidate such contracts. Corporations Code, § 820.

#### 17. Corporations ⇨320(14)

Action by minority stockholder on behalf of two manufacturing corporations to recover profits made by sales corporation belonging to majority directors of manufacturing corporations from sale of bricks manufactured by manufacturing corporations, was an equitable action, and trial court had full power to do equity.

#### 18. Corporations ⇨308(2)

A director or officer of a corporation may be compensated by bonus for extraordinary services.

#### 19. Corporations ⇨308(2)

Where majority directors of corporations rendered extraordinary services, benefits of which were realized by corporations, they could be compensated beyond their normal salaries.

#### 20. Corporations ⇨294

Statute providing that court may remove a director of a corporation in case of fraudulent or dishonest acts or gross abuse of authority or discretion and may bar from reelection any director so removed for a period prescribed by the court, is discretionary. Corporations Code, § 811.

#### 21. Corporations ⇨294

Where majority directors of brick manufacturing corporations made contract for those corporations with a sales corporation belonging to the majority directors, and sales corporation realized profits which would have gone to manufacturing corporations, and court required sales corporation to pay over profits to manufacturing corporations, and majority directors were

managing officers and for all practical purposes majority stockholders of manufacturing corporations, and they had demonstrated great managing ability as directors, court did not abuse its discretion in permitting them to remain as directors, subject to return of profits made by sales corporation. Corporations Code, § 811.

## 22. Corporations — 294

Generally, a director of a corporation will not be removed for acts committed during his term of office if he is subsequently reelected.

---

Johnson, Harmon & Henderson, San Francisco, for plaintiff-appellant.

Leo R. Friedman, San Francisco, for defendants-appellant.

PETERS, Presiding Justice.

These appeals present another round in the legal battles between the members of the Dandini family, their successors in interest, and the corporations they control or have controlled. Two of these controversies have already been before this court. *Remillard Brick Co. v. Dandini*, 98 Cal. App.2d 617, 220 P.2d 927; *Dandini v. Dandini*, 82 Cal.App.2d 263, 186 P.2d 41. According to the briefs and pleadings, other actions are pending in the trial court or are on appeal.

The present controversy involves four corporations and several members of their boards of directors. The corporations are:

1. Remillard Brick Company, the plaintiff, which is wholly owned by Lillian Dandini.

2. Remillard-Dandini Company, one of the defendants, on whose behalf this action was brought. This company has 403 shares of stock, 150 shares of which are owned by the Remillard Brick Company, and 253 shares owned by the Sesennas (successors to A. O. Dandini, divorced husband of Lillian Dandini) and which were controlled by defendants Stanley and Sturgis, who at all times here involved had the Sesennas' proxy to vote the stock and a contract to buy it. The directors of the Remillard-Dandini Company at all times here involved were de-

fendants Gatzert, Stanley and Sturgis, and Lillian Dandini and her lawyer Johnson.

3. San Jose Brick & Tile, Ltd., is the other defendant on whose behalf this action was brought. All of the stock of this company is owned by Remillard-Dandini Company. Its board of directors consists of Gatzert, Stanley, Sturgis, Den-Dulk, a law partner of Sturgis, and Davis, an employee of Remillard-Dandini Company. The San Jose Brick and Remillard Dandini companies are engaged in the manufacture of bricks. Their legal positions are substantially similar, and they will be referred to hereafter as the manufacturing companies.

4. Remillard-Dandini Sales Corporation, and defendant, was organized and is wholly owned, controlled and operated by Stanley and Sturgis.

Stanley was president and general manager of both manufacturing companies, full-time positions, for which he received \$400 per month from each for his services. Sturgis was secretary and secretary-treasurer of the two companies, part-time jobs, for which he received \$125 a month from each company.

Thus, Remillard Brick Company, the plaintiff, is wholly owned by Lillian Dandini, is a minority stockholder in one of the manufacturing companies, which, in turn, owns all of the stock in the other manufacturing company. Gatzert, Stanley and Sturgis are majority directors of the manufacturing companies, and Stanley and Sturgis wholly own the sales corporation.

This action was brought by Remillard Brick Company to recover, on behalf of the two manufacturing companies, profits made by the sales corporation and Stanley and Sturgis, from the sale of bricks manufactured by the two manufacturing companies. The first amended complaint states three causes of action:

- (1) To have certain contracts entered into in 1948 between the sales corporation and the two manufacturing companies declared void, and to recover on behalf of the manufacturing companies all profits made by the sales company from these contracts. By stipulation at the trial the allegations of the complaint on this issue

were made applicable to similar contracts entered into in 1949, after the original complaint was filed;

(2) Pursuant to sections 810 and 811 of the Corporations Code to oust Stanley, Sturgis and Gatzert, as directors of the two manufacturing companies, and

(3) To recover for Remillard-Dandini Company from Stanley and Sturgis and Gatzert certain fees paid to Sturgis by that company for services which it is claimed were not for the benefit of Remillard-Dandini Company, but were paid for personal services rendered for A. O. Dandini, former director and president of that company.

The facts as found in the record and set forth in the findings are as follows: The Remillard-Dandini Company was incorporated in 1935 and from that year until 1939 made profits that averaged about \$2,500 per year. In 1939 this corporation acquired the other manufacturing company, San Jose Brick. From 1939 until 1946, and particularly after 1941, the profits of both companies increased, and in 1946-7 the two companies showed a net profit, before taxes, of over \$45,000.

During these years neither of the manufacturing companies expended very much for capital improvements. From 1935 to 1948, Remillard-Dandini spent but \$54,000 for these purposes (\$18,000 of which was for a truck in 1936), while from 1939 to 1948, San Jose Brick expended but \$21,000 for these purposes. The result was that the equipment in both manufacturing companies was, in 1948, antiquated, and of such a nature that neither company could operate in the winter months. A good deal of this run-down condition of the two manufacturing companies was undoubtedly due to the mismanagement and misappropriations of over \$50,000 by A. O. Dandini, former husband of Lillian Dandini. (For this background see *Remillard Brick Company v. Dandini*, 98 Cal.App.2d 617.) A. O. Dandini transferred his controlling interest in Remillard-Dandini Company to the Sesennas. For this background see *Dandini v. Dandini*, 82 Cal.App.2d 263, 186 P.2d 41.

Stanley and Sturgis first tried to buy out the minority interest of Lillian Dandini. When she refused to sell, they stated that she would have to fight, and that they would run the company as they saw fit. Accordingly, in 1948, while acting as directors and officers of the two manufacturing companies, Stanley and Sturgis conceived the idea of separating the sales functions of the two companies from their manufacturing functions, by having the two manufacturing companies, by contract, transfer their sales functions to the sales corporation, wholly owned by them. On January 29, 1948, at a directors' meeting, Stanley and Sturgis proposed that they, as officers of the two manufacturing companies, be authorized by the respective boards to enter into contracts on behalf of the two manufacturing companies with the sales corporation to the end that the sales corporation would handle, exclusively, the promotion and sales of all products manufactured by the manufacturing companies. This resolution was formally adopted by the vote of Stanley, Sturgis and Gatzert. The minority directors, Lillian Dandini and attorney Johnson, voted "no." In February of 1948, Stanley and Sturgis, acting as officers of the manufacturing companies, caused certain contracts to be entered into between the manufacturing companies and the sales corporation. They acted also on behalf of the sales corporation. These contracts were one-year contracts. In 1949, a similar resolution was passed over the opposition of Lillian Dandini and Johnson, and in February, 1949, similar contracts were entered into for another one-year period. Both the 1948 and 1949 contracts were negotiated by Stanley and Sturgis while acting as officers for all of the contracting corporations. On February 10, 1948, the Sesennas, the record owners of 253 shares of stock in the Remillard-Dandini Company, filed a written consent to the 1948 contracts. A similar consent was filed in January, 1949, to the 1949 contracts. However, prior to the execution of the 1948 contracts, the Sesennas had given the sales corporation their proxy to vote their stock in the Remillard-Dandini Company. Also prior to the execution of the 1948 contracts, Stanley and Sturgis had



entered into a contract to purchase the Sesenna stock. This contract to purchase included a provision that Stanley and Sturgis assumed the responsibility for any litigation involving the Remillard-Dandini Company. Thus, prior to the 1948 contracts, for all practical purposes, Stanley and Sturgis had complete control of the two manufacturing companies.

It should be here mentioned that, although the plaintiff alleged the existence of the proxy and the contract to purchase in its complaint, defendants Stanley and Sturgis, in their verified answer, denied the existence of the proxy and contract to purchase the stock. Sturgis denied the existence of the proxy and contract to purchase in his pre-trial deposition. Stanley, at the trial, at first denied the existence of the proxy and contract to purchase, but finally divulged their existence only after the trial judge had practically threatened him with contempt.

The contracts between the manufacturing companies and the sales corporation transferred to the latter full control over the sales of all products, including promotion of sales, manufactured by the manufacturing companies. The sales corporation agreed to sell all products manufactured by the two manufacturing companies "that it is able to market and sell." The sales corporation agreed to purchase all products manufactured by the manufacturing companies on such conditions and prices as sales corporation should judge to be fair and reasonable. A reasonable and fair price was defined as a price that would yield the manufacturing companies a gross profit, before taxes, of not less than \$2.50 per thousand bricks manufactured and sold by the sales corporation. The contract was made irrevocable, except by consent of all parties, for one year. While the word "guaranteed" is used in the contract in reference to payments to be made to the manufacturing companies, it is quite apparent from the entire agreement that the sales corporation was under no obligation to pay for bricks that it did not sell. The sales corporation at no time handled any products other than those of the manufacturing companies.

A second agreement with each of the manufacturing companies related to the lease of certain equipment and facilities by the sales corporation, such as office space, trucks, machinery and tools, for which the sales corporation agreed to pay a fixed monthly rental. The sales corporation agreed to repair and maintain this leased equipment.

In this fashion the sales corporation undertook to sell the products of the manufacturing companies using almost exclusively the facilities and equipment of the manufacturing companies. Undoubtedly, Stanley and Sturgis did a good job, not only in selling but in modernizing the two manufacturing plants. The trial court found that, under these contracts, the sales corporation, in 1948, received profits and paid salaries to Stanley, Sturgis and Gatzert of \$55,727.73, while in 1949 such profits and salaries totalled \$37,939.60. However, neither of the manufacturing companies declared a dividend in these years.

The trial court found that the 1949 contracts were unfair to the manufacturing companies, were void, and ordered them cancelled. It ordered the defendants (after making certain adjustments not here challenged) to repay \$35,539.60, less \$4,400 allowed to Stanley for extraordinary services, and \$5,000 for the services of Sturgis. This left a balance ordered repaid of \$26,139.60. The trial court did not invalidate the 1948 contracts, and granted no relief as to them.

From this portion of the judgment there are several appeals. The plaintiff, Remillard Brick Company, appeals from that portion of the judgment which fails to invalidate the 1948 contracts, contending that, under the findings, these contracts should have been declared null and void. This plaintiff also appeals from the portions of the judgment which allowed Stanley and Sturgis a total of \$9,400 for their services to the sales corporation. Defendants sales corporation, and Stanley and Sturgis, appeal from those portions of the judgment declaring the 1949 contracts void.

On the second cause of action for the removal of the directors, the judgment pro-

vides that unless the sales corporation, Stanley and Sturgis shall, within sixty days from the date of the judgment, restore to the manufacturing companies the \$26,139.60 provided for in the first part of the judgment, Stanley, Sturgis and Gatzert shall be removed as directors of the manufacturing companies. The sales corporation, and Stanley and Sturgis appeal from this portion of the judgment. Remillard Brick Company also appeals from this portion of the judgment contending that, under the findings, the three majority directors should have been ousted without qualification.

Remillard Brick Company also appeals from the judgment insofar as it denies it any relief on the third cause of action—to recover legal fees paid to Sturgis. This portion of the appeal, however, has been abandoned.

Remillard Brick Company has moved to dismiss several of the appeals taken by the sales corporation, and by Stanley and Sturgis. It is pointed out that on May 31, 1951, Sturgis resigned as a director of the two manufacturing companies. It is urged that this renders moot his appeal from the order directing his conditional removal as director, and it is also contended that this resignation renders moot Remillard Brick Company's own appeal from that portion of the judgment failing to absolutely oust Sturgis as director in the two companies.

It is also contended that the appeal by the sales corporation, and by Stanley and Sturgis, from that portion of the judgment declaring the 1949 contracts void is moot because, within the sixty days provided in the judgment, these defendants paid the amount involved as directed in the judgment.

This motion to dismiss is without merit. So far as Sturgis resigning as director of the two manufacturing companies is concerned, Stanley has not resigned, and the two directors are in the same legal position. Moreover, the order of conditional removal involves a charge of fraud against Sturgis, and, whether he has or has not resigned, he is entitled to a review of the validity of that charge.

[1,2] While it is true that the sales corporation and Stanley and Sturgis have voluntarily satisfied that portion of the judgment requiring them to repay the manufacturing companies \$26,139.60, that satisfaction does not prevent them from challenging that judgment. The judgment expressly required that sum to be repaid within sixty days from the date of the judgment or the directors were to be removed from office. Moreover, the judgment, as to the 1949 contracts, finds the directors guilty of fraud. While the voluntary satisfaction of a judgment, generally speaking, will foreclose the right to have it reviewed on appeal, that rule only applies where the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal. *Reitano v. Yankwich*, 38 Cal.2d 1, 237 P.2d 6; *Estate of Merrill*, 29 Cal.2d 520, 175 P.2d 819. Here it is quite obvious that the payment was not voluntary, but was paid to keep the balance of the judgment from becoming operative. Moreover, Stanley and Sturgis have the legal right to have an appellate court pass upon the finding of fraud. The motion to dismiss should be denied.

#### Additional References to the Findings.

Reference has already been made to some of the pertinent facts. The findings are quite lengthy and detailed. There are other findings to which reference should be made. The court found that all of the contracts here involved "were negotiated and agreed upon" by Stanley and Sturgis "acting as agents for and on behalf" of the manufacturing companies and "at the same time as agents for and on behalf of Remillard-Dandini Sales Corporation"; that prior to entering into the contracts the sales corporation had the proxy of the Sesennas to vote their stock, and Stanley and Sturgis had a contract to purchase it, and a contract to assume full responsibility for any litigation involving the Remillard-Dandini Company; that after securing this proxy and these contracts Stanley and Sturgis "had full control of the policies and acts of the" manufacturing companies, "and had full power to fix the prices and

terms" of the 1948 and 1949 contracts; that during the execution of these contracts Stanley and Sturgis continued to act on behalf of the manufacturing companies and to receive wages from them, and acted on behalf of and received wages from the sales corporation; that during this period Stanley was president and manager of the two manufacturing companies; that these were full-time jobs; that as such he had charge of the production and sales facilities of the manufacturing companies for which he received \$400 per month from each corporation (prior to his election as director of the manufacturing companies Stanley had made \$90 a week selling bricks); that Sturgis was secretary of both corporations and received from each \$125 per month for such services; that after entering into the contracts of 1948 and 1949 the sales corporation took over and exercised all of the sales functions that had previously been exercised by the manufacturing companies; that Stanley and Sturgis had a gross total investment in the sales corporation of \$2,500; that in carrying out its functions the sales corporation has used the equipment of the manufacturing companies; that this whole setup was "part of a plan" whereby Stanley and Sturgis "obtained profits from the sale of bricks" manufactured by the two manufacturing companies "that ordinarily would go to" the manufacturing companies; that prior to the 1948 and 1949 contracts the manufacturing companies handled the sales of their own products; that it would have been to the best interests of the manufacturing companies to maintain their own sales facilities; that by reason of the control exercised over the companies by Stanley and Sturgis the best interests of the manufacturing companies "have been and now are subordinated to the private and personal interests of" Stanley and Sturgis; "that nothing was done in the handling of the sales of the bricks" of the manufacturing companies "that could not have been done by" Stanley and Sturgis as managers and officers of the manufacturing companies; that prior to trial Stanley and Sturgis concealed the profits they had made and the salaries received by them from the

sales corporation; that the only business of the sales corporation was the handling of the bricks for the manufacturing companies; that prior to trial Stanley and Sturgis (in control of all corporations) "failed and refused to divulge the amount of profits" made by the sales corporation under the contracts, and such information was concealed by them; that prior to trial Stanley and Sturgis denied they had a contract to purchase the Sesenna stock; that when the 1948 contracts were executed the profits of the sales corporation "were speculative"; that the 1948 contracts "were unfair and unreasonable" to the manufacturing companies "viewed as of February 1, 1949"; that the 1949 contracts were "unjust and unreasonable" to the manufacturing companies "at the time of their execution, and said contracts were not entered into in good faith" by the sales corporation and Stanley, Sturgis and Gatzert; that the execution of the 1949 contracts was "unfair, unjust and unreasonable" to the manufacturing companies "and constitutes a violation" by Stanley and Sturgis "of their duties and trusts as officers and directors" of the manufacturing companies, and is a "fraud upon said companies."

#### General Comments.

The 1948 and 1949 contracts were profitable to the manufacturing companies as well as to the sales corporation. In 1946-7 the net profits of the manufacturing companies were about \$45,000. Under the 1948 contracts the manufacturing companies received from the sales corporation net profits of \$78,198, while in 1949 they received \$47,199. During these periods both plants were rebuilt and rehabilitated. In addition, both manufacturing companies received substantial sums from the sales corporation for the rental of equipment and offices. The sales corporation, wholly owned by Stanley and Sturgis and in which each had a total investment of \$1,250, owned no equipment except one truck and trailer and some office furniture.

#### Validity of 1948 and 1949 Contracts.

The basic questions presented on this appeal revolve around the determination of



the trial court that the 1949 contracts were invalid, and its refusal to hold that the 1948 contracts were invalid. The sales corporation, and Stanley and Sturgis, confidently maintain that under section 820 of the Corporations Code, and because the minority stockholder and the minority directors of the manufacturing companies were informed of the interest of Stanley and Sturgis in the contracts, that the 1949 contracts were valid, and that the holding to the contrary is unsound.

Section 820 of the Corporations Code, enacted in 1947 and based on former section 311 of the Civil Code, provides:

"Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation. No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm, or association in which one or more of its directors are directors or are financially interested, is either void or voidable because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes or approves the contract or transaction, or because his or their votes are counted for such purpose, if the circumstances specified in any of the following subdivisions exist:

"(a) The fact of the common directorship or financial interest is disclosed or known to the board of directors or committee and noted in the minutes, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such director or directors.

"(b) The fact of the common directorship or financial interest is disclosed or known to the shareholders, and they approve or ratify the contract or transaction in good faith by a majority vote or written consent of shareholders entitled to vote.

"(c) The contract or transaction is just and reasonable as to the corporation at the time it is authorized or approved.

"Common or interested directors may be counted in determining the presence of a

quorum at a meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies a contract or transaction."

It is argued that, since the fact of common directorship was fully known to the boards of the contracting corporations, and because the Sesennas as majority stockholders consented to the transaction, the minority stockholder and directors of the manufacturing companies have no legal cause to complain. In other words, it is argued that if the majority directors and stockholders inform the minority that they are going to mulct the corporation, section 820 of the Corporations Code constitutes an impervious armor against any attack on the transaction short of actual fraud. If this interpretation of the section were sound, it would be a shocking reflection on the law of California. It would completely disregard the first sentence of section 820 setting forth the elementary rule that "Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation", and would mean that if conniving directors simply disclose their dereliction to the powerless minority, any transaction by which the majority desire to mulct the minority is immune from attack. That is not and cannot be the law.

Section 820 of the Corporations Code is based on former section 311 of the Civil Code, first added to our law in 1931. Stats. of 1931, Chap. 862, p. 1777. Before the adoption of that section it was the law that the mere existence of a common directorate, at least where the vote of the common director was essential to consummate the transaction, invalidated the contract. *Caminetti v. Prudence etc. Ins. Ass'n*, 62 Cal.App.2d 945, 950, 146 P.2d 15. That rule was changed in 1931 when section 311 was added to the Civil Code, and limited to a greater extent by the adoption of section 820 of the Corporations Code. If the conditions provided for in the section appear, the transaction cannot be set aside simply because there is a common directorate. Here, undoubtedly, there was a literal compliance with subdivision b of the section. The fact of the common directorship was

disclosed to the stockholders, and the Sennas, majority stockholders, did approve the contracts.

[3-7] But neither section 820 of the Corporations Code nor any other provision of the law automatically validates such transactions simply because there has been a disclosure and approval by the majority of the stockholders. That section does not operate to limit the fiduciary duties owed by a director to all the stockholders, nor does it operate to condone acts which, without the existence of a common directorate, would not be countenanced. That section does not permit an officer or director, by an abuse of his power, to obtain an unfair advantage or profit for himself at the expense of the corporation. The director cannot, by reason of his position, drive a harsh and unfair bargain with the corporation he is supposed to represent. If he does so, he may be compelled to account for unfair profits made in disregard of his duty. Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable to the corporation may be avoided. California Corporation Laws by Ballantine and Sterling (1949 ed.), p. 102, § 84. It would be a shocking concept of corporate morality to hold that because the majority directors or stockholders disclose their purpose and interest, they may strip a corporation of its assets to their own financial advantage, and that the minority is without legal redress. Here the unchallenged findings demonstrate that Stanley and Sturgis used their majority power for their own personal advantage and to the detriment of the minority stockholder. They used it to strip the manufacturing companies of their sales functions—functions which it was their duty to carry out as officers and directors of those companies. There was not one thing done by them acting as the sales corporation that they could not and should not have done as officers and directors and in control of the stock of the manufacturing companies. It is no answer to say that the manufacturing companies made a profit on the deal, or that Stanley and Sturgis did a good job. The point is that those large profits that should have

gone to the manufacturing companies were diverted to the sales corporation. The good job done by Stanley and Sturgis should and could have been done for the manufacturing companies. If Stanley and Sturgis, with control of the board of directors and the majority stock of the manufacturing companies, could thus lawfully, to their own advantage, strip the manufacturing companies of their sales functions, they could just as well strip them of their other functions. If the sales functions could be stripped from the companies in this fashion to the personal advantage of Stanley and Sturgis, there would be nothing to prevent them from next organizing a manufacturing company, and transferring to it the manufacturing functions of these companies, thus leaving the manufacturing companies but hollow shells. This should not, is not, and cannot be the law.

[8-15] It is hornbook law that directors, while not strictly trustees, are fiduciaries, and bear a fiduciary relationship to the corporation, and to all the stockholders. They owe a duty to all stockholders, including the minority stockholders, and must administer their duties for the common benefit. The concept that a corporation is an entity cannot operate so as to lessen the duties owed to all of the stockholders. Directors owe a duty of highest good faith to the corporation and its stockholders. It is a cardinal principle of corporate law that a director cannot, at the expense of the corporation, make an unfair profit from his position. He is precluded from receiving any personal advantage without fullest disclosure to and consent of *all* those affected. The law zealously regards contracts between corporations with interlocking directorates, will carefully scrutinize all such transactions, and in case of unfair dealing to the detriment of minority stockholders, will grant appropriate relief. Where the transaction greatly benefits one corporation at the expense of another, and especially if it personally benefits the majority directors, it will and should be set aside. In other words, while the transaction is not voidable simply because an interested director participated, it will not

be upheld if it is unfair to the minority stockholders. These principles are the law in practically all jurisdictions. 3 Fletcher, *Cyclopedia of Corps.* (Perm.Ed.), p. 173, § 838, et seq.; 13 Am.Jur., p. 948, § 997, et seq.

The United States Supreme Court has clearly established these principles. In *Pepper v. Litton*, 308 U.S. 295, at page 306, 60 S.Ct. 238, at page 245, 84 L.Ed. 281, the court, unanimously, stated the following: "A director is a fiduciary. [Citing a case.] So is a dominant or controlling stockholder or group of stockholders. [Citing a case.] Their powers are powers in trust. [Citing a case.] Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. [Citing a case.] The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." Referring directly to the duties of a director the court stated 308 U.S. at page 311, 60 S.Ct. at page 247: "He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy

technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

This is the law of California. It was the law before section 311 of the Civil Code was adopted, and is the law since. *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 78 P. 550; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496; *Isenberg v. Sherman*, 212 Cal. 454, 298 P. 1004, 299 P. 528; *American Trust Co. v. California etc. Ins. Co.*, 15 Cal.2d 42, 98 P.2d 497; *Lawrence v. I. N. Parlier Estate Co.*, 15 Cal.2d 220, 100 P.2d 765; *Bainbridge v. Stoner*, 16 Cal.2d 423, 106 P.2d 423; *Pasadena Mercantile F. Corp. v. De Besa*, 122 Cal.App. 575, 10 P.2d 492; *Schwab v. Schwab-Wilson Machine Corp.*, 13 Cal.App.2d 1, 55 P.2d 1268; *Angelus Securities Corp. v. Ball*, 20 Cal. App.2d 436, 67 P.2d 158; *Austin v. Turrentine*, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178; *Saracco Tank & Welding Co. v. Platz*, 65 Cal.App.2d 306, 150 P.2d 918. There is nothing in *Mannon v. Pesula*, 59 Cal.App.2d 597, 139 P.2d 336, or *Brainard v. De La Montanya*, 18 Cal.2d 502, 116 P.2d 66, or *Transportation Bldg. Co. v. Daugherty*, 74 Cal.App.2d 604, 169 P.2d 470, to the contrary. Those cases do not involve situations where a majority of directors have so used their power as to mulct the minority stockholders. No court in California has ever condoned such tactics.

Stanley and Sturgis seek to justify their actions on their testimony to the effect that the Sesennas were disgusted with the constant legal difficulties of the companies and refused to approve any rehabilitation of their facilities unless Stanley and Sturgis would take over. This evidence was apparently not believed by the trial court. Significantly enough, the Sesennas were not called to corroborate it. Moreover, even if this evidence were true, it does not explain why Stanley and Sturgis could



not do everything they did do as officers and directors of the manufacturing companies.

The findings, and the evidence upon which they are based, compel the conclusion that the trial court correctly decided that the 1949 contracts were unfair and inequitable and constituted a fraud upon the manufacturing companies and their minority stockholder. The trial court correctly set aside those contracts. That portion of its judgment should be affirmed.

[16] But the trial court failed to set aside the 1948 contracts, although it found that these contracts "were unfair and unreasonable" to the manufacturing companies "viewed as of February 1, 1949." Nevertheless, it did not set the 1948 contracts aside, apparently because it also found that when these contracts were entered into in February, 1948, the profits to be gained therefrom "were speculative." In other words, the trial court seemed to feel that, although the 1948 contracts were subject to the same objections as the 1949 contracts, they should not be set aside because when entered into no one knew whether or not the sales corporation would make profits under them. The 1948 contracts should have been set aside under the same conditions as the 1949 contracts. All of the contracts are voidable not because profits were or were not certain, but because of the inherent nature of the transactions. It would be a strange rule of law that would uphold contracts for the first year, because during that year profits were speculative, but hold that once it has been demonstrated that profits could be made, future contracts are voidable. There is no such doctrine that those false to their fiduciary responsibilities are entitled to the first year's profits gained from their wrongful conduct. The trial court should be instructed to amend the findings, conclusions and judgment so as to provide that the 1948 contracts are invalidated subject to the same terms and conditions, substantially, as are contained in the judgment in reference to the 1949 contracts.

[17-19] Remillard Brick Company objects to the allowance made by the trial

court of \$9,400 for the services of Stanley and Sturgis during 1949, pointing out that both men received salaries from the manufacturing companies, and that Stanley's job with those companies was supposed to be full time. It is urged that, since there is a finding that the 1949 contracts were unfair and a fraud on the manufacturing companies, Stanley and Sturgis, as trustees, should not be paid for activities that constituted a breach of their trust. As already indicated, the strict rules applicable to trustees are not applicable to directors and officers. This is an equitable action. *Bell v. Bayly Bros.*, 53 Cal.App.2d 149, 127 P.2d 662. The trial court has full power to do equity. *Colleter v. Oftedahl*, 48 Cal.App.2d 756, 120 P.2d 710. The trial court was undoubtedly impressed by the fact that Stanley and Sturgis during 1948 and 1949 did a first-rate job in promoting sales and selling the products of the manufacturing companies, and in carrying out a rehabilitation program for those companies. Had all of these services been rendered directly for the manufacturing companies, as they should have been, they were of such a nature that they would have justified the paying to them of a bonus for extraordinary services, in addition to their regular salaries. The services were no doubt of an extraordinary nature, and for these a director or officer may be compensated beyond his normal salary. *Bassett v. Fairchild*, 132 Cal. 637, 64 P. 1082, 52 L.R.A. 611. The trial court undoubtedly felt that the salaries given them by the manufacturing companies were not adequate to compensate them for these extraordinary services. This being so, we think that the trial court acted well within its powers in awarding these men \$9,400 for their services in 1949. This portion of the judgment should be affirmed, and on the reconsideration the trial court should determine whether Stanley and Sturgis are entitled to any allowance for extraordinary services for the year 1948, and, if so, how much.

The trial court ordered that some \$26,139.60 (net profits under the 1949 contracts) be restored to the manufacturing

companies within sixty days of the date of the judgment or Stanley and Sturgis should be removed as directors. Stanley and Sturgis appeal, making the same contentions as were made in reference to the portion of the judgment holding that the 1949 contracts should be set aside. For the reasons given in disposing of that phase of the appeal, the appeal by these parties from this portion of the judgment is without merit.

[20, 21] Remillard Brick Company also appeals from this portion of the judgment, contending that the majority directors should have been ousted without qualification. Section 811 of the Corporations Code provides that the court "may" remove a director "in case of fraudulent or dishonest acts or gross abuse of authority or discretion" and "may bar from reelection any director so removed for a period prescribed by the court." The section, by its very terms, indicates that the power is discretionary. The cases, both before and after the adoption of section 811, so hold. *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788; *DeGarmo v. Goldman*, 19 Cal.2d 755, 123 P.2d 1. In the present case Stanley and Sturgis not only are directors of the manufacturing companies, but are its managing officers, and, for all practical purposes, control and have a contract to purchase five-eighths of the outstanding stock. They have demonstrated their managing ability. Under such circumstances there was no abuse of discretion in permitting them to remain as directors, subject to their return of the profits made by the sales corporation.

[22] Moreover, it should be pointed out that the acts here committed occurred during the years 1948 and 1949. These two men were reelected by the stockholders for the year 1950. It is a general rule that

a director will not be removed for acts committed during his term of office if he is subsequently reelected. *Atkins v. Hughes*, 208 Cal. 508, 282 P. 787.

The appeal from the portion of the judgment disposing of the third cause of action has been abandoned, and the judgment in reference to it should be affirmed.

In reference to those portions of the judgment disposing of the first cause of action, it is ordered: that that portion of the judgment invalidating the 1949 contracts and ordering restitution is affirmed; that insofar as the trial court failed to invalidate the 1948 contracts and to order restitution for that year, the trial court is instructed to amend its findings, conclusions and judgment so as to invalidate the 1948 contracts, and to order restitution for that year subject to substantially the same conditions and terms as are contained in the portion of the judgment relating to the 1949 contracts; that the portion of the judgment allowing Stanley and Sturgis \$9,400 for their services in 1949 is affirmed. The trial court is directed, either upon the existing record or by the taking of additional evidence as it may determine, to ascertain whether Stanley and Sturgis are entitled to allowances for extraordinary services in 1948, and, if so, to fix the amount and allow it as an offset from the amount ordered restored for the year 1948.

It is also ordered that the portions of the judgment relating to the second and third causes of action are affirmed.

The motion to dismiss is denied.

The Remillard Brick Company is to recover its costs on all of the appeals.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

**DUPREY v. SHANE et al. \***

Civ. 14761.

District Court of Appeal, First District,  
Division 1, California.

March 4, 1952.

Hearing Granted May 1, 1952.

Iva Mae Duprey brought a malpractice action against chiropractors. The Superior Court of the State of California in and for the City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Peters, P. J., 238 P.2d 1071, affirmed the judgment after reducing the verdict, and thereafter a rehearing was granted. The District Court of Appeal, Peters, P. J., held that where employee of chiropractor was injured in course and scope of employment and chiropractor was guilty of alleged malpractice in subsequent treatment of the injury, aggravating the injury, employee could maintain malpractice action against chiropractor, though Industrial Accident Commission had awarded employee compensation.

Judgment affirmed.

**1. Appeal and Error** ⇨930(1)

On defendants' appeal from judgment on verdict for plaintiff, the facts were stated most favorable to plaintiff.

**2. Appeal and Error** ⇨1002

Conflicts in the testimony are for the jury.

**3. Workmen's Compensation** ⇨2253

Where physician's employee is injured in course and scope of employment and employing physician elects to treat the industrial injury, duties and obligations growing out of employer-employee relationship terminate, and physician assumes same responsibilities that any physician called in on the case would have assumed, and if physician's negligent treatment aggravates original injury, employee may sue physician-employer for malpractice, notwithstanding that Industrial Accident Commission has awarded compensation for the injury arising in course and scope of employment. Labor Code, § 3852.

\* Subsequent opinion 249 P.2d 8.

**4. Workmen's Compensation** ⇨2084

Where employer is insured and employee suffers injury in course and scope of employment, employee's remedy before Industrial Accident Commission is the exclusive remedy against the employer for the injury. Labor Code, §§ 3600, 3601.

**5. Workmen's Compensation** ⇨1791

The finding of Industrial Accident Commission that employee has suffered an injury compensable under the Workmen's Compensation Act is res judicata on that issue as against employer. Labor Code, § 3201 et seq.

**6. Workmen's Compensation** ⇨957

The rule that when a person is injured by a tortious act, and such injury is aggravated by negligence of attending physician, such aggravation of the injury is within scope of risk created by original tortious act applies to workmen's compensation cases. Labor Code, § 3201 et seq.

**7. Workmen's Compensation** ⇨1178

Where an employee is injured in industrial accident, and original injury is aggravated by negligence of attending physician, and employee seeks recovery for original injury and for aggravation from his employer or from insurance carrier, Industrial Accident Commission has exclusive jurisdiction to determine this claim against employer or insurance carrier. Labor Code, § 3201 et seq.

**8. Workmen's Compensation**

⇨957, 1177, 2253

Where an employee is injured in industrial accident and attending physician retained by insurance carrier is negligent and causes a new injury, employee may not only sue employer before Industrial Accident Commission but may also sue physician for malpractice and the commission has no jurisdiction of the malpractice accident against the physician. Labor Code, § 3201 et seq.

**9. Workmen's Compensation** ⇨1177, 2253

If employee of physician goes to such physician for treatment of non-industrial injury, and physician is negligent, employee may sue physician for malpractice, and the



Industrial Accident Commission has no jurisdiction of such an action. Labor Code, § 3201 et seq.

**10. Workmen's Compensation** ⇨2253

Where practical nurse employed by chiropractor was injured in course and scope of employment and chiropractor allegedly negligently treated injury and injury was thereby aggravated, and Industrial Accident Commission awarded compensation, nurse could maintain malpractice action against chiropractor. Labor Code, § 3852.

**11. Physicians and Surgeons** ⇨18(8)

In malpractice action against one chiropractor and another chiropractor employed by first chiropractor, evidence was sufficient to show that both chiropractors negligently treated plaintiff to her injury.

**12. Physicians and Surgeons** ⇨16, 18(6)

If two chiropractors who were alleged to have negligently treated plaintiff, were joint tort-feasors, both would be liable for full damage to plaintiff, at least in absence of evidence to show facts upon which an apportionment could have been made, and burden of producing such evidence was on chiropractors.

**13. Appeal and Error** ⇨930(4)

Where one medical bill of plaintiff was for \$1,220.59 and the other medical bill of plaintiff, which was paid by compensation carrier of one of the defendants, was \$2,351.81, and jury returned verdict for plaintiff for \$19,572.40, the District Court of Appeal would assume, in view of the odd amount of the judgment, that jury included the medical bill for \$2,351.81 in its verdict.

**14. Workmen's Compensation** ⇨2254

Where employee of chiropractor received an injury in course of her employment, and thereafter chiropractor was allegedly guilty of malpractice in treatment of employee, causing her further injury, and compensation carrier for chiropractor paid one of the employee's medical bills, and employee brought malpractice action against chiropractor, it was proper for judgment against chiropractor to include amount of medical bill paid by chiropractor's compensation carrier, and chiropractor's em-

ployee was statutory trustee of that portion of the recovery for compensation carrier. Labor Code, §§ 3850-3862.

**15. Workmen's Compensation** ⇨2254

Though as between employee and employer and employer's compensation carrier, malpractice of employer in treating employee is compensable, in so far as injury is due to malpractice and not due to original industrial injury, carrier can recover from employer those portions of amounts paid by carrier to employee that are due to malpractice. Labor Code, §§ 3850-3862.

Newell J. Hooey, San Francisco, Robert L. Lamb, San Francisco, for appellant.

Paul I. Myers, San Francisco, for respondent.

Partridge & O'Connell, San Francisco, for amicus curiae.

PETERS, Presiding Justice.

A rehearing was granted in this case to reconsider that portion of the opinion holding that the judgment was excessive in the amount of \$2,351.81. As to all other points discussed in our former opinion, 238 P.2d 1071, we are satisfied with the disposition there made. We therefore adopt our prior opinion, with certain deletions and additions all relating to the subject of excessive damages, as follows:

The cast of characters involved in this legal drama are:

Iva Mae Duprey, the plaintiff and respondent, employed as a practical nurse by the Shane Diagnostic Foundation;

The Shane Diagnostic Foundation, a partnership engaged in the practice of chiropractic, a defendant and appellant;

Dr. Raymond Shane and his wife Helen, defendants and appellants, who are partners doing business under the name of the Shane Diagnostic Foundation;

Dr. John J. Harrison, a defendant and appellant, who is a chiropractor employed by the Shane Diagnostic Foundation during the period here involved.

This is a malpractice action brought by Duprey against the Shane Diagnostic

Foundation, the two Shanes, and Dr. Harrison. The basic theory of the suit is that on December 8, 1947, the respondent received injuries to her neck and body while working at her employment; that thereafter she was treated by her fellow employee Dr. Harrison, and by her employer, Dr. Shane; that such treatments were negligently administered, resulting in a new and further disability, for which damages are sought. The basic defense on this appeal is that the superior court had no jurisdiction of the appellants, or of the subject matter of the action, because, so it is claimed, the injury arose in the course and scope of the employment, and the Industrial Accident Commission has exclusive jurisdiction. Admittedly, the commission has made an award to respondent, and it is claimed that this award is *res judicata* of all of the issues in this action. The trial court overruled demurrers, objections to the introduction of evidence, motions for nonsuit and for a directed verdict and other motions, all raising this basic question of jurisdiction. The jury brought in a verdict for \$19,572.40 against the appellants above named, judgment was entered on this verdict, and a motion for a new trial denied.

On this appeal appellants make three basic contentions:

(1) That the Industrial Accident Commission has exclusive jurisdiction over all of the injuries sustained by respondent, and its decision is *res judicata* of all of the issues involved herein;

(2) That, as a matter of law, the evidence is insufficient to sustain the judgment against Dr. Harrison. The other defendants do not urge the insufficiency of the evidence to show negligence;

(3) That the judgment is demonstrably excessive in the amount of \$2,351.81.

#### The Facts Most Favorable to Respondent.

[1] It was stipulated that Helen and Dr. Shane were partners doing business as The Shane Diagnostic Foundation; that Dr. Harrison was employed as a chiropractor by this partnership and was such during the week of December 8 to 15, 1947; that respondent was an employee of the partnership on December 8, 1947, and that she was

paid her wages for the week of December 8th to the 15th, and tried to work during that period.

On December 8, 1947, it is admitted that respondent was injured in an accident arising out of her employment. On that day, as a practical nurse and in the course and scope of her duties, she was giving therapy to a patient. The patient, in moving around in the course of the treatment, started to roll off the treatment table. Respondent, who was standing on the opposite side of the table from which the patient was falling, grabbed the patient in order to break the fall. The patient grabbed respondent by her hands and the lower part of her arms, and thus the patient was eased to the floor. The respondent was pulled across the table with a "terrific yank" to her shoulder. No injury to her neck was then received, according to respondent.

A short time after this incident respondent began to suffer pain in her right arm and shoulder, and her head began to ache. She spoke to Dr. Harrison about her pains, and, according to her testimony, he told her that headaches were his specialty and to come into his office and he would fix it up. This all occurred on the afternoon of December 8th. Dr. Harrison gave her what is referred to as a "Palmer adjustment," that is, the application of pressure to the neck while the patient is reclining. Respondent testified that this treatment was suggested by Dr. Harrison and consented to by her, and that Dr. Harrison gave her this same treatment several times that afternoon, after asking respondent if she were better, and receiving a negative reply.

Dr. Harrison's testimony is not very satisfactory. He stated that he gave respondent a treatment during the morning of December 8th, but he also testified that he "palpated" her back, spine and neck after the accident, on "some" afternoon, and made an examination. On this examination, he stated, he discovered an area of tenderness, normal spastic tissue found in cases of pain, and a soreness and stiffness of the cervical area. He testified that he did not then manipulate or adjust respondent's spine or neck, although he also testified that he "manipulated her or adjusted

her." At any rate, it is admitted that Dr. Harrison did not then or thereafter have any X-rays made, nor did he make a fluoroscopic examination.

Respondent testified that on December 9th, 10th, 11th and 12th Dr. Harrison gave her several chiropractic adjustments and manipulations each day, similar to the treatments of December 8th, that considerable pressure was applied each time, and that such treatments were very painful. Dr. Harrison could not remember giving respondent any treatments on these days. Respondent also testified that the pain increased with each adjustment, that a completely new pain developed in her neck, that she suffered terrible headaches, and that her head began to fall to one side. Other doctors in the office looked at her through a fluoroscope on December 12th, but no X-rays were taken.

Respondent testified that she was treated during part of this period by Dr. Shane. She testified that on December 10th, Dr. Shane gave her a "quick cervical"—a twisting and jerking of the head in the effort to try and snap in anything out of place. Similar treatment was given to her by Dr. Shane on December 11th. No X-rays were taken by Dr. Shane.

Dr. Shane denied that he gave respondent any chiropractic treatments on the days here involved, but testified that he examined her cervical spine on December 12th, but did not then examine the back of her head or her right shoulder. It was his testimony that respondent's head was rigid but erect, and that he could not then make a good examination because of the pain. Dr. Harrison, too, claimed that the reason he had not treated respondent was because of the pain spasm then present. This, he contended, prevented him from ascertaining the nature of the difficulty, although at another place he testified that his examination revealed a "subluxation of the fourth cervical vertebra," which means that that vertebra was out of place. Dr. Harrison testified that such condition requires an adjustment, but that such cannot be done when there is spastic tissue present. Heat and other forms of therapy will relieve the spastic condition. X-rays were not taken

by him because he did not believe that the condition he found required them, and he had no cause to suspect a fracture.

Dr. Shane, who was not particularly active in treating patients, testified that a vertebral fracture could be identified by palpation—finger pressure—but that to ascertain the type and degree, X-rays would be necessary. He thought that it would be bad practice for a chiropractor to treat a fracture.

By December 12th, according to respondent, she could not hold up her head, the entire right side of her body was very painful, and she could hardly use her right arm or walk. On December 13th—a Saturday—she told several of the doctors at her place of employment that she could not stand the pain any longer and believed that X-rays should be taken, and she had X-rays taken that day. Her condition became worse over the week end, and on Monday, December 15th, she consulted a regular physician and surgeon, Dr. Karfiol. This doctor took more X-rays which showed a partial dislocation of the fourth cervical vertebra. He hospitalized respondent on December 18th and kept her in traction for about two weeks, which made the dislocation no longer visible.

This physician testified that he applied traction rather than manipulation because he does not manipulate spines if there is an anatomical injury, that is, a disorder discoverable by X-rays or touch, because manipulation in such cases could be dangerous and cause nerve injuries. Dr. Karfiol's diagnosis of a subluxation was confirmed by Dr. Williams, an X-ray specialist, called in by Dr. Karfiol. A Dr. Brown, physician, examined the X-rays taken up to this point and could find no evidence of a dislocation.

In February of 1948 respondent consulted Dr. Anderson. He hospitalized respondent for about six or seven weeks, applied a Thomas collar to her neck, later a steel brace, and gave her therapy treatments until early 1949. Dr. Anderson testified as to the subluxation of the vertebra. When asked if had formed an opinion as to the probable cause of her condition, he replied



that he had reported to an insurance company that it was his opinion that "as a result of the above described injury, or, as is more likely, the vigorous manipulation subsequent to injury, the patient has a subluxation of her neck at the level of cervical four on five." As late as March of 1950 this doctor ascertained that respondent's posture was still poor, her right shoulder was carried considerably lower than the left, she leaned towards the left and her head was tilted in that direction, turning to the right was restricted 60 per cent, and the other side about 50 per cent. X-rays taken at this time showed that the vertebrae were about normal. Dr. Anderson found no evidence of fracture. He was of the opinion that there was no causal relation between the original injury suffered on December 8, 1947, and the injury which she exhibited while he was caring for her, and he was further of the opinion that "it is highly possible and probable that the conditions that were found \* \* \* could have been caused by the manipulations described." The doctor also gave it as his opinion that "it seems probable that the partial dislocation occurred as a result of the manipulations," and that the epidural bleeding and scarring of the spinal cord shown to exist could have been caused by the manipulations and adjustments of the spine. Counsel for respondent made a prolonged attempt to get an opinion from the doctor as to whether manipulation of the patient under the circumstances was or was not bad practice, and the doctor finally stated that manipulation without further diagnosis was bad practice.

A Dr. Garol, a physician and surgeon, examined respondent in March of 1950. After describing his method of examination and his findings, he concluded that there was extensive scarring of the spinal cord and that respondent had a fractured vertebra. He was definitely of the opinion that the accident of December 8, 1947, could not have caused the dislocation and fracture he later found.

[2] Some of this testimony was contradicted by testimony produced by appellants, but that conflict was for the jury.

Respondent applied for, and received, an award of compensation from the Industrial Accident Commission. The commission found that on December 8, 1947, respondent sustained injury arising out of and occurring in the course of her employment "consisting of a cervical strain," and that such injury had caused temporary total disability from December 12, 1947, to January 11, 1949, and an appropriate award was made for that period and thereafter "until the termination of disability."

### The Jurisdictional Question

[3] The basic arguments of appellants are that the commission had exclusive jurisdiction over all the injuries incurred by respondent, and that its decision is res judicata of the issues in this civil action. The question involved can be stated as follows: Where an employee of a doctor is injured in the course and scope of the employment, and the insured employer treats the industrial injury, and does so negligently, proximately causing a new and further injury and disability, may the employee sue the employer-doctor for malpractice, or has the commission exclusive jurisdiction? It is our conclusion that, when the employing doctor elected to treat the industrial injury, the duties and obligations growing out of the employer-employee relationship terminated, and the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case. As will be pointed out, such third party doctor can be sued for malpractice resulting in an aggravation of an industrial injury, or a new injury. It follows that the employer-doctor may be sued for malpractice when he elects to treat the industrial injury.

[4-7] There can be no doubt, of course, that, so far as the original injury of December 8, 1947, is concerned, the employer being insured, the remedy before the commission is "the exclusive remedy against the employer for the injury". Lab. Code, § 3601; see, also, Lab.Code, § 3600; *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; *Popejoy v. Hannon*, 37 Cal.2d 159, 231 P.2d 484.

It is also true that the finding of the commission that respondent suffered an injury on December 8, 1947, compensable under the Workmen's Compensation Act is res judicata on that issue as against the employer. *Goodman Bros., Inc. v. Superior Court*, 51 Cal.App.2d 297, 124 P.2d 644. It is equally true, and admitted by all here concerned, that, in tort cases generally, when a person is injured by a tortious act and this injury is aggravated by the negligence of the attending physician, such aggravation of the injury is within the scope of the risk created by the original tortious act. *Dodds v. Stellar*, 30 Cal.2d 496, 183 P.2d 658; *Heaton v. Kerlan*, 27 Cal.2d 716, 166 P.2d 857. This rule applies to workmen's compensation cases. Thus, it is clear that, where an employee is injured in an industrial accident, and this original injury is aggravated by the negligence of the attending physician, and the employee seeks recovery for the original injury and for the aggravation from his employer or from his insurance carrier, the Industrial Accident Commission has exclusive jurisdiction to determine this claim against the employer or his carrier. *Smith v. Coleman*, 46 Cal.App.2d 507, 116 P.2d 133. As to these principles, there is no serious disagreement between the parties.

[8] It seems equally clear that, when an employee is injured in an industrial accident, and the attending physician retained by the insurance carrier is negligent and causes a new injury, the employee may not only sue the employer before the commission, but may also sue the doctor for malpractice. The commission has no jurisdiction of that action against the doctor. This result is reached on the theory that a doctor in such cases is a "person other than the employer" within the meaning of section 3852 of the Labor Code which provides, in part, as follows: "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer." The same section gives the employer the right to sue such

third person for reimbursement for expenses incurred by him.

The proper principle is stated as follows in *Hanna "Industrial Accident Commission Practice and Procedure"* at page 103: "The commission lacks jurisdiction over any action for damages by an employee against a physician on account of alleged malpractice in the treatment of an industrial injury. It may grant increased indemnity or additional treatment to the employee when necessitated by mal-treatment on the part of the attending physician, such increased benefits being a part of the employer's liability. But when the employee chooses to seek damages from the doctor directly, jurisdiction is vested in the civil courts, as it is in all actions for negligence." (See, also, *Horovitz "Workmen's Compensation,"* p. 141, and p. 351, fn. 83.)

One of the first cases in this state so holding is *Smith v. Golden State Hospital*, 111 Cal.App. 667, 296 P. 127. That case not only directly held that an action lies in the civil courts against an attending physician by an employee injured by reason of the negligence of the insurance doctor in attending an industrial injury, but also suggested, by dicta, that the employee could not recover from the employer in a compensation case for such aggravation of the injury. As to the first point, which was the only point directly involved in the case, the appellate court, after a review of the authorities, stated, 111 Cal.App. at page 672, 296 P. at page 129: "That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency, and wanton disregard of the professional obligations of medical departments of industry, toward the artisan." The rule of this case, insofar as it held that the injured employee may sue the attending doctor in a malpractice case, has been consistently approved and followed in this state. Cum-

ming v. Auriemma, 7 Cal.App.2d 208, 210, 46 P.2d 209; Steiner v. Goodyear T. & R. Co., 115 Cal.App. 162, 164, 300 P. 980; Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 234, 60 P.2d 276; Smith v. Coleman, 46 Cal.App.2d 507, 513, 116 P.2d 133; Heaton v. Kerlan, 27 Cal.2d 716, 723, 166 P.2d 857. There are cases in other states that have adopted a contrary view, but California has consistently followed the rule as stated. For general annotations on the subject see 82 A.L.R. 932; 139 A.L.R. 1010.

It is true that in *Heaton v. Kerlan*, 27 Cal.2d 716, 166 P.2d 857, the dicta contained in the *Golden State Hospital* case to the effect that the employee could not recover against the insurance carrier in an action before the commission for the aggravation of the original industrial injury caused by malpractice of the attending physician was disapproved. The precise language of the court is, 27 Cal.2d at page 721, 166 P.2d at page 860: "Language in that case that negligence in the treatment of an injury is not within the scope of the risk created by the injury \* \* \* is disapproved." But the court expressly recognized, and its decision is predicated upon the theory, that the employee may sue the attending doctor for malpractice in a civil action—see discussion 27 Cal.2d at pages 722-723, 166 P.2d 857, 860. One of the cases several times expressly approved in the *Heaton* case is *Fitzpatrick v. Fidelity & Casualty Co.*, 7 Cal.2d 230, at page 234, 60 P.2d 276, at page 278, where it is stated: "It is well settled, of course, that a doctor is liable for his own acts and an award to an employee or his dependents against the employer or his insurance carrier does not raise a bar to an action against the doctor for negligence or malpractice." See, also, *Dodds v. Stellar*, 30 Cal.2d 496, 183 P.2d 658.

Thus, it must be accepted as established in this state that an employee injured in an industrial accident may recover in a civil suit against an insurance doctor who aggravates the original injury by negligent treatment, even though the employee has secured an award from the commission against the employer for injury.

[9] It is equally clear, of course, that, if an employee of a doctor goes to that doctor for treatment of a nonindustrial injury, and the doctor is guilty of negligence, the employee may sue his employer for malpractice. That is obvious, because, of course, the commission would have no jurisdiction of such an action.

[10] So far, the principles stated are reasonably clear. Appellants claim, however, that the rule that the employee injured in an industrial accident can sue the attending physician for malpractice only applies when the doctor is a third person, and has no application where the attending physician is also the employer. There seems to be no authority directly in point on this question, but on principle and logic it would seem that it should make no difference to the liability of the doctor for malpractice whether the attending doctor is the employer or an insurance doctor. This fact should not affect the legal rights of the employee. Dr. Shane, it is true, was the employer of respondent. As an employer it was his duty to secure compensation for his employee. That he did. As an employer he was under no obligation to treat respondent personally. Had he sent respondent to the insurance doctor and had that doctor been negligent in treating the industrial injury, that doctor would have been liable for malpractice. There seems to be no logical reason why the employer-doctor, when he undertakes to treat the industrial injury, should not be responsible in a civil action for his negligent acts in treating that injury. Once it is established that an action before the commission for the industrial injury is no bar to an action against the insurance doctor for malpractice, it would seem to follow that the employee does not lose his right to such an action simply because the employer who happens to be a doctor treats the injury. In such event, the employer-doctor is a "person other than the employer" within the meaning of section 3852 of the Labor Code above quoted. In treating the injury Dr. Shane did not do so because of the employer-employee relationship, but did so as an attending doctor, and his relation-



ship to respondent was that of doctor and patient.

Appellants say that such a result can be reached only on the theory that Dr. Shane had a dual legal personality—that is, Dr. Shane the employer, and Dr. Shane the doctor, and contend that the law frowns upon the creation of such dual legal personalities, citing such cases as *Walker v. City & County of San Francisco*, 97 Cal. App.2d 901, 219 P.2d 487, and *Park v. Union Mfg. Co.*, 45 Cal.App.2d 401, 114 P.2d 373. It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore towards his employee two relationships—that of employer and that of a doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic. We conclude, therefore, that an employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor's negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer.

Appellants next argue that the award before the commission compensated respondent for the injuries she now asserts. This same argument was repudiated by the courts of this state in the many cases above cited holding that the injured employee has an action against the insurance doctor for malpractice. The issues in the commission case and the malpractice case, and the items of damage recoverable in each case, are entirely different. *Sonnicksen v. Sonnickson*, 45 Cal.App.2d 46, 58, 113 P.2d 495.

#### Liability of Dr. Harrison.

Dr. Harrison was an employee of Dr. Shane. Most of his arguments are predicated on the theory that Dr. Shane, as employer, is not liable for malpractice and that he, as an employee of Shane should not be liable. Independently of the liability of Dr. Shane, it is hard to see how Dr.

Harrison is in any different position than the insurance company doctor would have been had he been called in to treat respondent. Regardless of this point, however, the holding that Dr. Shane is responsible for his negligent treatment necessarily constitutes a holding that Dr. Harrison is likewise legally responsible for his negligence.

[11] This appellant also argues that the evidence is insufficient, as a matter of law, to show negligence on the part of either Dr. Shane or himself. The evidence has already been reviewed. The evidence clearly supports the implied finding of the jury that respondent suffered a new and further injury by reason of treatments given to her by Drs. Shane and Harrison.

[12] Because the expert evidence is to the effect that these subsequent injuries were the result of the negligence of both Drs. Shane and Harrison, the latter contends that, because he, as an employee, is not responsible for the acts of Dr. Shane, respondents have failed to prove that his negligence was a proximate cause of the injury. Obviously, the jury must have found that Drs. Shane and Harrison were joint tortfeasors. If they were joint tortfeasors, both are liable for the full damage to respondent, at least in the absence of evidence to show facts upon which an apportionment could have been made. The burden of producing such evidence was on the appellants. *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91; *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 218 P.2d 17. None was here produced.

#### Excessive Damages.

No point is made that the general verdict, as to amount, is not supported by the evidence. Appellants do, however, contend that the verdict is demonstrably excessive in the amount of \$2,351.81.

[13] The verdict and judgment were for \$19,572.40 against Dr. Shane, his wife, The Shane Diagnostic Foundation and Dr. Harrison. In addition to proof of general damage, respondent introduced into evidence, over objection, and pursuant to an

amendment to her complaint pleading the amount as special damages, medical bills in the amount of \$3,572.40.

One bill was for \$1,220.59, admittedly paid by respondent, and concerning which there is no complaint, and another for \$2,351.81 paid by the Industrial Indemnity Company, the compensation carrier for Dr. Shane. The trial court instructed the jury that it could consider both bills in any award it might make. In view of the odd amount of the judgment, it may be assumed that the jury included the \$2,351.81 in its verdict. *Nitta v. Haslam*, 138 Cal.App. 736, 747, 33 P.2d 678.

[14, 15] The trial court was correct in instructing that this item could be included in the verdict. Although the Industrial Indemnity Company did not file an independent action against Dr. Shane for the proportion of the amounts paid by it due to the malpractice of Dr. Shane and Dr. Harrison, after judgment it did file a lien for over \$6,200, and later amended this lien to an even larger figure. Included within this claim of lien is the \$2,351.81 item here involved. Such a lien is provided for by section 3850 through section 3862 of the Labor Code (formerly § 26 of the Workmen's Compensation Act) and may be filed any time before satisfaction of judgment. *Jacobsen v. Industrial Accident Commission*, 212 Cal. 440, 448, 299 P. 66; *Dighton v. Martin*, 4 Cal.App.2d 401, 403, 41 P.2d 197. It seems quite clear that, although as between the employee and his

employer and carrier, the malpractice is compensable, insofar as the injury is due to malpractice and not due to the original industrial injury, the carrier can recover from the employer those portions of the amounts paid by it to the employee that are due to the malpractice. Certainly that would be true if the doctor guilty of malpractice were a third person, *Dodds v. Stellar*, 30 Cal.2d 496, 501, 183 P.2d 658; *Heaton v. Kerlan*, 27 Cal.2d 716, 720, 166 P.2d 857, and no different result should follow when it is the employer who is charged with malpractice. The mere fact that it may be difficult to segregate the portion of the payments made by the carrier for the original injury from that portion due to the malpractice does not defeat the carrier's right to its lien. *Jacobsen v. Industrial Accident Commission*, 212 Cal. 440, 448, 299 P. 66.

This being so, the questioned item is clearly recoverable by the employee in this action. Where the employee sues, and the carrier does not join in the action but seasonably files a lien, the employee may recover special damages common to both. In such event, the employee becomes a statutory trustee of that portion of the fund to which it is later determined the carrier is entitled. *Pacific Indemnity Co. v. California, etc., Ltd.*, 29 Cal.App.2d 260, 269, 84 P.2d 313.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

SWIFT et al. v. SUPERIOR COURT, IN  
AND FOR CITY AND COUNTY OF  
SAN FRANCISCO et al. \*

S. F. 18503.

Supreme Court of California, in Bank.

March 7, 1952.

Rehearing Granted April 3, 1952.

Jean Swift, and others, filed a petition for a writ of prohibition against the Superior Court of the State of California, in and for the City and County of San Francisco, Timothy I. Fitzpatrick, Judge thereof, to restrain the Probate Department of the Court from taking any further proceeding on petition for probate of a lost or destroyed will. The Supreme Court, Spence, J., held that Court was limited to the determination of whether a prima facie showing in favor of the validity of the will had been made to warrant submission of the issues to a jury.

Writ granted.

Prior opinion 235 P.2d 624.

1. Wills ⇨302(8)

Proof of due execution and existence of instrument, its fraudulent destruction in lifetime of testator, without his knowledge and its contents or provision, by two credible witnesses, are required for the establishment of an alleged fraudulently destroyed will. Probate Code, §§ 350-352.

2. Wills ⇨288(1)

In will contest, the burden of proving the material allegations of their petition for the consideration and determination of the court rests upon the proponents of the alleged fraudulently destroyed will. Probate Code, §§ 327-329, 350-352.

3. Jury ⇨19(7½)

There is no right to a jury trial in a probate proceeding unless such right is conferred by statute.

4. Wills ⇨277

Where petitioners raised issues as to the existence, fraudulent destruction, and validity of an alleged fraudulently destroyed will, the objections effectively constituted a contest of the probate of the proposed will although such objections were in the form of denials rather than affirmative averments pertaining to matters of compe-

tency of the deceased, fraud or undue influence. Probate Code, §§ 370, 371.

5. Wills ⇨218

Upon filing of contest the offer to prove the purported will was arrested and the probate thereof must await the determination of the contest of the alleged fraudulently destroyed will. Probate Code, §§ 370, 371.

6. Wills ⇨324(1)

Although in connected hearings the matter of preliminary proof of an alleged fraudulent or destroyed will is for the consideration of the court without the intervention of a jury, the question of whether grounds exist for refusing its admission to probate is triable to a jury. Probate Code, §§ 350-352, 370, 371.

7. Jury ⇨19(7½)

Wills ⇨309

Triable issues of fact which were grounds for contest may be joined upon opposition to probate of a will and such issues may be submitted to a jury if demanded. Probate Code, § 371.

8. Wills ⇨309

In proceedings for probate of a will subject to contest, duty of the court was limited to the determination of whether a prima facie showing in favor of the validity of the will had been made to warrant submission of the issues on the contest to a jury. Probate Code, §§ 370, 371.

9. Jury ⇨10

Probate Code provision that issues of fact which are grounds for contest of will must be tried by a jury unless a jury is waived as provided by Code of Civil Procedure is not qualified by the Rules of the Superior Court which provides the procedure to be followed by a party desiring a jury trial where the granting of a jury trial rests in the discretion of the court. Probate Code, § 371; Rules for Superior Courts, rules 6, 18.

Anthony S. Devoto, San Francisco, for petitioners.

Charles R. Collins, San Francisco, for respondent and petitioner Anna Creely.



Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, for Edward I. Creely, Andrew J. Creely and Anita O'Connor.

John Linehan, San Francisco, for certain other real parties in interest.

### SPENCE, Justice.

Petitioners seek a writ of prohibition to restrain the Superior Court of the City and County of San Francisco, sitting without a jury, from taking any further proceedings with regard to the issues raised by their petition for probate of a "lost or destroyed will" and the answers filed in contest thereof. They contend that they have the right to a jury trial for the determination of the disputed issues, and an analysis of the applicable statutory law sustains their position.

On March 21, 1951, petitioners filed a petition for the probate of an alleged fraudulently destroyed will of Thomas R. Creely, deceased. Copy of the document alleged to be the "last will and testament" of the deceased was annexed to the petition. Prob.Code, §§ 350, 351. They claimed that prior to the deceased's death, and without his knowledge or consent, a certain niece stole the will from him and fraudulently destroyed it. The hearing was set for April 12, 1951. Certain heirs at law or next of kin of the deceased filed answers denying the material allegations of the petition and prayed that the purported will be denied probate. On the day first set for the hearing, petitioners made an oral request and also filed a written demand for a jury trial of the issues of fact raised in opposition to the will's probate. On April 26, 1951, the day to which the hearing had been continued, the probate judge refused petitioners' demand and announced his intention to proceed with the hearing without a jury. Thereafter this petition was filed to prohibit him from doing so.

[1,2] The establishment of the alleged fraudulently destroyed will required proof of these facts: (1) due execution and existence of the instrument; (2) its fraudulent destruction in the lifetime of the testator, without his knowledge; and (3) its contents or provisions, by "two credible

witnesses." Prob.Code, § 350; see 26 Cal.Jur. § 330, p. 1056; Estate of Kidder, 57 Cal. 282, 283; Estate of Duffill, 14 Cal. App.2d 284, 286, 58 P.2d 185. The code sections specifically dealing with the probate of a lost or destroyed will, Prob.Code, §§ 350-352, make no mention either directly or indirectly of a jury trial of these issues. Neither do they provide for the giving of any special notice, so that the procedure and notice would be similar to the requirements upon a petition for probate of a produced will. Prob.Code, §§ 327, 328. As proponents of the alleged fraudulently destroyed will, petitioners had the burden of proving the material allegations of their petition for "the consideration and determination of the court". Estate of Relph, 192 Cal. 451, 459, 221 P. 361, 364.

[3,4] There is no right to a jury trial in a probate proceeding unless such right is conferred by statute. Estate of Dolbeer, 153 Cal. 652, 657, 96 P. 266; Estate of Land, 166 Cal. 538, 541, 137 P. 246; Estate of England, 214 Cal. 298, 300, 5 P.2d 428. Here proper parties have appeared and filed their answers in opposition to the probate of the proposed will. Within the contemplation of the law, Prob.Code, § 329, they have raised issues as to (1) the existence of the alleged instrument; (2) its fraudulent destruction, if it ever existed; and (3) its validity, if it ever existed and was fraudulently destroyed. While such objections were in the form of denial rather than affirmative averments (pertaining to matters of competency of the deceased, fraud, undue influence or the like) in opposition to petitioners' claims, they nevertheless effectively constituted a contest of the proposed will upon statutorily recognized grounds. "Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate". Prob.Code, § 370. "On the trial, the contestant is plaintiff and the petitioner is defendant. Any issue of fact involving \* \* \* the due execution and attestation of the will, or *any other question substantially affecting the validity of the will*, must be tried by a jury, unless a jury is waived \* \* \*." Emphasis added;

Prob.Code, § 371. The issues here raised come within the purport of this language.

A similar situation was presented in the case of *Goodale v. Murray*, 227 Iowa 843, 289 N.W. 450, 126 A.L.R. 1121, involving a petition for the probate of a lost will and the procedure to be followed upon its contest. It was argued that "the matter of the contents and all other matters germane to the establishment of the lost will [should] be submitted to a jury, instead of to the court." 289 N.W. at page 452. As a complete answer to such problem of trial procedure, the court at page 456 of 289 N.W. quoted from the case of *Coulter v. Petersen*, 218 Iowa 512, 255 N.W. 684, 686, as follows: "*The question \* \* \* as to the terms of the lost instrument is for the court in the first instance. If the court should find that the proof is insufficient to establish the terms of the lost instrument, the plaintiffs, of course, must fail. If, on the other hand, the court finds that the lost instrument is properly proven and established, then the next question is whether or not the same should be admitted to probate as the last will and testament of the deceased. When this point is reached the matter stands as do all wills when they are offered for probate; that is, the same is subject to contest on any of the recognized grounds of law, and if so contested may be tried to a jury.*" We think this marks out the simplest way of disposition of cases of this character."

The same reasoning was followed in this state in the *Estate of Black*, 199 Cal. 257, 248 P. 1015, in discussing the proper procedure to be adopted in proceedings involving a petition for the probate of a will and objections thereto upon a statutory ground of contest. It was suggested there in 199 Cal. at pages 260, 261, 248 P. at page 1016, that since some of the cases seemed to hold that such situation presented "two separate proceedings", the petition for probate of the will to be tried by the court and the contest to be tried by the jury, the two proceedings were "independent trials of the issues involved." That theory was rejected with the statement that an analysis of the cases shows them to proceed upon the basis that the

"hearing of the petition for the probate of the will is supplementary to, and in aid of, the hearing upon the contest." Observing that "the general rule as to the granting of a motion for a nonsuit" might "well be applied", the court continued at page 262 of 199 Cal., at page 1017 of 248 P.: "Upon the contest of the will the determination of the issues is for the jury, if a jury is demanded. Upon the hearing of the petition for the probate of the will, the determination of the issues is for the court alone. *Estate of Relph*, supra. \* \* \*

"We are satisfied that, upon proceedings for the probate of a will involving both a contest of the will and a petition for probate, the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a *prima facie* case has been established in favor of the validity of the will, sufficient to warrant the submission of the case to a jury.

"Inasmuch as section 1312 of the Code of Civil Procedure [now Prob.Code §§ 370, 371] guarantees to either party litigant the right to a trial by jury upon any of the issues raised by the contest, it seems to us that the issues should be submitted to a jury for its determination, unless there is such a dearth of evidence that the granting of a motion for a nonsuit would be proper."

[5, 6] While the *Estate of Black* did not involve a lost or destroyed will, the same principle of law would apply in distinguishing the procedure appropriate to the matter of its preliminary proof from that pertaining to the trial of the issues of fact raised in contest of its admission to probate. As was aptly said in *McCormick v. Jernigan*, 110 N.C. 406, 14 S.E. 971: "The only difference between the probate of a will which can be produced and one which has been lost is as to the nature and quantity of the evidence required to prove it." Here upon the institution of the contest before probate, the offer to prove the purported will was arrested, and the probate thereof must await the determination

of the contest. See *Estate of Cook*, 205 Cal. 581, 589, 271 P. 1083; *Murray v. Superior Court*, 207 Cal. 381, 385, 278 P. 1033; *Estate of Matthiessen*, 10 Cal.App. 2d 323, 327-328, 52 P.2d 248. While in the connected hearings the matter of preliminary proof of the instrument is for the consideration of the court without the intervention of a jury, the question of whether grounds exist for refusing its admission to probate is triable to a jury. 26 Cal.Jur. § 340, pp. 1076, 1078; 57 Am.Jur. § 989, p. 642; *Goodale v. Murray*, supra, 227 Iowa 843, 289 N.W. 450, 456.

[7] In *Budde v. Superior Court*, 97 Cal.App.2d 615, 218 P.2d 103, it was held that parties filing written opposition to petitions for the appointment of a guardian of the person and estate of an alleged incompetent were entitled to a jury trial. Numerous California cases considering the right to such trial in probate proceedings were reviewed, and it was concluded that the existence of the right depended on whether there was statutory authority for the formation of triable issues of fact in the particular proceeding. *Estate of Perkins*, 21 Cal.2d 561, 566-567, 134 P.2d 231; see, also, *Estate of Smead*, 12 Cal.2d 20, 24-25, 82 P.2d 182; *Estate of Van Deusen*, 30 Cal.2d 285, 292, 182 P.2d 565. As above noted, there is statutory authority for the joinder of triable issues upon opposition to the probate of a will and the submission of such issues to a jury if demanded. Prob.Code, § 371. Cases like *Estate of Bell*, 58 Cal.App.2d 333, 338, 136 P.2d 804, and *Estate of Cazaurang*, 75 Cal.App.2d 217, 226, 170 P.2d 694, denying jury trials in certain specified probate proceedings because there was no express statutory authorization therefor, are not in point.

[8] The foregoing principles are illustrated in *Estate of Carr*, 82 Cal.App.2d 780, 187 P.2d 912, 913. There it was held that where a will contest with request for a jury trial was instituted prior to probate and then before the trial thereof a second and conflicting instrument was offered for probate, the question as to which was the later will was for "the court to decide." Such conclusion was reached because "Sec-

tion 371, Probate Code, prescribes the issues triable by jury" in a will contest before probate and "that question is not among them." 82 Cal.App.2d at page 782, 187 P.2d at page 913. However, it was deemed error for the court, in hearing the petitions for probate of the two wills, to admit one will to probate and reject the other when a contest as to one will triable by a jury was pending and undisposed of. On this point reference is made to the *Estate of Mollenkopf*, 164 Cal. 576, 578, 129 P. 997, where it was said: "It is not disputed that if the written opposition was properly served on petitioner's attorney, and was not filed too late to entitle it to be considered, it was a bar to the admission of the alleged will to probate until disposed of in the manner provided by law. Such disposition involved an opportunity to those interested in the will to answer the opposition, and a trial of the issues thus made, by a jury if either party so requested." In further clarification of the point, the court in the *Estate of Carr* also cites and quotes the above language from the *Estate of Black*, 199 Cal. 257, 262, 248 P. 1015, recognizing the dual nature of proceedings for the probate of a will subject to contest, both inextricably bound together to reach a proper solution of the problem, with the court's duty limited to the determination of whether a prima facie showing in favor of the validity of the will has been made to warrant submission of the issues on contest to a jury.

[9] Question is also raised here as to the propriety of petitioners' demand for a jury trial because of an asserted failure to comply with the Rules for the Superior Court. 33 Cal.2d 1. Reference is made to Rule 6, providing for a memorandum to set civil cases, and Rule 18, regulating the procedure to be followed by a party desiring a jury trial "where the right thereto is not guaranteed by law"—in other words, where the granting of a jury trial rests in the discretion of the court. See 57 Am.Jur. § 926, p. 609. Neither situation is presented here. While the record is not before us, cf. *Estate of Cone*, 35 Cal.App.2d 226, 228, 95 P.2d 183, it is not disputed that on the day first set for hearing the petition for probate of the alleged fraudulently destroyed will



and following the filing of the objections thereto, petitioners made both an oral and a written demand for a jury trial. In view of the provision in section 371 of the Probate Code that the issues of fact therein mentioned as grounds for contest "must be tried by a jury, unless a jury is waived as provided by the Code of Civil Procedure", it follows that the above-mentioned Rules 6 and 18 do not apply in qualification of this mandate of the law.

It is ordered that a peremptory writ issue, prohibiting the probate court from proceeding with the hearing of the disputed issues in contest of the probate of the will otherwise than by jury trial, in conformity with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



38 Cal.2d 565

**PEOPLE v. APARICIO.**

Cr. 5250.

Supreme Court of California, in Bank.

March 11, 1952.

Homicide prosecution wherein the Superior Court, Orange County, Kenneth E. Morrison, J., rendered judgment imposing the death penalty for first degree murder, and defendant appealed from the judgment and from order denying motion for new trial. The Supreme Court, Shenk, J., held that the actions of defendant during all of the proceedings had cast a grave "doubt" on his "sanity," within the meaning of the Penal Code section requiring a separate determination of a defendant's sanity, and that the ends of justice would best be served by a new trial.

Judgment and order reversed.

**1. Criminal Law** ¶625

The "sanity" contemplated by code section providing for determination of question as to defendant's "sanity" at time of trial is tested by appraising present ability

of defendant to so understand nature and purpose of proceeding taken against him as to be able to conduct his own defense in rational manner. Pen.Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Sanity".

**2. Criminal Law** ¶625

A strong showing is required before abuse of discretion is deemed to result from failure of trial court to order separate determination of defendant's sanity at time of trial. Pen.Code, § 1368.

**3. Criminal Law** ¶625

In Penal Code section requiring separate trial on issue of sanity if a "doubt" arises as to sanity of defendant at time of trial, the "doubt" mentioned is one that must arise in mind of trial judge, rather than in mind of counsel for defendant or in that of any third person, and determination of motion for hearing upon issue of defendant's sanity is one which rests with in sound discretion of trial court, and trial judge must always be allowed wide latitude. Pen.Code, § 1368.

**4. Criminal Law** ¶625

Even testimony of experts as to insanity in general sense is not sufficient to create doubt requiring separate trial on issue of insanity of defendant at time of trial insofar as that testimony does not relate to defendant's ability to conduct his own defense. Pen.Code, § 1368.

**5. Criminal Law** ¶625, 1166(1)

When doubt of defendant's sanity at time of trial, as contemplated by statute providing for separate trial on issue of insanity, appears on face of record as matter of law, abuse of discretion is shown and failure to order determination of question of sanity results in miscarriage of justice and requires reversal. Pen.Code, § 1368.

**6. Criminal Law** ¶625

The failure of defendant, at time he was trying his own case, to plead that he was then "insane," within meaning of Penal Code section providing for separate trial on issue of sanity, was not controlling on issue as to whether judge abused his discretion in failing to order separate trial of

defendant's sanity, since duty imposed upon trial judge by statute is not conditioned on motion in reliance on code provision. Pen. Code, § 1368.

#### 7. Criminal Law ⚖️625

Determination of jury, in homicide prosecution, that defendant was sane, so as to be legally responsible for crime he had committed, did not settle question as to whether "doubt" should have arisen at time of trial as to defendant's sanity, within meaning of Penal Code section providing for separate determination of sanity of defendant at time of trial. Pen.Code, § 1368.

#### 8. Criminal Law ⚖️625

In homicide prosecution, defendant's actions during all proceedings cast grave "doubt" on his "sanity" within meaning of code section requiring judge to order separate determination on issue of sanity of defendant at time of trial. Pen.Code, § 1368.

#### 9. Criminal Law ⚖️1189

Where it appeared, on appeal from homicide conviction, that a separate determination should have been had on the issue of defendant's sanity at time of trial, ends of justice would best be served by a new trial. Pen.Code, § 1368.

---

James C. Monroe and George H. Chula, Santa Ana, for appellant.

Frank Richards, Deputy Atty. Gen., for re-Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was charged with the murder of Santana Acosta on April 16, 1951. Since he claimed to be unable to understand English an interpreter was appointed. The defendant pleaded not guilty and not guilty by reason of insanity. He refused to engage an attorney or to have one appointed by the court to represent him. The court directed the public defender to assist him as *amicus curiæ*. He was found guilty of first degree murder without recommendation but the jury was unable to

agree as to whether he was sane at the time the crime was committed. A second jury, in proceedings presided over by the same trial judge, found that he was sane at that time. A motion for a new trial was denied. The appeal is from a judgment imposing the death penalty and from an order denying the motion for a new trial.

The defendant and the deceased, friends of long standing, were alone in the defendant's house on the afternoon of the homicide. According to the defendant each had had about five drinks of wine when his companion inquired about "papers" which dealt with the defendant's ownership of certain real property and stated that they were needed by a Mr. Carillo. The defendant then mentioned Mr. Carillo as one engaged in a conspiracy to deprive him of his land and as one who had previously sent spies to the premises and had "used gas" around the house. He testified that after the decedent had made the inquiry about the "papers" the latter swung at him, cutting his hand. The defendant admitted that he then struck the decedent causing him to fall to the floor and that he hit him with a hatchet as he sought to rise. The defendant himself called the police who found the victim still alive but badly beaten and arranged for his transportation to the hospital where he passed away.

When asked at the trial if he had intended to kill the deceased the defendant simply replied, "I only tried to make my defense. What if he had killed me." Although he denied remembering how many times he struck the victim, he admitted that he knew what he was doing each time he hit him.

On appeal the defendant is represented by counsel. They make numerous contentions. The principal one, for the purposes of the appeal, is that the trial court should have ordered a determination of the sanity of the defendant at the time of the trial as provided by Penal Code section 1368. That section provides: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined

by \* \* \* the court without a jury, or with a jury, if a trial by jury is demanded \* \* \*.”

[1-5] The sanity contemplated by the code section is tested by appraising the present ability of the defendant to so understand the nature and purpose of the proceedings taken against him as to be able to conduct his own defense in a rational manner. *People v. Perry*, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123; *In re Buchanan*, 129 Cal. 330, 334, 61 P. 1120, 50 L.R.A. 378; *People v. West*, 25 Cal.App. 369, 143 P. 793; see also 3 A.L.R. 94. A strong showing is required before an abuse of discretion is deemed to result from the failure of the trial court to order a determination of present sanity. It was said in *People v. Lindley*, 26 Cal.2d 780, at page 789, 161 P.2d 227, at page 232: “The ‘doubt’ mentioned is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person (*People v. Perry* [supra], 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123, and cases there cited), and the determination of a motion for a hearing upon the issue of a defendant’s sanity at the time of trial is one which rests within the sound discretion of the court. Necessarily, an appellate court cannot measure to a nicety the basis for the ruling, and the trial judge must always be allowed a wide latitude. (Citing cases.) \* \* \*” Even the testimony of experts as to insanity in a general sense is not sufficient to create a doubt insofar as that testimony does not relate to the defendant’s ability to conduct his own defense. *People v. Darling*, 107 Cal.App.2d 635, 237 P.2d 691; see also, *People v. Huntoon*, 41 Cal.App. 392, 182 P. 776. However, when a doubt of the defendant’s sanity at the time of the trial as contemplated by the statute appears on the face of the record as a matter of law, an abuse of discretion is shown and the failure to order a determination of the question of sanity results in a miscarriage of justice and a reversal is required. *People v. Vester*, 135 Cal.App. 223, 26 P.2d 685; *People v. West*, supra, 25 Cal.App. 369, 143 P. 793. :

[6] The failure of the defendant at the time he was trying his own case to plead that he was then insane within the meaning of the section is not controlling. The duty imposed upon the trial judge by the statute is not conditioned on a motion in reliance on the code provision. In *People v. Ah Ying*, 42 Cal. 18, this court stated at page 21: “There is no plea of present insanity required. If at any time a doubt arose as to the sanity of the defendant, it was the duty of the Court, of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined. Common humanity requires that one should not be tried for his life while insane, and counsel for the defendant cannot waive such inquiry when the doubt exists; nor can he, by interposing such a plea, compel the Court to enter upon such inquiry where no ground for such doubt exists.” See also *People v. Lee Fook*, 85 Cal. 300, 303, 24 P. 654. No plea was necessary. *People v. Vester*, supra, 135 Cal.App. 223, 233, 26 P.2d 685.

Defendant’s conduct at the time of the trial held on his plea of not guilty is claimed to have indicated a lack of sanity within the meaning of section 1368. At the opening session he announced, “I feel that I want to have this case transferred to the Superior Court in Sacramento because I feel this is a case of the Federal Court because my case is not being heard here, my case is not being fair.” He declared that he would not say anything until this transfer was secured. He refused to confer with the public defender. He declared that the prosecution and the court were doing everything possible to punish him in order to “extricate” him from his property. The public defender informed the court that he believed that the defendant was “incompetent.” The prosecutor himself suggested that “from a long and personal knowledge of the defendant and his previous difficulties” a plea of not guilty by reason of insanity should be entered for him. This was done with the result on the second trial of that plea as above stated.



[7] Evidence received during the second trial of the insanity plea is more suggestive of the "doubt" contemplated by section 1368. The testimony of various psychiatrists, one of whom was on the staff of the state mental institution to which the defendant had theretofore been committed several times, dealt principally with the defendant's sanity in the sense of his ability to distinguish right from wrong at the time of the homicide rather than in the sense of his present ability to conduct his own defense. The jury's verdict resolved the question whether the evidence indicated that the defendant was sane so as to be legally responsible for the crime he had committed. But such a determination did not settle the question whether a doubt should have arisen at the time of the trial as to his sanity within the meaning of section 1368. But see *People v. Sloper*, 198 Cal. 238, 251, 244 P. 362. The psychiatrists testified as to the defendant's mental condition as it appeared to them upon their examinations conducted during the month prior to this trial. One stated that the defendant was suffering from delusions of persecution and hallucinations; another stated that he was "paranoid and delusional"; while a third described him as possibly psychotic from a psychiatric point of view even though he was not legally insane.

Witnesses testified as to previous instances of irrational conduct on the part of the defendant which took the form of expressions of fear of a plot to secure his land and statements that he "heard voices." One witness testified that the defendant had run water into the ground underneath his own house saying that he did so in order to drown spies participating in the plot to secure his land.

The defendant continued to seek a transfer of the case, expressed the belief that he was not getting a fair trial, declared that the proceedings were simply designed to secure his property, addressed garbled questions to the witnesses, and tended to defeat his case by taking the position that he was perfectly sane.

[8,9] The evidence reveals a continuous course of irrational conduct upon the

part of the defendant. His actions during all of the proceedings cast grave doubt on his sanity within the meaning of section 1368. While it is a delicate matter for a court on review to hold that a trial court has abused its discretion in not ordering a determination of sanity as contemplated by the code section, it is concluded that on this record the ends of justice will best be served by a new trial. No other points require discussion.

The judgment and the order denying the motion for a new trial are reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



38 Cal.2d 556

**PEOPLE v. MARTINEZ.**

**Cr. 5276.**

Supreme Court of California, in Bank.

March 7, 1952.

The defendant was convicted in the Superior Court of Tulare County, Frederick E. Stone, J., of first degree murder, and defendant appealed. The Supreme Court, Traynor, J., held that evidence was sufficient to sustain conviction either on theory of premeditation or on theory that murder was perpetrated by means of torture.

Affirmed.

**1. Homicide ☞253(3, 4)**

Evidence was sufficient to sustain first degree murder conviction either on theory of premeditation, or on theory that homicide was perpetrated by means of torture. Pen.Code, § 189.

**2. Homicide ☞22(2)**

A homicide is murder of the first degree when the accused, as result of deliberation and premeditation, intended to take

unlawfully the life of another. Pen.Code, § 189.

### 3. Homicide ☞22(1)

Murder is perpetrated by means of "torture" when intent of accused was to cause cruel suffering on the part of the object of the attack, either for purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. Pen. Code, § 189.

See publication Words and Phrases, for other judicial constructions and definitions of "Torture".

### 4. Homicide ☞180

In murder prosecution, wherein defendant admitted that he committed the homicide, but contended that he did not have the capacity, by reason of intoxication or insanity, to form intent necessary for first degree murder, court properly refused to permit defendant's counsel to ask physician, who was an expert on the effect of alcohol, if defendant's mind "functioned normally", if at time of homicide he had 2.3 or 2.35 milligrams of alcohol per cubic centimeter of blood, since a negative answer, favorable to defendant, would not be directed to the issues of the trial. Pen. Code, § 189.

### 5. Criminal Law ☞474

In murder prosecution, wherein defendant admitted that he committed the homicide, but contended that he did not have the capacity, by reason of intoxication or insanity, to form intent necessary for first degree murder, defendant's counsel could properly have asked physician, who was an expert on the effects of alcohol, whether a man whose blood had an alcoholic content of 2.35 milligrams per cubic centimeter, could understand that the actions he contemplated would culminate in the wrongful death of another human being. Pen.Code, § 189.

### 6. Criminal Law ☞671

Trial court could call attention of defendant's counsel to rule of law in the presence of the jury, when the rule was not being followed, since trial court has duty to instruct jury on questions of law at the end of the case.

Robert H. Haden, Public Defender, County of Tulare, and Ben Curry, Jr., Visalia, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant Aurelio Martinez was charged by information with the murder of his wife, Hope Martinez. He pleaded not guilty and not guilty by reason of insanity. A jury returned a verdict of guilty of murder of the first degree without recommendation and found that defendant was sane at the time of commission of the offense. Defendant's motion for a new trial was denied and he was sentenced to death. The appeal to this court is automatic. Penal Code, § 1239.

Defendant was 37 years old at the time of the homicide. He and his wife Hope had seven children. During the marriage he had many quarrels with Hope, and with her mother and stepfather with whom they resided in Tulare. Defendant threatened Hope, cursed her, and, on at least one occasion, beat her. On May 2, 1951, after a long argument with Hope and her mother, defendant moved out of the house. His mother-in-law had him arrested about this time but the judge released him after warning him to stay away from the house where Hope lived.

Thereafter, until the time of the killing, defendant lived alone in a house owned by his brother. He gave Hope about \$40 a week from his earnings to support herself and the children and kept about \$20 for himself. Hope made a lunch for him each day to take to work and did his laundry. About two weeks before the homicide defendant told a friend that some day "he was going to do something bad" to her.

On August 2, 1951, defendant and Hope quarreled again. He had come home from work and had no cigarettes or money. He asked Hope, who was on her way to the grocery store, to buy him a package of cigarettes. She refused, saying that she needed the money for milk for the baby and for doctor's bills. Defendant felt ag-

grieved that out of the \$40 he had given her that week she refused to give him fifteen cents for cigarettes. In the ensuing argument Hope said that she would no longer make defendant's lunch. A woman at the store said that "now somebody is going to see who is going to be the boss." It irritated defendant that three or four of defendant's friends overheard this remark. He cursed his wife and left. Later that day he borrowed money from a friend and bought a fifth of a gallon of wine. He returned to his room and drank the wine. He arose during the night, obtained a butcher knife and went to Hope's house with the intention, he testified, of "scaring" her. When he entered her bedroom, she screamed and aroused the house. In the excitement her hand was cut by the knife and defendant ran out of the house.

The next morning defendant walked over to Hope's house and found that she had not left any lunch for him on the porch. He told the driver of the car who stopped by to take him to work, that he was staying home that day because he had "a little family trouble." He idled about town during the morning. He telephoned Hope, but she told him that she did not want him to bother her and hung up. Defendant drank two or three bottles of beer and bought a fifth of a gallon of wine. He returned to his room, lay in bed, and drank nearly all the wine.

Later in the day defendant's niece and another young girl looked in the bedroom window at defendant. He became enraged and rushed out to argue with the girls' parents. During this argument defendant was informed that the police were looking for him, since Hope had signed a complaint against him because of the knife incident. Defendant subsequently told an investigator that at that moment he made up his mind to "destroy" Hope.

Defendant left his room for the Montelano Store, a few blocks away. En route he picked up an empty lard can. When he approached the store he saw his sister-in-law Molly enter and followed her into the store. It was Molly's intention to call Hope to warn her to avoid defendant.

Upon discovering that he was following her, she became frightened and left without calling Hope. After Molly left, defendant also left and went to the Morales Grocery Store. At the pump in front of the store he purchased enough gasoline to fill the lard can. He then walked over to Hope's house, carrying the can of gasoline, a small box of matches, and a stick.

When he entered the back door, his sister-in-law Jessie was calling the police because she had heard that defendant was coming for Hope. The occupants of the house were thrown into a panic. Hope ran out the front door as he came running through the kitchen. He followed her through the house, knocking Jessie down and spilling gasoline on a young girl who was in his way. He shouted in Spanish, "Hope, don't run, because any way I am going to destroy you." As Hope ran through the yard she stumbled over some corrugated metal and fell. Defendant was beside her in a moment and threw the gasoline over her. A woman neighbor who had come to the scene on hearing Hope's screams shouted twice, "Don't burn her up." Defendant ignored her. He struck one match, which failed to ignite. He lit a second match and threw it on Hope's gasoline-drenched body. She caught on fire and at the same time the gasoline remaining in the can ignited, and defendant's clothes caught on fire. The neighbor who had attempted to stop defendant was slightly burned.

A witness who had been attracted by Hope's screams and was watching the scene in horror snatched a blanket from his car and threw it over Hope as she arose and started to run in flames. With the aid of other witnesses, the flames were extinguished with the blanket and dirt. Meanwhile, another passerby dragged a hose from a nearby house towards Hope. Defendant ran to the faucet, disconnected the hose, and got under the faucet to put out the fire on his own clothes. He made no effort to give Hope assistance. When the police arrived, Hope's relatives were beating defendant with sticks.

Hope was rushed to a hospital. Between seventy and eighty percent of her body was



covered with second and third degree burns. She died three days later. The doctor in attendance testified that the burns were the direct cause of her death.

Many witnesses testified to these events. Defendant testified in his own behalf and agreed in all material matters with the witnesses for the prosecution. When questioned on cross-examination concerning his state of mind preceding the slaying, defendant stated that when he purchased the gasoline, "Well, I guess I just went up to see if I could burn myself and burn her too. But I don't know just—my mind was—I was just out of my mind." During his testimony defendant recalled all the events during the pursuit of his victim, the throwing of the gasoline, the striking of the two matches, and the burning of Hope and himself. His ability to remember details is significant in view of the contention that he was too drunk to premeditate the killing.

[1] The first question presented is whether the evidence is sufficient to support a conviction of murder in the first degree. The instructions authorized the jury to return a verdict of first degree murder on one or both of two theories: the murder was willful, deliberate, and premeditated, or it was perpetrated by means of torture.<sup>1</sup> There is substantial evidence to support both theories.

[2] A homicide is murder of the first degree when the accused, as the result of deliberation and premeditation, intended to take unlawfully the life of another. Pen. Code, § 189; *People v. Bender*, 27 Cal.2d 164, 178, 163 P.2d 8. There is ample evidence of deliberation and premeditation here. Defendant had long had difficulties with his wife. He announced that some day he would "do something bad" to her. On the night before the homicide he threatened her with a deadly weapon. On the day of the killing he remained home from work brooding over his troubles. His acts following his discovery that his wife had signed a complaint against him show a fixed intent to kill her. His picking up the empty

can, maneuvering to prevent his sister-in-law from warning his wife, filling the can with gasoline, proceeding directly to his victim's house, pursuing her despite her frantic efforts to escape, covering her with gasoline, striking a second match after the first failed to ignite, and his failing to aid in rescue attempts and actively hindering those attempts by disconnecting the hose, were all acts of deliberation that the jury could reasonably conclude were done pursuant to a premeditated plan to kill his wife.

[3] The evidence also supports the theory that the murder was perpetrated by means of torture. Murder is so perpetrated when "the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity." *People v. Tubby*, 34 Cal.2d 72, 77, 207 P.2d 51, 54; *People v. Bender*, 27 Cal.2d 164, 177, 163 P.2d 8. In the present case defendant had previously stated that he intended to "do something bad" to his wife. The jury could reasonably conclude that when defendant set about to burn his wife with gasoline, his intention was to inflict cruel suffering as punishment or revenge on his victim.

The principal contention presented by defendant concerns the trial court's rulings on questions asked by defendant on cross-examination.

After the defendant was taken to the hospital for treatment of his burns, a blood sample was taken by the doctor in attendance, Dr. Eckleson, and given a laboratory analysis. The analysis showed that at about 8 p.m., when the sample was taken, the alcohol content of defendant's blood was about 1.9 milligrams per cubic centimeter. Dr. Neal, director of a laboratory in Visalia, who regularly examined intoxicated persons for the sheriff's office and the California Highway Patrol, testified that the average alcohol destruction in a person is approximately ten percent per hour, which would make the alcohol content in defendant's blood at the time of the killing, about

1. Penal Code Section 189 provides: "All murder which is perpetrated by means of \* \* \* torture \* \* \* or by any Cal.Rep. 241-242 P.2d-7

other kind of willful, deliberate, and premeditated killing \* \* \* is murder of the first degree".

6:30 p.m., approximately 2.3 or 2.35 milligrams per cubic centimeter.

Dr. Eckleson, called as a witness for the defendant, thought that the average person was "drunk" with about 1.5 alcohol content in his blood. On cross-examination he stated that the influence of alcohol on mental and physical faculties differed greatly from one person to another. When asked by the prosecution to apply his theories to the facts of this case, Dr. Eckleson replied that he thought that a person with the alcohol in his blood that defendant had would be able to buy gasoline, pursue another person and drench her with the gasoline, and light the gasoline, but would still be so drunk that he wouldn't "know what he was doing."

In rebuttal the prosecution called Dr. Neal, who had not personally examined defendant or the blood specimen. He testified that a person with 1.9 alcohol content would understand the consequences of his actions and, on cross-examination, that a person with 2.35 alcohol content could tell right from wrong.

[4] Counsel for defendant asked Dr. Neal on cross-examination if the mind of a person with a 2.35 alcohol content could "function normally." The court, in the presence of the jury, discussed the problem at some length and refused to allow the question to be asked.<sup>2</sup> After the jury was excused, the issue was argued by counsel. The court again refused to allow the question and stated that the inquiry must be directed to defendant's ability to form an

intent to commit torture or murder. Counsel for defendant did not show any inclination to pursue the issue of sanity and refused to follow the line of questioning indicated by the court. The witness was excused.

The court's ruling presents the question whether counsel should have been allowed to ask if defendant's mind "functioned normally." In *People v. Wells*, 33 Cal.2d 330, 350, 202 P.2d 53, 65, a majority of this court stated: "It thus appears that on the trial in its first stage, mental capacity to commit the crime, insofar as sanity, but sanity only, is concerned, is conclusively presumed but that the specific mental state (intent or motive) necessary to be proved as a fact in order to establish guilt of the particular crime is not presumed, either conclusively or otherwise. Whenever a particular mental state, such as a specific intent, is by statute made an essential element of a crime, that specific state must be proved like any other fact." Accord, *People v. Letourneau*, 34 Cal.2d 478, 487, 211 P.2d 865; *People v. Danielly*, 33 Cal. 2d 362, 379, 202 P.2d 18. It is contended that under the views expressed in the foregoing cases the court's ruling was erroneous. We have reviewed this contention with care because given defendant's admission that he committed the homicide, his only defense of any substance is that he did not have the capacity, by reason of intoxication or otherwise, to form the intent necessary for first degree murder. The disallowed question was not directed to this defense. Dr. Neal testified as an expert

2. "Haden [counsel for defendant]: And at 2.3 or 2.35, Doctor, his mental ability would be considerably impaired, I take it?"

"Dr. Neal: His mental ability would be further impaired, but it is my opinion that his judgment would not be so impaired that he could not tell right from wrong."

"Haden: That isn't the proposition here, Doctor. This isn't a matter of sanity. This is a matter of whether or not his mind could function normally. Do you feel his mind could function normally?"

"The Court: That isn't the question. That is misstating the proposition. The question is whether his mind would be so affected by the alcohol that he couldn't

form the intent to commit the act. If the — the jury will have to determine whether or not because of the alcohol he is alleged to have consumed he would be incapable to form the intent to commit torture. That is one thing. And also whether he would be able to premeditate, to commit the murder with premeditation. And the question is not whether he was sane or insane, not whether his mind functioned properly, but whether his mind under those conditions was such that he could form the intent to commit either of those two acts."

"Haden: Your Honor, I wonder if you would ask that the jury be excused, please."

on the effect of alcohol on a person's mental and physical capacities. The question whether a person with a 2.35 alcohol content could "function normally" was directed only to the effect of intoxication, in the obvious hope that the witness would answer in the negative. But a negative answer, favorable to the accused, would not be directed to the issues of the trial. The question before the jury was whether defendant had the capacity to form the specific intent essential to first degree murder. A person with the alcohol in his blood defendant had, will not ordinarily "function normally" but it does not follow that he could not commit first degree murder. As defense counsel undoubtedly realized, the jury would not necessarily take this distinction into consideration. Faced with a hostile witness, counsel understandably wished to protect his client's interests by asking his questions in a general rather than a specific manner. The vice of the question is that it was designed to elicit an answer that could be misinterpreted by the jury.

This case is not one in which the trial court foreclosed inquiry into the mental condition of the defendant. The court at all times expressed willingness to allow counsel to pursue the matter further if he would rephrase his question. Under these circumstances his refusal to allow the question as presented by counsel was not error.

[5] Defendant points out that in ruling that the question must be rephrased, the court limited the inquiry to defendant's capacity to form the specific intent essential to first degree murder. He then contends that the suggested line of approach was improper, on the theory that an expert witness could not express an opinion on the state of defendant's mind. Defendant's argument is based on the erroneous assumption that an expert cannot be asked a ques-

tion that coincides with the ultimate issue in the case. *People v. Wilson*, 25 Cal.2d 341, 349, 153 P.2d 720; *State v. Romo*, 66 Ariz. 174, 184, 185 P.2d 757; 7 Wigmore, Evidence [3d ed.], § 1921; see cases collected in 78 A.L.R. 755; 20 Am.Jur. 653. Counsel could properly have asked Dr. Neal whether a man whose blood had a 2.35 alcohol content could understand that the actions he contemplated would culminate in the wrongful death of another human being.

[6] Defendant also attacks the ruling of the trial court on the ground that the discussion in the presence of the jury was prejudicial. At the request of defendant's counsel the jury was instructed to disregard the statements of the court, and he assured the court that the admonition cured any error. In any event, since a trial court has the duty to instruct the jury on questions of law at the end of the case, it can call counsel's attention to a rule of law in the presence of the jury, when the rule is not being followed. *People v. Vukich*, 201 Cal. 290, 298, 257 P. 46. "The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered. It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed in so far as it may be, within the established rules of evidence." *People v. Mendez*, 193 Cal. 39, 46, 223 P. 65, 68; *People v. Ottey*, 5 Cal.2d 714, 721, 56 P.2d 193; 3 Wigmore, Evidence [3d ed.], § 784.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 499

**HOSTETTER v. ALDERSON**, Chief Engineer & Gen. Manager of Department of Fire, City of Los Angeles et al.

L. A. 21634.

Supreme Court of California, in Bank.

March 3, 1952.

Rehearing Denied March 31, 1952.

Action by Homer J. Hostetter against John H. Alderson, chief engineer and general manager of the Department of Fire of the City of Los Angeles, and another for declaratory relief. The Superior Court, Los Angeles County, Charles A. Paulsen, J., entered a judgment for defendants and plaintiff appealed. The Supreme Court, Edmonds, J., held that the physical disability of plaintiff to perform his duties was sufficient cause for dismissal.

Affirmed.

Carter and Shenk, JJ., dissented.

Prior opinion 234 P.2d 229.

**1. Administrative Law and Procedure** ⇨657  
**Declaratory Judgment** ⇨201

An action for declaratory relief is not appropriate for review of an administrative order.

**2. Mandamus** ⇨1

In action by dismissed fireman against head of fire department and municipality for declaratory relief, whereby plaintiff sought restoration to his position with full pay from date of removal, complaint could be regarded as petition for writ of mandate.

**3. Municipal Corporations** ⇨198(3)

Charge against fireman, who was dismissed following hearing before board of rights, that clearly and concisely stated that fireman lacked physical ability to perform properly his duties, despite grammatical weaknesses, was sufficiently specific to permit accused to identify the transaction, understand nature of alleged offense, and prepare and present his defense.

**4. Municipal Corporations** ⇨198(2)

Physical disability resulting from illness not incurred in line of duty is "sufficient cause" for dismissal from fire department under municipal charter provision that no officer or employer may be removed from service of department except for good and sufficient cause shown upon finding of

guilty of specific charge or charges assigned after proper hearing before board of rights.

See publication Words and Phrases, for other judicial constructions and definitions of "Sufficient Cause".

**5. Municipal Corporations** ⇨198(3)

In action by dismissed fireman against head of fire department and municipality for declaratory relief, whereby plaintiff sought restoration to his position, record was insufficient to sustain claim that fireman was found guilty of charge of physical inability to perform duties solely upon hearsay evidence.

George E. Cryer, R. Alston Jones, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams, John F. Feldmeier, Deputies all of Los Angeles, for respondents.

EDMONDS, Justice.

Homer J. Hostetter was removed from his position as a fireman of the City of Los Angeles following a hearing before the Board of Rights. He then filed in the superior court a complaint for declaratory relief. Upon a trial, judgment was entered against him upon the ground that he was legally discharged. His appeal is from that judgment.

[1,2] Hostetter's complaint names as defendants the City of Los Angeles and John H. Alderson, Chief Engineer and General Manager of its fire department. The relief demanded is restoration to his position with full pay from the date of his removal. An action for declaratory relief is not appropriate for review of an administrative order. See Tenth Biennial Report of the Judicial Council of California, 137. However, the complaint may be regarded as a petition for a writ of mandate. See *Boren v. State Personnel Board*, 37 Cal.2d 634, 637, 638, 234 P.2d 981.

Hostetter alleges that Alderson issued an order temporarily relieving him from duty pending a hearing and decision by the Board of Rights on charges preferred under section 135 of the Charter of the City

of Los Angeles. The charges, as set forth in the order served upon Hostetter, are: "For your physical inability to properly perform the duties required of all uniformed personnel, at the expiration of your vacation \* \* \* as provided in section 132 of the Rules and Regulations governing the department, such inability caused by illness incurred not in line of duty as determined by competent medical authority after thorough examination."

Other allegations of the complaint are that at the Board of Rights hearing only hearsay evidence was introduced as to his physical ability. Following the hearing, the board found him "guilty" and fixed the "penalty" to be imposed as "removal" from his position. Later, certain claims and demands for compensation and reinstatement and a request for rehearing by the board were filed. In conclusion, Hostetter asserts that a controversy exists as to the validity and effect of the proceedings against him.

In their answer, Alderson and the city state that Hostetter was present in person and represented by counsel of his own choosing at the board hearing and that he admitted his guilt of the charges filed against him. There was no objection to any of the evidence offered or received and Hostetter introduced evidence on his own behalf.

The record of the board hearing shows that Hostetter was present with counsel. Offered the opportunity of pleading guilty or not guilty, he replied: "Gentlemen, as the service demands fire duty, my answer is guilty, however if the service demands other duties my answer is not guilty and I would like my representative to explain this more fully." His counsel then elaborated, saying, "\* \* \* yes the boy is guilty as charged in the Rules and Regulations read by you in which it says it may demand the duties of him as a part of the Fire Department \* \* \* I would like at this time to enter a plea of guilty to the charges and ask for a suspension from the department of six months, at the expiration of such time he will have to submit to a complete medical examination \* \* \*

if he is found capable of performing fire duty he will be restored at that time".

In effect, Hostetter's defense at the hearing was that he was too ill to perform full duties; however, he could do light duty and at some future time return to full duty. He introduced into evidence letters from various doctors indicating that improvement in his condition might be expected. The record shows that he had requested, and been denied, an additional leave of absence to recover his health.

It appears that less than two weeks after completing his period of probation and becoming a fireman, Hostetter was discovered to be suffering from hyperthyroidism. Since that time, he has been absent from duty 154 days. He received repeated leaves and vacations to permit him to attempt to recover his health. He was advised by his superiors to seek employment better suited to his physical condition and to resign from the force. Numerous records, reports and letters were introduced indicating Hostetter's unfitness for duty, the leaves which had been accorded him, and the treatment which he had received. One of his superiors testified that, during the period Hostetter was on active duty, he was a good fireman. In determining "the proper penalty to be prescribed", the board examined his personal file in his presence.

Following a trial before the court without a jury, the superior court rendered a declaratory judgment denying Hostetter any relief and holding that he had been legally discharged from his position for good and sufficient cause upon a fair and regular hearing.

Hostetter contends that the Board of Rights was without jurisdiction to proceed with the hearing because the complaint does not state a charge against him under section 135 of the city charter. He claims first that the complaint does not contain a statement in clear and concise language of all the facts constituting the charge, and second, that physical disability is not a ground for dismissal within the meaning of the charter section. The other points

relied upon are that he was not afforded a fair and impartial hearing and that he was convicted solely on hearsay evidence.

[3] Hostetter's first objection is to the grammatical construction of the charge filed against him. He contends that it is not a complete sentence, but a mere series of phrases not constituting a charge of any kind. However, despite grammatical weakness, the charge clearly and concisely states that Hostetter does not have the physical ability properly to perform his duties. It is sufficiently specific to permit the accused to identify the transaction, understand the nature of the alleged offense, and prepare and present his defense. *Gipner v. State Civil Service Comm.*, 13 Cal.App.2d 100, 107, 56 P.2d 535. It was not necessary to plead the facts concerning his illness, its nature, cause, and duration. The decisive question is whether the charter provides for dismissal because of physical difficulties.

Hostetter contends that physical disability is not a sufficient cause for removal under section 135 of the Charter of the City of Los Angeles. His position is that this section is intended to provide a means of disciplinary action for an *offense* committed by a fireman, and that physical illness cannot be properly described as misconduct. He relies upon specific wording in the charter as tending to support his claim.

Paragraph one of section 135 provides that no officer or employee may be "suspended, removed, deprived of his office or position, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned \* \* \*," after a proper hearing before the Board of Rights. (Emphasis added.) The paragraph further specifies that the charge must be based upon some act committed or omitted within one year prior to the filing of the complaint.

Paragraph 12 of the same section prescribes the procedure to be followed in the hearing before the Board of Rights. "The departmental personal history and

records of the accused shall not be available to the Board of Rights except and only in such cases where the accused has been found guilty of any charge upon which he was heard or tried by the Board of Rights, then only for the purpose of determining a proper penalty to be prescribed; provided, however, that in prescribing such penalty the said board must look to the nature and gravity of the offense of which the accused has been found guilty and may at its discretion review the departmental personal history and record of such accused \* \* \*." From "penalty" and "gravity of the offense" Hostetter concludes that the section is to be confined to one of punishment for misconduct.

Although the phraseology of section 135 is somewhat inartistic, it does not necessarily mean that by inclusion of language possibly indicating a primary intent to punish for misconduct, inability to perform the duties of the position should not also be ground for removal. A comparable provision is found in the Government Code in section 19570 et seq. which concern disciplinary proceedings before the Civil Service Commission. Section 19570 defines "punitive action" as dismissal, demotion, suspension, or other disciplinary action. Section 19572, which for the most part enumerates acts of misconduct as cause for discipline, includes physical and mental disability.

A more pertinent inquiry is that of the basic policies behind this type of charter provision. In other jurisdictions having municipal charter provisions similar to the present one, it has been held that the best efficiency is obtained in public service when personnel are selected according to qualifications and positions are retained without fear of removal for reasons of local politics. *White v. City of Hopkinsville*, 280 Ky. 661, 134 S.W.2d 236, 238. Courts have also upheld the policy that the public is best served when department officials are permitted to eliminate unqualified or undesirable personnel, and to replace them with persons better qualified. *City of Wewoka v. Rodman*, 172 Okl. 630, 46 P.2d 334, 336; *Hunter v. Quick*, 183 Okl. 19, 79 P.2d 590, 593.



In numerous decisions, the discharge or retirement of public employees physically or mentally unable to perform the duties called for in their positions has been upheld. See Annotation, 28 A.L.R. 777; *Loucks v. Board of Education*, 258 App. Div. 1003, 16 N.Y.S.2d 733; *Balacek v. Board of Trustees, etc.*, 263 App.Div. 712, 30 N.Y.S.2d 1007; *Sganga v. Teaneck Tp.*, 130 N.J.L. 218, 32 A.2d 505; *School Dist. No. 1 v. Teachers' Retirement Fund Ass'n*, 163 Or. 103, 95 P.2d 720, 96 P.2d 419, 125 A.L.R. 720, 727; *In re Carney*, 182 Va. 907, 30 S.E.2d 789. In *Gentner v. Board of Education*, 219 Cal. 135, 25 P.2d 824, and *Tilton v. Board of Education*, 25 Cal.App. 2d 746, 78 P.2d 474, schoolteachers were retired because of physical disability. In the *Tilton* case, in commenting upon the *Gentner* decision, it was said: "The reasoning in that case dictates the conclusion that where, as in the instant case, the school board was justified in retiring a teacher because of physical disability to perform her duties, it became the board's duty to remove the teacher from the classroom, \* \* \*. Such a conclusion finds support in the basic principle underlying our school system—that the welfare of the children is the paramount consideration." 25 Cal.App.2d at page 749, 78 P.2d at page 475.

[4] It is apparent that there is no fault on the part of Hostetter or intimation that he has in any way been guilty of misconduct. But personal fault does not appear to be the primary consideration. Misconduct is important only insofar as it affects the efficiency of the department. The loss of efficiency to the department, and the detriment to the public which would result from lack of authority to discharge a physically disabled fireman, is a sound basis for concluding that "sufficient cause" should be construed as physical disability resulting from illness not incurred in the line of duty.

If section 135 is given the construction urged by Hostetter, the charter makes no provision for the suspension or removal of a fireman in his situation because of non-service connected disability. Hostetter

argues that his was a "case for retirement under section 182 and that he was entitled to a hearing before the Board of Pension Commissioners. However, that section applies only to a fireman disabled in the line of duty. Hostetter admits that his illness was not service connected.

Section 182½ provides for retirement of a fireman who is disabled other than in the line of duty, provided he has served in the department for five years or more since the date of his last appointment. Hostetter's illness occurred almost immediately following his appointment and his total length of service is considerably short of five years.

Section 108 permits the transfer of physically disabled personnel to other civil service departments, but only in the event that the employee has served for at least three years, or has become disabled because of injury or illness resulting from the discharge of his duties. Hostetter meets neither qualification.

[5] Hostetter argues that he was found guilty solely upon hearsay evidence. The record does not support his contention. He admitted his inability to perform his duties and pleaded guilty to the charge against him. No evidence was required or taken upon the question of guilt. The records and papers introduced were solely for the purpose of enabling the board to determine the penalty to be prescribed.

A thorough review of the record of the board hearing fails to disclose any unfairness therein. Hostetter was given every opportunity to present his case in person and by counsel of his own choosing. There is no allegation of bad faith or oppression on the part of the board, and none appears from the record. Hostetter's claim that Chief Alderson was unfairly prejudiced against him is not sustained by the evidence, nor is it shown that, even if such prejudice existed, it affected the decision of the board.

As the uncontradicted evidence shows facts justifying Hostetter's dismissal from the fire department, he is not entitled to relief either in this action or by way of mandate. The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Section 135(1) of the Charter of the City of Los Angeles provides that: "The right of an officer or employee of the Fire Department to hold his office or position and to the compensation attached to such office or position *is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the Fire Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Fire Department, (other than by resignation) except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights \* \* \*.*" It is also provided that the charge must be based on some act committed or omitted within one year prior to the filing of the complaint.

Section 135(12) provides in part that the "Board of Rights, shall at the conclusion of the hearing, make its specific findings of 'guilty' or 'not guilty' (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its decision in writing."

The only charge against plaintiff was that he was in ill health and unable to perform his duties because of physical disability. The two paragraphs of section 135 of the charter above quoted certainly connote some sort of *misconduct*. It appears to me that it takes quite a stretch of the imagination to say that one may be found "guilty" or "not guilty" of poor health. It most assuredly is not something over which an individual has any control.

The majority, in holding that plaintiff may be removed from the fire department under the quoted provisions of the charter, say that a comparable provision is found in sections 19570 et seq. of the Government

Code. I most emphatically do not agree. Section 19572(e) of that code provides specifically that an employee may be disciplined for physical or mental disability. No such provision is made in the section here under consideration.

Section 182¼ of the charter provides for retirement of a fireman who is disabled other than in the line of duty, provided he has served in the department for five years or more since the date of his last appointment. Plaintiff's illness occurred shortly after he had served his probationary period and so he does not come within this provision. Section 108 permits the transfer of physically disabled personnel to other civil service departments in the event that the employee has served for at least three years, or has become disabled because of service-connected disability. Plaintiff does not come within this category either, so there is very clearly a hiatus in the charter which the majority has filled by indulging in judicial legislation. Since no provision was made for disability which was not service-connected and which occurred prior to the five year period of service, this court decides that plaintiff can be removed from his position upon a finding of "guilty" of poor health.

The majority opinion contains the following statement: "In numerous decisions, the discharge or retirement of public employees physically or mentally unable to perform the duties called for in their positions has been upheld." This statement is allegedly supported by the following authorities which, in my opinion, are all distinguishable from the case under consideration.

In *Re Carney*, 182 Va. 907, 30 S.E.2d 789, the act involved provided that: "Whenever the Supreme Court of Appeals of Virginia shall have reasonable cause to believe that the judge of any court of record in this State \* \* \* *is afflicted with an illness or disability, mental or physical*, which renders such judge \* \* \* *permanently incapacitated or incompetent* to discharge the duties of his office, it shall be the duty of the Court to enter an order directing an inquiry to determine such

judge's \* \* \*, capacity and competency. \* \* \*" (Emphasis added.) This case involved a situation where there was *specific statutory authority* for removal or retirement of the judge from office.

In *Sganga v. Teaneck Tp.*, 130 N.J.L. 218, 32 A.2d 505, there was no discharge involved. A police officer, due to defective vision, was unable to perform any police duties other than desk work and the court held that the township was justified in denying him a pension *and in putting him on sick leave at half salary.*

In *Balacek v. Board of Trustees, etc.*, 263 App.Div. 712, 30 N.Y.S.2d 1007, a fireman who was found to be totally and permanently physically unfit for duty was retired, *apparently at an annual pension.*

In *Loucks v. Board of Education*, 258 App.Div. 1003, 16 N.Y.S.2d 733, a school teacher was dismissed for physical disability. But there is nothing in the case to show whether or not any particular legislative act was involved.

In *Gentner v. Board of Education*, 219 Cal. 135, 25 P.2d 824, a school teacher who had, because of the Teachers' Tenure Law, achieved the status of a "permanent teacher" was dismissed because of incompetence and unfitness to teach. The School Code in effect at that time (Stats.1933, ch. 391, p. 1017) provided for dismissal for "immoral or unprofessional conduct, commission or aiding or advocating the commission of acts of criminal syndicalism \* \* \* dishonesty, incompetency, evident unfitness for service, persistent violation of or refusal to obey the school laws of California, or reasonable regulations prescribed for the government of public schools." This case presents another example of dismissal in accordance with *specific statutory authority.*

In *Tilton v. Board of Education*, 25 Cal. App.2d 746, 78 P.2d 474, a teacher was *retired* for physical incapacity (defective hearing) and the question presented for determination was whether she was to be given active employment from the date of her retirement until her dismissal at the end of the year. She was retired pursuant to the provisions of section 5.890 of the School Code *and no question was raised as*

*to the propriety of her eligibility for retirement* or as to the physical facts which necessitated it.

In *School District No. 1 v. Teachers' Retirement Fund Ass'n*, 163 Or. 103, 95 P.2d 720, 96 P.2d 419, 125 A.L.R. 720, 727, a statute which provided for a pension plan for teachers under the age of 60 who should become disabled by reason of illness or accident was involved. The Board of Directors of the school district adopted a rule requiring every applicant to take a medical examination and where a physical disability was discovered, the applicant was to sign a waiver of any claim for disability benefits from the Teachers' Retirement Fund Association. The waivers were held void as contrary to public policy.

I have no quarrel with cases holding that a public employee may be retired on a pension or removed from office or position for physical disability when there is statutory authority therefor. I do object strenuously to such judicial legislation as is found in the majority opinion. If the legislative body intends that an employee, in the position of the plaintiff here, may be removed from his position, it is its sole prerogative to say so. It is not the function of this court to determine that the charter provision, so obviously meant to provide for the discharge of an employee guilty of misconduct, applies to one suffering from a physical disability. If, as I am convinced it does, the charter makes no provision for the removal of a person in the category in which plaintiff finds himself, undoubtedly the situation could be remedied by the *proper* authorities in a very short period of time. It is not the duty of this court to supply the missing links in the legislative chain.

I would, therefore, reverse the judgment with directions to the trial court to enter judgment in favor of plaintiff directing his restoration to his position in the Department of Fire of the City of Los Angeles without loss of pay.

SHENK, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.



38 Cal.2d 543

**HALL et al. v. COYLE et al.**

L. A. 22152.

Supreme Court of California, in Bank.

March 7, 1952.

Kenneth W. Hall, and another, brought tort action against William Coyle, and Clyde Truss, individually, and doing business as Ramona Gas & Appliance Company, and others, for damages to plaintiffs' house caused by fire which occurred when agent of defendants was transferring butane gas to plaintiffs' containers. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment for plaintiffs and Clyde Truss appealed. The Supreme Court, Shenk, J., held that judgment of nonsuit entered in a prior action based upon a settlement agreement, was not a bar to instant tort action.

Affirmed.

Prior opinion, 235 P.2d 67.

#### 1. Judgment ⇨951(3)

Generally, either parol evidence or a reporter's transcript is admissible to show what matters provable under the issues of a case were or were not submitted to a jury as an aid in determining whether a judgment acts as a bar to another action.

#### 2. Compromise and Settlement ⇨15(1)

Rights under an agreement compromising a claim are not dependent on validity of the claim itself.

#### 3. Judgment ⇨746

Where plaintiffs, whose house was destroyed by fire when defendant's agent transferred butane gas to plaintiffs' containers, brought suit against defendant based on alleged agreement of defendant to pay sum in full satisfaction of plaintiffs' claim and defendant's attorney stated in his motion for nonsuit that the action was one upon an alleged contract, defendant thereby waived any right to claim that such action involved more than a suit on the alleged contract, and hence he could not raise question of res judicata in subsequent tort action.

#### 4. Judgment ⇨589(2)

Judgment of nonsuit granted defendant on motion in plaintiffs' action based on

alleged agreement of defendant to pay sum in full satisfaction of losses sustained by plaintiffs when their house was destroyed by fire, was not a bar to subsequent action in tort since identity of causes of action was not established.

Raymond F. Feist, Oceanside (Henry F. Walker, Los Angeles, of counsel), for appellant.

Charles B. Provence, Brooks Crabtree, San Diego, for respondents.

SHENK, Justice.

This is an appeal from a judgment based on the trial court's findings and conclusion that the plaintiffs were entitled to recover \$7,000 as damages for the destruction of their house and its contents by fire due to the defendants' negligence.

The defendants operate as a limited partnership doing business under the name of Ramona Liquid Gas and Appliance Company. The business is that of selling butane gas in San Diego County for use as household fuel. It is alleged in the complaint that on October 28, 1947, the property of the plaintiffs was destroyed because of the negligence of an employee of the defendants in transferring butane gas to the containers of the plaintiffs. The defendants answered denying the alleged negligence and pleaded contributory negligence. As a special defense they contended that the property destroyed was community property; that theretofore on December 5, 1947, the plaintiff Kenneth W. Hall had filed a complaint against these defendants on behalf of the community wherein he "sought to recover from these defendants compensation for the loss alleged to have been suffered by the plaintiffs by reason of said fire; that said cause came regularly on for trial and that thereafter, on or about the 29th day of July, 1948, judgment was entered in said cause, adjudicating the merits thereof in favor of these defendants, and against the plaintiff, and that such judgment has become final and constitutes a bar to any and all proceedings in the instant cause."

The court in the present case found in favor of the plaintiffs on the issues of negligence, contributory negligence and proximate cause, and no question is raised as to the sufficiency of the evidence to support those findings. On the special defense the court found that the issues in the prior action were not involved or tried in the present action, and concluded that the judgment in the prior action did not constitute a bar to the present action. The controlling question now presented is whether the finding and conclusion on the plea in bar are supported by the record.

The record shows that on December 5, 1947, the plaintiff Kenneth W. Hall filed a complaint entitled "Complaint on Express Contract." It was alleged therein that the plaintiff's property was destroyed by the negligent conduct of the defendants; that the reasonable value of the property was \$7,000; that in consideration of the damages and destruction of the plaintiff's property the defendants had offered to pay to the plaintiff the sum of \$4,000 in full satisfaction of the claim, which offer the plaintiff had accepted; and that demand had been made for the payment of that sum but that the defendants had failed and refused to pay the same. The prayer was for judgment in the sum of \$4,000, interest, costs, and general relief. In their answer to that complaint the defendants denied the negligent destruction of the plaintiff's property and the existence of the alleged contract.

The prior cause proceeded to trial and evidence was introduced in support of the alleged settlement agreement. At the close of the plaintiff's case the defendants' counsel made a motion for a nonsuit. The motion was granted. A transcript of the remarks of the trial judge and counsel at the time of the motion was received in evidence in the present action over the objections of the defendants. It indicates that at the time the motion for nonsuit was granted the defendants' counsel expressly stated that the action then before the court was one based on an alleged compromise agreement, which was the contract sued on; that the plaintiff had failed to establish the defendants' liability thereunder; that the oral agreement was an unexecuted accord assertedly under-

taken by one partner assuming to bind the partnership and that the offer had been revoked. The court granted the motion on the theory that the action was brought and presented solely on the existence of a contract obligation and that the plaintiffs still had time within which to file an action on the tort liability. No appeal was taken from the judgment of nonsuit.

The defendant Clyde Truss (individually and doing business as Ramona Gas & Appliance Company) has appealed from the judgment in the present action. He contends that this action is barred by the judgment of nonsuit under the doctrine of *res judicata* and that the prior action represents a binding election of a particular remedy from among several available on the same facts. In addition he relies on Section 581c of the Code of Civil Procedure. That section provides that if a motion for a nonsuit is granted, "unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits." The order did not specify that it was without prejudice as to the merits.

[1] The defendant insists that no evidence outside the judgment roll in the first action should have been considered. In the *United Bank & Trust Co. v. Hunt*, 1 Cal.2d 340, 346, 34 P.2d 1001, 1005, it was stated: "It is also a general rule that either parol evidence or a reporter's transcript is admissible to show what matters provable under the issues of a case were or were not submitted to a jury as an aid in determining whether a judgment acts as a bar to another action \* \* \*." See also *Olwell v. Hopkins*, 28 Cal.2d 147, 151, 168 P.2d 972.

[2,3] The basic premise of the defendant's position is his assumption that the same cause of action is involved in both proceedings. The required identity of causes of action is not established for the reason that in the first action the plaintiff sought to enforce an alleged obligation of the defendants to pay money in accordance with an agreement compromising the very claim here sued on. Rights under an agreement compromising a claim are not dependent on the validity of the claim it-

self. *Stub v. Belmont*, 20 Cal.2d 208, 217, 124 P.2d 826; *Bennett v. Bennett*, 219 Cal. 153, 159, 25 P.2d 426. A recovery in the first action would have barred the present suit—not because they both involved the same cause of action, but because under the alleged compromise agreement the plaintiffs would have surrendered their right to sue for damages.

[4] Furthermore the defendant has, by virtue of his own conduct, waived any right to a claim that the first action involved more than a suit on the alleged contract. His attorney expressly stated in his motion for a nonsuit that the action was one upon an alleged contract and it is undisputed that both the trial judge and opposing counsel entertained a similar belief. The defendant may not at this time reverse his position and declare that the issue of negligence was also involved.

In *United Bank & Trust Co. v. Hunt*, supra, 1 Cal.2d at page 345, 34 P.2d 1001, the plaintiff was held to have waived its right to raise the question of whether an earlier action was *res judicata*. In that action it had opposed a motion to include the causes of action set forth in the later case and had opposed a motion to try the two cases together. This court held that the course pursued by the trial court and by counsel in an earlier action was tantamount to an express determination on the part of the court with the consent of opposing counsel that certain issues should be reserved for future adjudication, and that the doctrine of *res judicata* did not apply. See also *Comer v. Associated Almond Growers*, 101 Cal.App. 687, 282 P. 532; 30 Am.Jur. § 207, p. 944; 50 C.J.S., Judgments, § 597, p. 15; *Rest. of Judg.*, § 62 at p. 257.

Various cases cited by the defendant, e. g. *Estate of Keet*, 15 Cal.2d 328, 100 P.2d 1045; *Ernsting v. United Stages, Inc.*, 206 Cal. 733, 276 P. 103; *Henderson v. Miglietta*, 206 Cal. 125, 273 P. 581; *Gaskill v. Wallace*, 32 Cal.App.2d 354, 89 P.2d 687, involving the effect of the *res judicata* doctrine and the admission of the evidence outside the judgment roll of the earlier action are not in point. No waiver of a right to rely on the prior judgment was shown by the com-

ments of court and counsel as is true in this case. The defendant's argument that he did nothing to prevent proof of negligence in the earlier action ignores the fact that he secured a judgment in that action on the basis of a representation that a contractual liability only was involved.

The findings and conclusions of the trial court are supported by the record.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



38 Cal.2d 547

# PEOPLE v. DESSAUER.

Cr. 5269.

Supreme Court of California, in Bank.

March 7, 1952.

Rehearing Denied March 31, 1952.

Conviction in the Superior Court, Los Angeles County, Clement D. Nye, J., of first degree murder and from the judgment and an order denying his motion for new trial, defendant appealed. The Supreme Court, Carter, J., held that the evidence was sufficient to establish first degree murder.

Judgment and order affirmed.

## 1. Homicide ⇨253(1)

Evidence, including defendant's statement to officers showing that he purchased gun intending to kill woman with whom he had been living and had carried out such intent, was sufficient to establish first degree murder. Pen.Code, §§ 188, 189.

## 2. Homicide ⇨11

A wilful, deliberate and premeditated killing could be found to be malicious, even though killer's motive was to have victim die while happy. Pen.Code, §§ 188, 189.

## 3. Homicide ⇨233

Establishment of a motive for commission of a homicide is not indispensable to support a conviction. Pen.Code, §§ 188, 189.



**4. Criminal Law** ⇨535(2)

Evidence that defendant entered rear of automobile where he had gun and after a conversation with woman seated on front seat, aimed gun at the back of her head and shot her four times without apparent provocation was sufficient to indicate intent to kill and establish the corpus delicti without resort to defendant's extrajudicial statements to officers. Pen.Code, §§ 188, 189.

**5. Criminal Law** ⇨662(8)

The right to be confronted by witnesses, whether assured by Constitution or statute, may be waived and trial may be had on transcript of the testimony taken at preliminary hearing on stipulation by defendant and his counsel or on counsel's stipulation made in defendant's presence.

**6. Stipulations** ⇨14(8)

Objections to the admissibility of physicians' reports on issue of not guilty by reason of insanity could not be raised on appeal from conviction of first degree murder in the face of stipulation by defense counsel at opening of trial that state's case might be submitted on testimony taken at preliminary hearing and that defendant waived right to be confronted by witnesses.

**7. Criminal Law** ⇨1036(1)

A waiver or failure to object to the admission of evidence precludes objection on appeal.

**8. Criminal Law** ⇨260(11)

Submission of state's case in prosecution for first degree murder on the transcript of testimony taken at preliminary hearing and physicians' reports as to sanity of defendant, pursuant to stipulation entered into by defense counsel at opening of trial, was not reversible error in absence of showing of any prejudice to defendant.

**9. Criminal Law** ⇨623

The right under statute to have guilt and sanity separately tried may be waived, at least in a case tried by the court without a jury. Pen.Code, § 1026.

**10. Criminal Law** ⇨623

Trial by court of issues both of guilt and sanity at the same time with express

or tacit consent of defense counsel was not error in absence of showing of prejudice. Pen.Code, § 1026.

**11. Stipulations** ⇨3

Defense counsel may stipulate that the degree of offense and penalty shall be determined on the evidence adduced at the trial.

**12. Jury** ⇨29(7)

Any right of defendant found guilty of first degree murder by trial court without a jury to have the penalty to be imposed determined by a jury was waived by waiver of jury trial. Pen.Code, § 190.

**13. Jury** ⇨29(7)

Where defendant waived trial by jury on charge of first degree murder and case was tried by the court, the case did not come within Penal Code provision that persons guilty of first degree murder shall suffer death or life imprisonment at the discretion of the jury trying case. Pen.Code, § 190.

**14. Criminal Law** ⇨254

Physicians' reports and defendant's testimony at trial on charge of first degree murder failed to show any lack of capacity to intelligently waive rights to trial by jury and to be confronted by witnesses. Pen.Code, §§ 189, 1026.

**15. Criminal Law** ⇨412(2)

Admitting defendant's extrajudicial statement to police officers in prosecution for murder was not error on ground of absence of showing that statement was free and voluntary, where no suggestion was made during trial that statement was coerced in any respect, though defendant was questioned on direct examination in regard to the manner in which statement was taken. Pen.Code, § 189.

**16. Criminal Law** ⇨260(11, 12)

Supreme Court on appeal from judgment and sentence to death for first degree murder had no power to reduce the degree of the crime or the penalty imposed in absence of error, or to review the discretion of trial court in fixing the penalty. Pen.Code, § 189.

Morris Layvine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant pleaded not guilty and not guilty by reason of insanity to a charge of murder. After trial by the court sitting without a jury he was found sane and guilty of murder of the first degree and sentenced to death. His motion for a new trial was denied. The case is here on automatic appeal from the judgment and order denying the new trial.

Defendant, 28 years of age, and Libby Bershad, the victim of the homicide, had been living together as husband and wife since June, 1950, without legal sanction. Apparently one source of their income for a living embraced various activities, such as prostitution by Libby, bad check passing and the "badger" game, wherein she would entice a man into their living quarters and while they were in a compromising situation, defendant, posing as her husband, would enter demanding monetary satisfaction.

According to defendant's testimony in court, he and Libby left their place of abode in Hollywood to do some shopping about seven in the morning on April 2, 1951. After articles of apparel were purchased for Libby with cash and bad checks, they returned to Hollywood in defendant's car arriving about two in the afternoon. They stopped in front of a bank and Libby gave him a check to cash. He entered the bank to cash the check, but knowing it would not be paid, he got "cold feet" and returned to the car, taking a position in the rear seat, Libby being in front, where a discussion ensued in which he told her why he did not attempt to pass the check, and she told him he should not have been afraid. They did not have an argument or quarrel. He owned a gun which he had placed on the floor in front of the back seat of the car. While she was facing forward, he held the gun about eight inches from the back of her head and shot four times, causing her death. He then left the

car intending to surrender to the authorities. Not finding an officer he attended a theater for about an hour. He went to a restaurant where he made some notes on blank checks, and about eight in the evening called the police. They came to the restaurant and took him into custody. He denied he had any intent to kill Libby before the shots were fired or that he purchased the gun to kill her. He said he shot her because she was in trouble and would eventually be imprisoned; he also said he had purchased the gun at Libby's suggestion for protection and to use in the "badger" games.

In a statement made to the officers, defendant stated that Libby and he had discussed suicide because they had nothing for which to live and she had attempted it several times; that he first decided to kill Libby about a month before the homicide "because she told me that life, as it was, wasn't worth living, she wasn't having a very good time, and neither was I, it was rough and unpleasant, and we saw no end in sight, a happy end"; because they were unhappy by reason of lack of money; that he purchased the gun for the "specific reason" of killing her; that he carried his plans to conclusion on the day of the homicide; and that he put the gun in his pocket on the morning of that day before they left their home with the thought of killing her.

[1-3] Contrary to defendant's contention the evidence is adequate to establish first degree murder. His statement to the officers shows that he purchased the gun intending to kill Libby and carried out that intent. Clearly, there is sufficient evidence to show that murder was perpetrated by a "willful, deliberate, and premeditated killing". Penal Code, § 189. Defendant seems to think that because he said his motive was to have her die while she was happy the element of premeditation was eliminated. This does not necessarily follow, but even if it did, the court could have disbelieved that evidence. The killing could be found to be malicious, because "\* \* \* malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to

take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Penal Code, § 188. Moreover, the establishment of a motive for the commission of a homicide is not indispensable to support a conviction. *People v. Isby*, 30 Cal.2d 879, 186 P.2d 405; 13 Cal.Jur. 685.

[4] Further in this connection defendant urges that the statements of defendant to the officers could not be used to show the premeditation and deliberation sufficient to establish the crime of murder of the first degree; and that such must be proved by other evidence. If he is speaking of proof of the corpus delicti, there was adequate evidence aside from his extrajudicial statements to establish it. It will be recalled that there is evidence that he had the gun in the back of his car and when he returned to the car from the bank he entered the back seat rather than the front seat where Libby was seated. After a conversation with her and with no apparent provocation he aimed the gun at the back of her head and shot her four times. That is sufficient to indicate an intent to kill and proof of the corpus delicti aside from his extrajudicial statements. See *People v. Corrales*, 34 Cal.2d 426, 210 P.2d 843; *People v. Mehafeey*, 32 Cal.2d 535, 197 P.2d 12; *People v. Stroble*, 36 Cal.2d 615, 226 P.2d 330. If he means that his statements cannot be used in support of the proof of deliberation and premeditation, and hence, first degree murder, he cites no authority so holding. His statements together with the other evidence clearly established deliberation and premeditation. See *People v. Briggs*, 20 Cal.2d 42, 123 P.2d 433. In *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, relied upon by him there were no facts in the extrajudicial statement from which premeditation could be inferred. In *People v. Thomas*, 25 Cal. 2d 880, 156 P.2d 7, the court was pointing out the closeness of the case and hence the necessity for correct instructions on deliberation and premeditation. The admissions there made and other evidence are not comparable to this case.

[5-8] Under a claim of denial of due process of law, defendant makes various contentions that the state's case was based on the transcript of the testimony taken at the preliminary hearing, and as to the sanity issue, on reports, rather than testimony in court, by alienists, containing sordid accounts of defendant's sex life, and that there was no confrontation of witnesses against him. Defendant was represented by counsel at the preliminary hearing and witnesses were cross-examined. He and his counsel waived a trial by jury on both this issue of guilt and insanity. His counsel at the opening of the trial stipulated that "the People's case may be submitted to the Court on the testimony taken at the preliminary examination; that the Court may read the transcript of that testimony to the same force and effect as though those witnesses were here, sworn and testified, the defendant waiving his right to further cross-examination of those witnesses and waiving his right to be confronted by those witnesses, and any stipulations entered into at the preliminary hearing may be deemed entered into at this proceeding, and any exhibits received at the preliminary hearing may be received and marked as exhibits here." The use of doctor's reports was also stipulated, as will more fully appear later herein. The right to be confronted by witnesses, whether assured by Constitution or statute, may be waived, and a trial may be had on the transcript of the evidence taken at the preliminary hearing on stipulation by defendant and his counsel, *People v. Wallin*, 34 Cal.2d 777, 215 P.2d 1, or by the latter's stipulation, at least when made in defendant's presence. *People v. Romero*, 100 Cal. App.2d 352, 223 P.2d 511; *People v. Young*, 100 Cal.App.2d 488, 224 P.2d 46. It follows that the right to confront the doctors was also properly waived. Insofar as the admissibility of the reports is concerned that cannot be raised in the face of the stipulation. A waiver or failure to object to the admission of evidence precludes objection on appeal. 8 Cal.Jur. 500 et seq. In any event no prejudice has been shown. See *People v. Stroble*, supra, 36 Cal.2d 615, 226 P.2d 330.



After the prosecution had finished its case on the issue of guilt, the court called defendant's counsel's attention to the fact that the previous stipulations had not covered the doctors' reports on the issue of insanity. Defendant's counsel then stipulated "that the Court may read and consider the reports of the doctors on the second issue of not guilty by reason of insanity \* \* \*. [T]hat the Court may read and consider the reports of the doctors, Dr. Bielinski and Dr. Tucker, submitted as a result of their appointment under Section 1026 and following Sections of the Penal Code in determining the issue of the Defendant's plea of not guilty by reason of insanity \* \* \*. And such other doctors' reports as may be submitted by either prosecution or defense." A report by a Dr. Bailey was submitted by defendant's counsel. The People then rested and defendant was called to the stand and testified. After defendant rested the state called a rebuttal witness. At the end of the case defendant's counsel stipulated that both issues, guilt and insanity, could be determined "at the one pronouncement." The court then found defendant guilty of murder of the first degree and sane. At the time of pronouncement of the sentence, defendant stood mute when asked if there was any legal cause why sentence should not be pronounced, and his counsel said there was no cause. The death penalty was imposed.

In that state of the record defendant contends that a reversal is required because the two issues were not tried separately, as required by the statute reading: "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty \* \* \* then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the

time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law." Penal Code, § 1026. Defendant also contends that evidence was not taken to determine the penalty, that a jury was not summoned for that purpose and that those things could not be waived.

It is clear from the record that the manner of conducting the trial on the issues and determining the penalty was with the consent of defendant's counsel. He, at no time, made any objection to the procedure. He either tacitly or expressly assented. In regard to the penalty the court had all the facts surrounding the commission of the crime before it and also the reports of three doctors on defendant's mental status.

[9,10] At least in a case tried by the court without a jury the right to have guilt and insanity separately tried may be waived. *People v. Hazelwood*, 24 Cal.App. 2d 690, 76 P.2d 151; *People v. Pettinger*, 94 Cal.App. 297, 271 P. 132. Those cases have not been disapproved, as claimed by defendant, by the later cases such as *People v. French*, 12 Cal.2d 720, 87 P.2d 1014; setting forth the procedure for separation of the trial of the two issues. Moreover, defendant has not shown he suffered prejudice. *People v. Stroble*, supra, 36 Cal.2d 615, 226 P.2d 330.

[11] In regard to the determination of the degree and penalty it is settled that defendant's counsel may stipulate that they be determined on the evidence adduced at the trial. *People v. Walker*, 33 Cal.2d 250, 201 P.2d 6; *People v. Thomas*, 37 Cal.2d 74, 230 P.2d 351. That is in effect the situation here.

[12,13] In regard to the lack of a jury to determine the penalty to be imposed, defendant invokes section 190 of the Penal Code, which provides that persons guilty of first degree murder shall suffer death or life imprisonment at the discretion of the jury "trying the same". If any such right existed it was waived, as seen from the above discussion. Moreover, where the

case is tried by the court after the jury has been waived we do not have a case within the language of section 190, that is, where the jury is trying it.

[14] Defendant urges that the waivers should not be sustained because defendant's sanity was doubtful and he could not be expected to act intelligently. The alienists appointed by the court and the one chosen by defendant all agreed that defendant was sane at the time of the commission of the crime and when examined. The trial was had on July 18, 1951, and the reports of those doctors were dated July 16, May 29 and 27, 1951. From his testimony at the trial he appeared entirely rational.

[15] Defendant contends that there was no showing that the statement he made to the police was free and voluntary. There was no intimation or suggestion at any time during the trial that the statement was coerced in any respect. Defendant was questioned on direct examination in regard to the manner in which his statement was taken and no suggestion of coercion was mentioned. He testified that he told a different story to the police then and on the stand as to why he purchased the gun, to "obviate things," that is, because he thought the officers wanted him to answer that way or because of despondency.

[16] Defendant contends that the offense should be reduced by this court to second degree murder, or the penalty reduced to life imprisonment. The evidence, however, is, as we have seen, ample to establish first degree murder and no prejudicial error was committed by the trial court. This court has no power to reduce the degree of the crime or the penalty imposed in the absence of error, or to review the discretion of the trial court in fixing the penalty. *People v. Odle*, 37 Cal.2d 52, 230 P.2d 345; *People v. Thomas*, supra, 37 Cal.2d 74, 230 P.2d 351.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

CITY OF VERNON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 21820.

Supreme Court of California, in Bank.

March 3, 1952.

As Modified on Denial of Rehearing

April 2, 1952.

Proceedings to review a judgment on contempt entered by the Superior Court of the State of California in and for the County of Los Angeles, Joseph W. Vickers, J. The Supreme Court, Schauer, J., held that petitioners were properly adjudged in contempt for their failure to obey a mandatory injunction directing them to provide for sewage disposal facilities or to make arrangements with City of Los Angeles for financing of its proportionate share of new sewage treatment plant to be built by that city.

Judgment of contempt affirmed.

Edmonds, J., dissented in part; Carter, J., dissented.

Prior opinion 223 P.2d 662.

1. Injunction ⇨208

Resort may be had to the findings of fact and conclusions of law to clarify any uncertainty or ambiguity in an injunction.

2. Nuisance ⇨86

Terms of mandatory injunction entered in action by state against certain municipalities to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage discharged into ocean through Los Angeles sewage disposal system, requiring that Los Angeles build sewage treatment plant of sufficient capacity to abate nuisance and that each corporate defendant either should provide its own facilities or should look within 90 days after entry of decree have completed all arrangements necessary for financing its proportionate share of said new treatment plant were sufficiently definite for City of Vernon and five members of its city council to comply with terms thereof.

3. Nuisance ⇨86

Where judgment entered in action against Los Angeles and other cities and sanitation districts to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage discharged into ocean through Los Angeles sewage disposal sys-

tem required that Los Angeles build sewage treatment plant of sufficient capacity to abate nuisance and that each corporate defendant either provide its own facilities or should within 90 days after entry of decree complete all arrangements necessary for financing of its proportionate share of new treatment plant, 90 day period commenced to run when judgment became final after disposition of the appeal.

#### 4. Nuisance ⚡86

Affidavit by which contempt proceeding was begun against city and certain members of its council for failure to comply with terms of decree entered in action by state to abate public nuisance averring that after decree became final petitioners took certain steps in attempt to comply with certain provisions of decree sufficiently showed petitioners had personal knowledge of final disposition of proceedings to review injunction decree.

#### 5. Nuisance ⚡86

Affidavit by which contempt proceeding was commenced against city and certain members of city council for failure to comply with mandatory injunction entered in action against certain cities to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage discharged into ocean through Los Angeles sewage disposal system by requiring Los Angeles to build sewage treatment plant of sufficient capacity to abate nuisance and that each corporate defendant provide its own facilities or complete within 90 days all arrangements necessary for financing of its proportionate share of treatment plant to be built by Los Angeles which alleged, that cities with knowledge of injunction with ability to comply did not obey it, was sufficient.

#### 6. Nuisance ⚡86

In contempt proceeding against city and certain members of city council arising out of cities' failure to comply with terms of mandatory injunction entered in action against Los Angeles and other cities to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage discharged into ocean through Los Angeles sewage disposal system, evidence sustained finding that petitioners had knowledge of terms of injunction and that their action in failing to comply therewith was intentional, despite expressed disclaimers of contentious intent.

#### 7. Contempt ⚡28(2, 3), 58(4)

Disclaimer of an intent to commit contempt is no defense where contempt clearly appears from circumstances constituting

act and one cannot justify disobedience of order of court on ground that it was based on advice of counsel, and neither can such disobedience be excused by fact that it was in good faith and under mistake as to law.

#### 8. Nuisance ⚡86

Where judgment entered in action against Los Angeles and other cities to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage discharged into ocean through Los Angeles sewage disposal system refrained from passing on any of rights, obligations or liabilities affecting various defendants by reason of their contractual relations with each other but defendant city continued reliance on its 1909 and 1938 contracts with Los Angeles for sewage disposal that was, in effect, a refusal to abandon contentions which were made and decided against it in injunction suit and established that bringing of actions on old contracts was not compliance with injunction.

#### 9. Nuisance ⚡86

In proceedings to review a judgment of contempt entered against city councilmen for failure to comply with mandatory injunction, power of review of Supreme Court was limited to a determination of whether inferior tribunal had regularly pursued authority of such tribunal and reasonableness of punishment could not be passed on, but trial court on its own motion or on application by petitioners could remit unexecuted provision of judgment that petitioners be personally punished for contempt, in view of fact that since making of contempt order they had fully complied with requirements of injunction. Code Civ. Proc. § 1074.

E. L. Searle, Los Angeles, for petitioners.

Fred N. Howser, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., Carson B. Hubbard, City Atty., Huntington Park, Edward R. Young, John F. O'Hara, and John W. Shenk, III, Special Counsel, all of Los Angeles, for respondent.

SCHAUER, Justice.

The city of Vernon and the five members of its city council were found guilty of contempt for failing to obey a mandatory injunction. The petitioners here include the city and four members of the council. The trial court ordered that each petitioner pay a fine, that the individual petitioners be confined in the Los Angeles county jail for a period of five days, and



that the individual petitioners be detained in jail until they, as members of the city council, complete all arrangements for financing Vernon's share of the cost of a sewage disposal plant as hereinafter described. In this proceeding the petitioners seek certiorari to annul the judgment of contempt. Their contentions are directed not only at the validity of the contempt proceeding but also at the injunction decree, which has long since become final. We have concluded that the judgment of contempt should be affirmed.

For many years Vernon and others, pursuant to contracts with the city of Los Angeles, disposed of their sewage through the Los Angeles sewer system, which emptied into Santa Monica Bay. Thus there was created and maintained a public nuisance so noisome and notorious as to finally (December 13, 1943) provoke the State of California into bringing the abatement action which forms the basis for this proceeding. By such action the People of the State of California sought to restrain the municipal and public corporations which used the Los Angeles sewer system, and their officers and employees, from discharging sewage into Santa Monica Bay without a permit and to abate the public nuisance which resulted from their sewage disposal. Judgment for plaintiff was entered on February 1, 1946, and affirmed (*People v. City of Los Angeles* (1948), 83 Cal.App.2d 627, 189 P.2d 489; this court denied hearing; and the United States Supreme Court denied certiorari (335 U.S. 852, 69 S.Ct. 80, 93 L.Ed. 400)).

The judgment in material part required that Los Angeles build a sewage treatment plant of sufficient capacity to abate the nuisance; that each corporate defendant either should provide its own facilities for disposing of its sewage in a safe and sanitary manner or should "within ninety days after the entry of this decree have \* \* \* completed all arrangements necessary for the financing of its proportionate share of said new treatment plant \* \* \* [to be built by Los Angeles] according to the gallonage allotted to said corporation, so that said share will be available as required"; each corporate defendant which

elected to use the Los Angeles sewage system was ordered to report to the superior court, on or before April 29, 1946, the arrangements which it made to pay for its share of the plant; the superior court retained jurisdiction to make further orders to carry its decree into full effect. Those are the material terms of the decree which has become final.

The affidavit by which this contempt proceeding was instituted contains the following averments: Vernon elected to use the Los Angeles sewage system. After the denial of certiorari, the trial court ordered the corporate defendants, which had so elected, to report to it on or before August 29, 1949, what they had done to comply with the portion of the judgment requiring them to arrange to finance their share of the cost of the plant. Vernon, instead of reporting its arrangements, reported its reasons for not having complied with that portion of the judgment. Each member of the city council of Vernon has personal knowledge of the terms of the judgment. Neither Vernon nor the council has taken any steps to provide the money necessary to pay Vernon's share of the cost of such plant, although they have the ability to do so.

#### Certainty of Injunction

Petitioners cannot be guilty of contempt if the injunction which they violated is so uncertain that they could not determine what it required them to do. (*Weber v. Superior Court* (1945), 26 Cal.2d 144, 148, 156 P.2d 923.) Petitioners have been found guilty of violating those provisions of the injunction which required them to arrange for payment of Vernon's "proportionate share" of the cost of the plant "according to the gallonage allotted to said corporation" and have such undetermined (but ascertainable) sums "available as required." They contend that the judgment is fatally uncertain because it does not determine the amount or fractional interest which constitutes Vernon's "proportionate share" or what the cost of the plant will be or how much "gallonage" has been allotted to Vernon or to whom or how or when the undetermined sum shall be "available as required."

[1] In California "resort may be had to the findings of fact and conclusions of law to clarify any uncertainty or ambiguity" in an injunction. (*Gelfand v. O'Haver* (1948), 33 Cal.2d 218, 222, 200 P.2d 790; see also *Ophir Creek Water Co. v. Ophir Hill Consol. Mining Co.* (1923), 61 Utah 551, 216 P. 490, 492, where the court said, "In arriving at a correct interpretation of the decree and its meaning and effect it is incumbent upon the court to consider not only the language of the decree \* \* \* but also the purpose and object of the litigation which terminated in the decree"; a judgment of contempt for violation of the disputed terms of the decree was upheld.)

If petitioners will consider the 1946 injunction in the light of the findings of fact and conclusions of law and "the purpose and object of the litigation which terminated in the decree," as made evident by the pleadings, they will be able to comply with it. The findings give a definite formula for computation of Vernon's share of the cost; they make it clear that this share is to be paid to Los Angeles; and if Vernon had desired to comply with the decree it could have ascertained the precise amount to be paid at any fixed time by consultation with Los Angeles and, if necessary, under court supervision. As already mentioned, the court had retained jurisdiction to this very end. Other cities, parties to the same basic litigation and subject to the same judgment, have been able to understand and comply with its terms. Also, it is to be remembered, Vernon voluntarily elected to accept these terms of the decree, for abatement of its share of the nuisance, rather than to adopt the alternative of providing its own facilities for sewage disposal. It is not reasonable to infer that Vernon made such election without knowing what it was undertaking. Vernon's share of the cost of the plant based upon estimates known to it at the time of the entry of the decree would have been \$901,250. Vernon made no attempt to raise or appropriate this or any other sum. From time to time the estimated cost of the plant increased, but Vernon made no effort to compute or raise its share of the increased cost.

[2] In October, 1949, Los Angeles demanded \$1,814,952.60 as Vernon's share; petitioners by resolution took the position that the 1946 judgment "now requires the payment by The City of Vernon of \$901,250.00, and \* \* \* gives no legal basis for the demand of or the payment of \$1,814,952.60" and that Los Angeles purportedly allotted to Vernon "10,129,968 gallons per day instead of 10,300,000 gallons per day as allotted by said judgment." It thus appears that in October, 1949, petitioners recognized that the 1946 judgment required them to raise money to be paid to Los Angeles but took the erroneous position that a liquidated, rather than a to be calculated, amount to be raised and paid was fixed by that judgment. Their present claim that they do not know to whom the money should be paid does not appear to be advanced in good faith. Indeed, as will hereafter appear, their chief objection to the injunction appears to be not so much that it is uncertain but that notwithstanding the finality of the judgment, it is erroneous. The judgment, of course, makes abatement of the nuisance an absolute requirement not dependent on the cost thereof.

#### Sufficiency of Affidavit

Petitioners urge that the affidavit by which this proceeding was begun is fatally defective because it does not allege the date when they should have complied with the January, 1946, judgment. As stated, that judgment required that Vernon make its financial arrangements "within ninety days after the entry of this decree." The mandatory provisions of the judgment were stayed by the appeal (*City of Pasadena v. City of Alhambra* (1946), 75 Cal. App.2d 91, 95, 170 P.2d 499) and the District Court of Appeal further stayed enforcement of the judgment until final decision of the United States Supreme Court on the petition for certiorari. Thus the 90 days after entry of the decree had long since passed when the judgment became final. The trial court did not fix, and Vernon did not ask it to fix, a new date for performance.

[3] In the contempt proceeding the trial judge took the position that the 90 days

commenced to run when the judgment became final. This view is supported by *Fenton v. Farmers' & Merchants' Nat. Bank* (1901, 27 Tex.Civ.App. 231), 65 S.W. 199, 201. There a decree awarded land to plaintiff on condition that it pay a certain sum "within 90 days from the date of said decree"; the judgment was stayed pending appeal. It was held that the 90-day period began to run when the judgment became final after disposition of the appeal. In accord are *Southern Oil Co. v. Scales* (Tex.Civ.App.1902), 69 S.W. 1033, *Norris v. Kelsey* (1915), 60 Colo. 297, 300, 152 P. 1167, and *Uthoff v. Thompson* (1933), 176 La. 599, 146 So. 161, 165. This position is fair to petitioners and we are in accord with it.

Petitioners rely upon *In re McDonald* (1932), 217 Cal. 29, 31, 16 P.2d 995, for the proposition that the affidavit must show that they had personal knowledge of the outcome of the appeal and the petition for certiorari, and upon *Phillips v. Superior Court* (1943), 22 Cal.2d 256, 258, 137 P.2d 838, for the proposition that the fact that they were parties to those proceedings does not charge them with knowledge of the outcome thereof. However, on the facts established here, those cases clearly are not controlling. The affidavit sufficiently shows petitioners' personal knowledge of the final disposition of the proceedings to review the injunction decree by its averments that after that decree became final petitioners took certain steps (the filing of an application<sup>1</sup> for a permit to use the new plant and the making of a report to the trial court stating "its reasons for not having complied with \* \* \* [a certain provision] of the judgment") in attempted compliance with certain provisions of the decree (not the provisions under consideration in this contempt proceeding). (See *Romine v. Cralle* (1890), 83 Cal. 432, 437, 23 P. 525.)

[4,5] Petitioners attack the sufficiency of the affidavit on the further ground that

it does not allege that they intended to violate the injunction. They rely on *Hutton v. Superior Court* (1905), 147 Cal. 156, 160, 81 P. 409. It is there said, "Contempt proceedings are quasi-criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a criminal offense." This is not to say, as petitioners seem to believe, that the affidavit must contain the words "intent to violate the terms of the injunction"; it is sufficient if it appears from the affidavit, as it does here, that the citees, with knowledge of the injunction and with ability to comply, did not obey it. (See *Hume v. Superior Court* (1941), 17 Cal.2d 506, 513, 110 P.2d 669; *Ex parte Creely* (1908), 8 Cal.App. 713, 719, 97 P. 766.)

#### Sufficiency of the Evidence

Petitioners urge that because John Leggett, who made the affidavit of contempt, did not testify the evidence is insufficient to support the finding that they were in contempt. They cite no authority and give no reason in support of their claim that the case against them should be proved by the affiant, rather than by the testimony of other witnesses and by documentary evidence.

[6] Petitioners also contend that there is no evidence that they had knowledge of the terms of the injunction. This contention is wholly lacking in merit. In 1946, when the judgment was rendered, three of the four individual petitioners were members of the Vernon city council. There is evidence that after the judgment was rendered Mr. Young, an attorney who represented the city and the council, appeared before the council, "gave a report on the matter and advised them that an appeal should be taken," and the council authorized him to do so. The trial court was justified in inferring that the three petitioners who were members of the council in 1946 retained their knowledge of the existence of the judgment until it became

1. As shown by the affidavit for contempt, the application was filed on August 24, 1949 (after the judgment had become final) and such application avers that "This application is made pursuant to the

Order of the Superior Court \* \* \* contained in that certain Judgment," etc., the judgment identified being the basic injunction decree herein concerned.



final and that petitioner R. J. Furlong, who became a councilman in 1948 and has served as such since then, learned of the existence of the judgment in the due performance of his official duties. Also, as already shown (see footnote 1, above), an application indicating knowledge of the terms of the judgment was filed with the State Department of Public Health on August 24, 1949. Likewise, the report to the superior court (filed on or about August 26, 1949) stating reasons for not having complied with the judgment indicates knowledge of its existence and its terms. Although it is said in *Groves v. Superior Court* (1944), 62 Cal.App.2d 559, 568, 145 P.2d 355, and in *In re Felthoven* (1946), 75 Cal.App.2d 465, 470, 171 P.2d 47, that "the evidence \* \* [is] to be strictly construed in favor of the accused," the annulment of the contempt orders in those cases was not based on a view of the evidence least favorable to upholding the order. For a reviewing court to construe the evidence in favor of accused would violate the rule that "the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction." (*Bridges v. Superior Court* (1939), 14 Cal.2d 464, 485, 94 P.2d 983, and cases there cited.)<sup>2</sup> Here, the evidence on any reasonable view amply sustains all essential findings.

[7] Petitioners further assert that there is no evidence that they intended to violate the injunction. Petitioners, with knowledge of the terms of the injunction and ability to comply therewith, did not do so; it can be reasonably inferred that their inaction was intentional, despite express disclaimers of contemptuous intent. "Disclaimer of an intent to commit contempt is no defense where a contempt clearly appears from the circumstances constituting the act. And one cannot justify disobedience of an order of the court upon the ground that it was based upon the advice of counsel; neither can such disobedience be excused by the fact that it was in good faith and under a mistake as to the law." (5 Cal.Jur., Contempt, § 45; see also *Havemeyer v. Superior Court* (1890), 87 Cal. 267, 274, 25 P. 433, 10 L.R.A. 650.)

#### Asserted Compliance with the Injunction

Petitioners admit that they "have not exercised any \* \* \* official powers to levy a tax or to incur a bonded indebted-

ness or impose any \* \* \* charges, to provide the means by which said municipal corporation could or might raise \* \* \* the monies necessary for the payment of the city's alleged proportionate share of the cost of construction of the new treatment plant so that its share would be available as required," but they contend that they have taken other means to comply with the injunction; namely, on advice of counsel, in 1949, they brought an action against Los Angeles in which they allege that in 1909 and 1938 Vernon made contracts with Los Angeles whereby the latter agreed to dispose of Vernon's sewage; Vernon claims rights to sewage disposal under these contracts without payment of its share of the cost of the new plant.<sup>3</sup>

It is manifest that the institution of further litigation is not compliance with the injunction. The issues raised in the injunction proceeding have been litigated and finally adjudicated. The obvious purpose of the injunction was to get the nuisance promptly abated and to that end to get the new plant built and paid for without the delay attendant on independent or later ensuing litigation to determine the validity and effect of the old contracts of Vernon and other corporate defendants. As to these contracts the District Court of Appeal said (page 648 of 83 Cal.App.2d, page 501 of 189 P.2d), "This is a proceeding initiated by the people of the State of California on behalf of the state itself \* \* \* to abate a public nuisance. Therefore, the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. Insofar as the judgment herein is concerned, if any of the appellants have any rights against the city of Los Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action."

[8] This ruling preserves to petitioners all contractual rights they may possess under the mentioned contracts but likewise

2. The *Bridges* case was reversed on other grounds (314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192).

3. The very bringing of this action constitutes further evidence of petitioners' knowledge of the injunction decree.

it requires them to settle or litigate those rights independently of compliance with the injunction decree. Vernon's continued reliance on its 1909 and 1938 contracts with Los Angeles is, in effect, a refusal to abandon contentions which were made and decided against it in the injunction suit. The judgment in that suit and the decision of the District Court of Appeal, which has become final, conclusively establish that the bringing of actions upon the old contracts with Los Angeles is not compliance with the injunction and that such litigation remains open for determination on its merits, unaffected by the injunction decree. (*Norris v. San Mateo County Title Co.* (1951), 37 Cal.2d 269, 272, 273, 231 P.2d 493.)

The individual petitioners urged that so long as they might be confined in the Los Angeles county jail pursuant to the contempt order they could not comply with the injunction because they could not meet as a city council in Vernon. Respondent answers this contention adequately by pointing out that most omissions which are contempts cannot be corrected while the contemnor is in jail but that, if the contemnor indicates his willingness in good faith to perform, he would be entitled, and will be allowed, to leave the jail in order to do so.

[9] The conduct of the petitioning councilmen which was found contemptuous was not the conduct of private individuals but that of public officials protecting the interests of the municipality which they were elected to serve, acting under the advice of counsel; and since the making of the contempt order they have fully complied with the requirements of the injunction. The argument is made on behalf of petitioners that by reason of those facts the punishment of the individual petitioners by fine and imprisonment is so extreme as to be beyond the range of proper judicial discretion. Such argument, however, is not a proper one to address to this court at this time. It includes facts not all of which were before the trial court at the time of the proceedings under review. Our power of review on the present record is limited, by section 1074 of the Code of Civil Procedure, to a determination "whether the inferior tribunal . . . has regularly pursued the authority of such tribunal," and the reasonableness of the punishment cannot be passed upon in these review proceedings (see *In re Carboni*, 1941, 46 Cal.App. 2d 605, 614, 116 P.2d 453). The trial court, however, on its own motion or on applica-

tion by petitioners, may remit the unexecuted provision of the judgment that petitioners personally be punished for contempt. The argument based on the mitigating circumstances above mentioned may in all propriety be addressed to that court, and it is to be presumed that it will take into consideration such mitigating circumstances and make an order appropriate in the premises.

For the reasons above stated the judgment of contempt is affirmed.

GIBSON, C. J., TRAYNOR and SPENCE, JJ., and McCOMB, J. pro tem., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that, under applicable principles, the petitioners were guilty of contempt. I base this concurrence solely upon the ground that Vernon's suit against the City of Los Angeles was not filed within the time fixed by the injunction for complying with its provision.

The judgment in the abatement action required each city which did not provide its own sewage disposal facilities to complete "all arrangements necessary for the financing of its proportionate share of said new treatment plant" within 90 days. Vernon took no steps within the required time to comply with that order. However, prior to the commencement of the contempt proceedings, it filed an action against the City of Los Angeles seeking to avoid any liability for the cost of the Hyperion plant or to recover such amounts as might be due under existing contracts.

The injunction in no way restricts the "arrangements" which the city might make to meet its obligations. Any rights it has in the contracts sued upon are assets. Certainly if its position is upheld, it will be able to satisfy all demands which may be made upon it for payment of its share of the cost of the new treatment plant.

The course which Vernon took was open to it under the injunction provisions. In affirming the judgment in the abatement action, it was held: "This is a proceeding initiated by the People of the State of California on behalf of the State itself, and on behalf of the State Department of Public Health, as well as other state agencies, against all named defendants, to abate a public nuisance. Therefore, the court

rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. In so far as the judgment herein is concerned, if any of the appellants have any rights against the City of Los Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action. All of appellants' property and rights were preserved to them and the judgment in the instant action does not impair or violate any of their constitutional rights." *People v. City of Los Angeles*, 83 Cal.App.2d 627, 648, 189 P.2d 489, 501.

This language is now interpreted as requiring the city "to settle or litigate those rights independently of compliance with the injunction decree." Further, it is read as a determination of the present controversy.

I do not so interpret the opinion. The clear import of the decision of the District Court of Appeal is that the abatement action was not the proper proceeding in which to adjudicate private rights. The contract rights of all parties were specifically preserved. The question as to whether there were rights which would reduce or eliminate financial obligations under the injunction was specifically left open. It is clear that the only result of the abatement proceeding was to determine the duties of the respective defendants in abating the nuisance. Whether, as between each other, there existed rights to have one assume the responsibilities of another, was not determined. Clearly an action to secure judicial determination of these rights was a possible "arrangement" which would comply with the injunction.

I, therefore, find no basis for holding that the petitioners are continuing to violate the injunction. At most, there was a mere technical violation of the court's decree by the failure to sue within 90 days. There is no showing that, by the delay of a few days, the petitioners in any way impeded or subverted the ultimate purpose of the injunction. In a case such as this, where it is claimed that public officials have not performed their duties, sound public policy should require a much greater flaunt-

ing of the court's authority than the technical violation of one phase of the involved and complicated order of this case.

In my opinion, one claiming that a judgment of the kind here involved has been disobeyed should be required to show that the delay has in some way obstructed the fulfillment of the purpose for which the judgment was rendered. In the present case, the failure to comply with the court's order within the specified time has not delayed the abatement of the nuisance nor obstructed the carrying out of the court's purpose. This is an additional circumstance which the trial court may well consider in determining whether the unexecuted portion of the judgment should be remitted.

I would modify the judgment by striking therefrom the order for the continuing imprisonment of petitioners C. W. Trowbridge, C. H. Mailliard, Genevieve Anderson and R. J. Furlong.

CARTER, Justice.

I dissent.

In my opinion the judgment of contempt should be annulled for two reasons: (1) The insufficiency of the affidavit upon which the order to show cause in re contempt was based; and (2) the uncertainty and ambiguity of the injunction which has allegedly been violated.

#### Insufficiency of the Affidavit

The affidavit of John T. Leggett, assistant sanitary engineer of the Bureau of Sanitary Engineering of the State Department of Public Health of Los Angeles, does not allege the date on which petitioners were required to comply with the terms of the judgment of January, 1946. The judgment provides as follows: "It is further Ordered, Adjudged And Decreed that as to those corporate defendants who do not adopt some method of disposing of sewage originating in the corporate limits of such defendants other than a new treatment works at Hyperion, that such defendant shall, within ninety days after the entry of this decree, have filed an application with the State Department of Public Health of the State of California for a permit to discharge its sewage through a proposed new treatment plant to be built at Hyperion, and that such defendants shall have by said time completed all arrangements necessary for the financing of its proportionate share of said new treatment



plant or works according to the gallonage allotted to said corporation so that said share will be available as required." The affidavit sets forth a statement to the effect that an appeal was taken from said judgment to the District Court of Appeal, and was affirmed on February 11, 1948; that petitioners sought certiorari in the United States Supreme Court which was denied in October, 1948, and "that the judgment of this Court is now final." There is no allegation that the 90-day period commenced to run from any particular time, or that it has now expired. In *Re McDonald*, 217 Cal. 29, 31, 16 P.2d 995, it was held that personal knowledge of the existence and status of a decree must be alleged. The affidavit contains an allegation that all "of said persons named above has personal knowledge of all the terms and provisions of said judgment," but it was held by this court in *Phillips v. Superior Court*, 22 Cal.2d 256, 137 P.2d 838, that an allegation that the citee had actual knowledge of a judgment in an action to which he was a party is not sufficient to show that he had knowledge that the judgment had been affirmed on appeal and had become final.

Petitioners also contend, and, in my opinion with merit, that the affidavit is insufficient because it did not allege (nor was there testimony to the effect) that they intended to violate the injunction relying on *Hutton v. Superior Court*, 147 Cal. 156, 160, 81 P. 409, 410, wherein it was said: "Contempt proceedings are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a \* \* \* criminal offense." The majority answers this contention by saying that it is sufficient if it appears from the affidavit "as it does here, that the citees, with knowledge of the injunction and with ability to comply, did not obey it." The effect of the two errors is to allow a judgment of contempt to rest upon two assumptions—that the petitioners had *knowledge* of the time the 90-day period commenced to run and *intended* to violate the injunction. The majority bases its finding of intention to violate the injunction on its assumption of

petitioners' knowledge of the time within which the 90-day period was to run.

The California courts have held that reviewing courts are to construe the affidavit in a contempt proceeding very strictly in favor of the accused and that no intendments are indulged in aid of its sufficiency, *In re Felthoven*, 75 Cal.App. 2d 465, 470, 171 P.2d 47, 50; *Frowley v. Superior Court*, 158 Cal. 220, 224, 110 P. 817. In the *Felthoven* case it was said that "The affidavit, the order to show cause, the evidence and the findings in a contempt of court proceeding are to be strictly construed in favor of the accused, and the presumption in favor of the regularity of the proceedings and the judgment does not apply in contempt matters." Yet the majority here is assuming facts in order to fill the gaps in the affidavit and thus uphold the judgment. Since a contempt proceeding is "quasi-criminal" in nature, *Hutton v. Superior Court*, 147 Cal. 156, 81 P. 409, this method of affirmance can hardly be said to be in accordance with recognized principles of due process of law. Another inference drawn by the majority is that R. J. Furlong, who did not become a councilman until 1948, knew of the course of the action because of his official capacity. The original judgment was rendered in January, 1946, but Mr. Furlong is imprisoned because of an inference which the majority says must have occurred because of his position. In *Lindsley v. Superior Court*, 76 Cal.App. 419, 425, 245 P. 212, it was said that the affidavit must set forth not merely the ultimate facts, but the facts themselves. This would seem to be more than applicable here.

#### Insufficiency of the Injunction

I have quoted the judgment in the first part of this dissent. It makes no provision for the amount of money that these petitioners shall make "all arrangements necessary" to raise, and remains silent with respect to whom it shall be paid. The majority opinion points out that resort may be had to the findings of fact and conclusions of law to clarify any uncertainty or ambiguity in an injunction, Gel-

fand v. O'Haver, 33 Cal.2d 218, 222, 200 P.2d 790, and concludes that these findings and conclusions, together with the pleadings, make it clear that the money is to be paid to the city of Los Angeles, that the findings set forth a definite formula for computation of Vernon's share of the cost of the sewage disposal plant. *The findings and conclusions are not included in the record before this court*, and resort must be had to the case of *People v. City of Los Angeles*, 83 Cal.App.2d 627, 189 P.2d 489 (affirming the judgment in the public nuisance action) where they are partially set forth. It appears to me that the record in *this* case must speak for itself. If petitioners are to be found guilty of contempt committed because of an alleged violation of a judgment which, in order to be construed, must be interpreted in the light of the findings of fact and conclusions of law which preceded it, it would appear to me that the burden is being placed on petitioners to prove themselves not guilty of the charges against them. This is contrary to settled principles of law. Conceding that the majority is correct in assuming that resort may be had to the findings of fact and conclusions of law to explain the judgment, it does not follow that this rule is applicable to a case such as this where the findings and conclusions are not a part of the record in the contempt proceeding. In fact, even though resort is had to the decision of the District Court of Appeal on the appeal from the judgment in which the injunction was granted, it is impossible to determine therefrom what, specifically, defendants are required to do in order to comply with the injunction.

Where in the judgment is to be found a statement of Vernon's proportionate share, which is to be fixed according "to the gallage allotted to said corporation"? In order to determine what Vernon's share is, it is necessary, according to the majority, for petitioners to go back to the findings of fact and conclusions of law filed in the nuisance action and use the formula there set forth. Even if this were possible, I do not believe such a burden can lawfully be imposed upon citees

in a contempt action. But, assuming that such a burden may be imposed, there is still no definite or ascertainable and fixed amount which petitioners can be said to be required to raise. In 1946, petitioners' share of the cost of the plant "based upon estimates known to it at the time of the entry of the decree would have been \$901,250 \* \* \*. In October, 1949, Los Angeles demanded \$1,814,952.60 as Vernon's share." It appears that the original estimate of the total cost of the project was to have been \$21,000,000, but according to the Legett affidavit such an amount has already been exceeded although the plant was then only 50% complete, indicating a probable total cost of some \$43,000,000 and, in light of the change in economic conditions, a possible total cost of many millions more. Petitioners are to be jailed and fined for failing to raise an indefinite and unascertained amount of money to be available *as required*. I agree with petitioners who ask "available to whom, when and where, and how much?" The majority admits that petitioners cannot be guilty of contempt if the injunction which they violated is so uncertain that they could not determine what it required them to do. If petitioners are to be found guilty of contempt because of a violation of the injunction, interpreted in the light of the findings of fact, it appears to me that they may only be held liable for Vernon's share of the estimated cost of \$21,000,000, because that is the estimate on which the formula is based and which appears in *People v. City of Los Angeles*, supra, 83 Cal.App.2d 627, at page 637, 189 P.2d 489. The record does not show that any demand was made on them for any sum approximating this amount.

If petitioners are to be held to a proportionate share of the total cost of the plant which, at the time of the commencement of this proceeding, was only 50% complete and had already exceeded the total estimated amount, then this action is premature. There is no possible way for petitioners to know what Vernon's proportionate share will be when the sewage plant is completed.

The majority opinion in this case is a typical illustration of the saying that "hard cases make bad law." Because, as a matter of public welfare, the sewage disposal plant is necessary, petitioners are to be imprisoned and fined for relying on the law as set forth in the cases heretofore decided which have held that the affidavit in a contempt action must set forth the facts with particularity, and that the judgment allegedly violated must be sufficiently certain so that it could be carried into effect.

From the foregoing it appears that the majority opinion violates recognized concepts of law applicable to contempt proceedings in order to reach a result, the justness and soundness of which is, to say the least, questionable. I cannot, therefore, subscribe to such holding and would annul the order here under review.

Rehearing denied; CARTER, J., dissenting.



38 Cal.2d 527

**LEONIS v. SUPERIOR COURT IN  
AND FOR LOS ANGELES  
COUNTY et al.**

**L. A. 21821.**

Supreme Court of California, in Bank.

March 3, 1952.

Rehearing Denied April 2, 1952.

Proceedings for review of an order of a Superior Court of the State of California, in and for the county of Los Angeles, and the Honorable Joseph W. Vickers, J., denying petitioner's motion to set aside a contempt judgment and for review of the contempt judgment. The Supreme Court, Schauer, J., held that evidence sustained finding of trial court that attorney who represented other members of city council, of which petitioner was member, in injunction proceeding was justified in believing that he had authority to represent petitioner in the contempt proceeding based on failure to comply with terms of the injunction.

Judgment affirmed.

Edmonds, J., dissented in part; Carter, J., dissented.

Prior opinion 223 P.2d 657.

**1. Nuisance ⇐86**

In proceedings to review order committing petitioner, a member of a city council, for contempt for failure to comply with previous judgment in action by state to abate a public nuisance, evidence sustained finding that although petitioner was not served within prescribed time or at all with show cause order and never appeared personally at contempt proceeding he authorized attorney who represented city and four other councilmen to appear for him in contempt proceedings.

**2. Nuisance ⇐86**

Where petitioner, a member of city council, was a defendant in state's previous action in which mandatory injunction was entered directing abatement of nuisance but was not served with show cause order in contempt proceeding instituted for failure to comply with terms of mandatory injunction and did not personally appear at contempt proceeding but attorney representing four other councilmen appeared on petitioner's behalf and defended on the merits, personal service on petitioner was waived. Code Civ.Proc. §§ 416, 1063 et seq.

**3. Nuisance ⇐86**

In proceeding to review order committing member of city council for contempt for failure of city to comply with previous judgment in action by state to abate public nuisance, alleged fact that petitioner's term of office expired while proceeding to review contempt commitment was pending was a matter to be presented to trial court and it would be presumed that proper action there would ensue but it did not go to validity of contempt judgment as of time it was rendered, which was the matter subject to review.

E. L. Searle, Los Angeles, for petitioner.  
Fred N. Howser, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

John B. Leonis was one of the councilmen of the city of Vernon who were found guilty of contempt in the proceeding reviewed in City of Vernon v. Superior Court,



Cal.Sup., 241 P.2d 243. After the judgment of contempt was rendered he appeared specially by counsel E. L. Searle and moved to set aside the contempt judgment as to him on the ground that the trial court had not acquired jurisdiction over his person. The trial court denied this motion. By petition for review Leonis now attacks both the order denying his motion and the contempt judgment. We have concluded that the order and judgment are valid.

The order to show cause in the contempt proceeding was issued on December 5, 1949; it directed that a copy of the affidavit charging contempt and a copy of the order be served on the councilmen at least five days before the date set for hearing. Leonis was not served within the prescribed time or at all. He did not conceal himself to avoid service. He refused to sign and verify the answering affidavit, which was signed and verified by the four other councilmen. He never appeared personally at the contempt proceeding. Respondent court held that it nevertheless had jurisdiction to find Leonis in contempt because he authorized attorney Edward R. Young (who also represented Vernon and the four other councilmen) to, and Mr. Young did, appear for him in the contempt proceeding. Leonis disputes Young's authority and the facts upon which the trial court resolved the issue are therefore pertinent.

On December 6, 1949, a deputy city clerk of Vernon telephoned Mr. Young and told him that the affidavit and order to show cause had been served on Vernon and the members of the city council and that the members of the city council had asked Mr. Young to represent them and the city in the contempt proceeding. Mr. Leonis had attended no meetings of the city council since January 3, 1949, and had been on leave of absence from the council since February 15, 1949, and there is no direct evidence that he authorized the other members of the council to employ Mr. Young on his behalf. There is evidence that Leonis knew that Mr. Young believed that he was employed to represent Leonis as well as the other Vernon council members; that he knew that Mr. Young, pursuant to his belief, was appearing in behalf of Leonis as well

as the others, and that with such knowledge Leonis remained silent and did not disavow such representation, or Young's authority, until after the citees had been found guilty.

On December 28, 1949, Mr. Young informed the court and opposing counsel that he appeared on behalf of Mr. Leonis; that because of illness Leonis would not be present at the contempt hearing; and that it would not be necessary to serve him. On January 5, 1950, Mr. Young caused the answer which he had prepared and which contained lines for the signatures of all five members of the city council, to be signed and verified by the four members other than Leonis. As stated, Leonis refused to sign and verify the answer.

The contempt proceeding was heard and on January 12 the court found all the citees guilty of contempt. It set January 16 as the date for pronouncing sentence and told Young that Leonis should be present at that time. Mr. Young said, "I will do the best I can, your Honor. I cannot do it if he won't come. I can't carry him," and the court replied, "If he won't come we will then have to take such steps as the law provides for requiring his appearance here in court. He should be here at the time sentence is imposed if possible." On January 16 Mr. Young advised the court that Leonis had told him that because of his physical condition he could not be present; the court then pronounced sentence.

On January 17, five days after the conclusion of the hearing and after the citees had been found guilty, Mr. Leonis wrote to Mr. Young that Young was not to represent him in any capacity in the proceeding. On January 24 the judgment of contempt was signed and entered. On January 26 the special appearance through new counsel and notice of motion to set aside the judgment as to Leonis were filed.

Mr. Young had represented Mr. Leonis, the other members of the city council and Vernon in the injunction proceedings, and had been Leonis' personal attorney for 20 years. Never before had Young appeared for Leonis or filed a pleading for him without having been given express authority. Mr. Young did not request, but believed he

had been given, authority to represent Leonis in the contempt proceeding.

Affidavits of Mr. Young and Mr. Leonis are somewhat in conflict as to whether Young fully advised Leonis of the pending contempt proceeding and as to whether Leonis instructed Young not to file the answer on Leonis' behalf. On the hearing of the motion to set aside the contempt judgment the trial court read these affidavits and concluded that "It is perfectly apparent that he [Mr. Leonis] knew that Mr. Young was representing him and purported to represent him. At no time, the Court is satisfied, did he say to Mr. Young or indicate to Mr. Young that Mr. Young was not to represent him in this proceeding; not to compile any documents. \* \* \* It is true that by itself the fact that Mr. Young was the attorney of record for the defendant in the main case did not give him, according to this Court's opinion, the authority to represent and file an appearance on behalf of Mr. Leonis in this contempt proceeding. \* \* \* He did that which he had every reason to believe he was justified in doing and was proceeding for the benefit of this contemner as well as the other contemnors in the proceeding."

[1] The above related conclusions of the trial court are amply supported by the record, only brief excerpts from which need be mentioned. The trial court was entitled to believe the averments of Mr. Young that he advised Leonis of the institution and progress of the contempt proceeding, that he further "advised said John B. Leonis that in his [Young's] opinion it would be unnecessary for him [Leonis] to appear as long as he was represented by counsel"; that Leonis did not forbid Mr. Young to file the answer; that he (Young) requested Leonis to sign and verify the answer and that Leonis "then informed affiant [Young] that he was sick and under the care of his physician and that he would not sign said answer, giving no other reason than that he was sick and was under the care of his physician." Leonis' conduct seems to have been calculated to encourage Mr. Young to represent him and to take full advantage of

Mr. Young's services in the event that success attended them but to disavow them in the event of loss. There is no room for doubt that Leonis was fully informed as to the pendency and nature of the proceedings and as to Mr. Young's appearance in good faith for him. In the circumstances Leonis, if he were not to be bound, should have expressly directed Young not to enter his appearance or represent him; instead he refrained from any such suggestion, knowing that Young believed he had authority and was proceeding on that belief. There is no question as to the complete good faith of Mr. Young, and the question of his authority, insofar as it appears to be one of fact, has been determined against Leonis and is fully supported by the evidence.

[2] There is a further question whether personal service on Leonis was a jurisdictional requirement which could not be waived by Leonis' appearance through counsel and defense on the merits. For the purpose of jurisdiction in a civil action "The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." (Code Civ.Proc. § 416.) Section 416 does not control in contempt proceedings, which, according to their position in the code (Title III of the Code of Civil Procedure), would seem to be "Special Proceedings of a Civil Nature," but which, by reason of their inherent aspects, have been held to be "special proceedings of a criminal character" (*Bridges v. Superior Court* (1939), 14 Cal.2d 464, 477, 94 P.2d 983, reversed on other grounds, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192). No good reason appears why the principle and purpose enunciated in section 416 for civil actions should not be applied here. This view is supported by *Foley v. Foley* (1898), 120 Cal. 33, 39, 52 P. 122, where the contemnor contended that he could not be punished for contempt because he was not served personally. The court pointed out that he "appeared by his counsel in answer to the order to show cause, and submitted evidence upon the merits of the application, and resisted the same without objection

to the want of personal service," and said, "This of itself was sufficient to give the court jurisdiction over him." We apply that principle here. (It is noted that the decision in the Foley case went in favor of the contemnor on other grounds.)

[3] Petitioner presents a certificate of the city clerk of Vernon which shows that his term of office expired while this proceeding to review the contempt commitment has been pending. Therefore, he says, the portion of the commitment which requires his imprisonment until he, as city councilman, complies with the injunction should be annulled. This is a matter to be presented to the trial court; it is to be presumed that proper action there will ensue; it does not go to the validity of the contempt judgment as of the time it was rendered, which is the matter subject to review.

The remaining contentions of petitioner are answered adversely to him by our decisions in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243 and *Culver City v. Superior Court*, Cal.Sup., 241 P.2d 258.

For the reasons above stated the order and judgment are affirmed.

GIBSON C. J., TRAYNOR and SPENCE, JJ., and McCOMB, J. pro tem., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the judgment affirming the order denying the motion to set aside the judgment of contempt. Also, for the reasons stated in my concurring and dissenting opinion in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243, I join in the conclusion that the petitioner was guilty of contempt. However, aside from any question arising from the change in the petitioner's official status, I believe that, while still a member of the city council, he made all "arrangements" required by the injunction, although not within the time prescribed by it.

I would, therefore, modify the judgment by striking therefrom the order of continuing imprisonment.

CARTER, Justice.

I dissent.

I adopt that portion of the opinion of the District Court of Appeal, Second District, Division One, which refers to the lack of service of process on John B. Leonis, as part of my dissent in this case.

"It appears as recited in the petition for Writ of Review, that John B. Leonis, a member of the City Council of Vernon, had been seriously ill for some two years, had not attended any meetings of the Council since January 3, 1949, and had been on a leave of absence because of such illness. The contempt order to show cause was issued on December 5, 1949 and ordered Leonis and the other citees to appear before Judge Vickers on January 3, 1950. This order required that 'a copy of said Affidavit and of this Order be served upon the person specifically named \* \* \* at least five days before the date of said hearing'. It is conceded that there was no such service on the petitioner Leonis at any time.

"According to the respondent's brief, 'On December 28, 1949, there was a conference in the chambers of the judge (Vickers). \* \* \* It was then reported that all persons except John B. Leonis had been served. Thereupon, Edward R. Young stipulated that he was authorized to represent John B. Leonis and that it would not be necessary to make service upon him and that he would appear for the said John B. Leonis \* \* without the necessity of serving him \* \* \*'. Attorney Young 'also stated to the court that he would have John B. Leonis present in the court on January 3, 1950, unless the physical condition of John B. Leonis was such that he could not be present'. Petitioner did not attend the trial held on January 10th and 11th, 1950, at which time Leonis and the other defendants were found guilty of contempt.

"On January 5, 1950 Attorney Edward R. Young, representing the City of Vernon, caused to be presented to petitioner Leonis an answer for the latter's signature. Leonis twice refused to sign the answer; nevertheless Attorney Young filed said answer in behalf of Leonis, the other four councilmen having signed it. Affidavits and coun-



teraffidavits appear of record in reference to the attorney's authority to appear for petitioner; Mr. Young stated to the Court, however, 'I will admit I never requested authority'. In reference to this matter respondent's brief lays some stress on the fact, commented on by Judge Vickers, that 'Mr. Young had represented Mr. Leonis as a member of the City Council for some several years'. The affidavits are in conflict as to whether Attorney Young was definitely instructed not to represent the petitioner.

"After the judgment of contempt was entered on January 11, 1950, a registered letter dated January 17, 1950 was sent by Leonis to Attorney Young instructing the latter not to represent petitioner in any capacity. To this Young responded by a letter advising Leonis of the judgment of contempt 'of which I have already advised you by telephone'. On January 26, 1950, petitioner filed a Notice of Special Appearance and motion to vacate the contempt judgment, which motion was denied, the trial judge expressing disbelief in the assertions contained in petitioner's affidavit.

"It can hardly be questioned that a judgment imposing a jail sentence and fine for alleged contempt of court must be preceded by the certain preliminary steps in due compliance with law, and with proper consideration for the rights of the accused person. Whatever academic distinctions may be attempted between the criminal and civil aspects of contempt proceedings in general, the present proceedings in its practical application is essentially criminal or at the least quasi-criminal in nature.

"The well known constitutional guarantees of due process are particularly applicable and cannot be dispensed with. Certainly in this respect there can be no difference whether the defendant is charged as a private individual or, as in the present case, for alleged dereliction as a member of a city council. In any and all cases such a defendant is entitled to stand upon the constitutional guarantees and to insist upon compliance with the law in reference to service of process and representation in court. Such matters are too serious and

too far reaching in effect to justify cursory treatment. The validity of such a judgment must not depend upon supposition or conjecture.

"In the instant case it is conceded that John B. Leonis was not served with the order to show cause in re contempt, although, as noted in petitioner's brief, 'there is no contention that Mr. Leonis was either concealing himself to avoid service \* \* \* nor that Mr. Leonis was not a resident of California'. Petitioner was indeed, as stated to the court by Attorney Young, sick at home, and would 'have to be brought up in a wheel chair. \* \* \* his physical condition is such that it makes it very difficult for him to get around, not only by reason of having had a leg amputated, but also because of age'. Petitioner could hardly have accepted service of process even if so inclined.

"Since the first and fundamental step of service of process as required by the order to show cause was entirely omitted, it then became incumbent on the trial court to be assured of personal jurisdiction over this particular defendant before proceeding to pronounce a judgment imposing fine and imprisonment. This was not done. All that was done towards this end, according to the record, was to accept an attorney's oral 'stipulation' that petitioner along with other defendants was represented by such attorney, and that it would therefore not be necessary to serve petitioner. In this connection it may be noted that petitioner's associates, the other four councilmen, had been served with process. No explanation as to why John B. Leonis was not also served as specifically required by the order, has been offered." 223 P.2d at page 659.

Insofar as the merits of the case are concerned, I feel that aside from the lack of service of process so far as Mr. Leonis is concerned, the judgment of contempt should be annulled for the reasons set forth in my dissenting opinion in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243.

Rehearing denied; CARTER, J., dissenting.

**CULVER CITY et al. v. SUPERIOR  
COURT IN AND FOR LOS AN-  
GELES COUNTY.**

**L. A. 21826.**

Supreme Court of California, in Bank.  
March 3, 1952.

As Modified on Denial of Rehearing  
April 2, 1952.

Proceedings by a city and others as former or present members of the city council to review a judgment of contempt entered by the Superior Court of the State of California, in and for the County of Los Angeles finding that petitioners were guilty of contempt for failure to perform acts required by mandatory injunction entered in action by state to abate a public nuisance. The Supreme Court, Schauer, J., held that petitioner city's continued reliance on its 1922 and 1925 contracts with Los Angeles for disposal of sewage was in effect a refusal to abandon contentions which were made and decided against it in injunction suit and in which the decree required petitioner to settle or litigate its contractual rights independently of its compliance with decree.

Judgment affirmed.

Edmonds, J., dissented in part; Carter, J., dissented.

**1. Nuisance ☞86**

Where decree entered in injunction suit by state against city of Los Angeles and other municipalities to abate public nuisance arising from pollution of ocean and adjoining beaches by discharge of sewage into ocean through Los Angeles sewage disposal system, directed that Los Angeles construct sewage treatment plant of sufficient capacity to abate nuisance and that each corporate defendant either provide its own facilities or complete arrangements for financing its proportionate share of new treatment plant and all contractual rights parties had with one another were preserved to them and they were required to settle and litigate those rights independently of compliance of injunction decree, continued reliance by city under its 1922 and 1925 contracts with Los Angeles for disposal of sewage was in effect a refusal to abandon contentions decided against it in injunction suit and the bringing of actions on its old contracts was not compliance with injunction.

**2. Nuisance ☞86**

In proceeding by city and members of its city council to review and annul judgment that petitioners were guilty of contempt for failure to perform acts required by injunction entered in suit by state against city of Los Angeles and other municipalities to abate public nuisance arising from pollution of ocean and adjoining beaches by discharge into ocean of sewage through Los Angeles sewage disposal system, evidence sustained finding that city and members of council had not made good faith effort to comply with terms of injunction.

**3. Nuisance ☞86**

Fact that commitments for contempt of certain cities and members of their councils for failure to comply with terms of mandatory injunction entered in suit by state against various municipalities to abate public nuisance resulting from discharge of sewage in ocean through Los Angeles sewage disposal system permitted alternative methods of compliance, was to the benefit rather than detriment of cities and omission to specify precise sums to be paid to city of Los Angeles should such cities make arrangements to contribute to proportionate cost of construction of new sewage treatment plant by city of Los Angeles was not a fatal defect in view of fact that cost could be determined by consultation with Los Angeles and trial court expressly reserved its jurisdiction to supervise and settle any disputes which might arise in respect of fixing cities' share of the cost.

**4. Contempt ☞40**

Proceedings leading to punishment for failure to obey a decree, criminal contempt, and to imprisonment until committed act is performed, civil contempt, are exactly the same. Code Civ.Proc. §§ 1209-1219.

---

E. L. Searle, Los Angeles, for petitioner.

Fred N. Howser, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioners, Culver City and the members of its city council, seek review and annulment of a judgment that they are guilty of contempt for failure to perform acts required by the injunction in *People v. City of Los Angeles* (1948), 83 Cal.App.2d 627, 189 P.2d 489. The relevant portions of the injunction and the factual situation which led to its issuance are described in the opinion in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243. We have concluded that the contempt judgment should be affirmed.

The contempt proceeding was commenced by the filing of an affidavit which contained the following allegations: Petitioners have personal knowledge of the terms of the judgment and the requirements imposed by it on Culver City. The judgment became final on November 12, 1948, after affirmance on petitioners' appeal and denial of their petition for certiorari. Culver City intends to dispose of its sewage through the new plant built by Los Angeles. Since 1945 Los Angeles has attempted "to work out an arrangement" with Culver City by which the latter could pay its proportionate share of the cost of the new plant, but Culver City has refused to do so. On February 14, 1949, the city council authorized institution of an action against Los Angeles to obtain judicial interpretation of agreements with Los Angeles, made in 1922 and 1925, which concern disposition of sewage. On April 11, 1950, the city council submitted to the electors of Culver City a proposed bond issue of \$1,250,000 to pay for sewage facilities, and the issue was approved by more than two-thirds of the electors. Petitioners have done nothing more to comply with the injunction, although they have the ability to comply.

The reason for Culver City's failure to obtain money for its share of the cost of

the new plant by selling its bonds appears from an answering affidavit of petitioners and from the testimony at the contempt hearing. The city cannot sell the bonds, it is asserted, because it cannot obtain the opinion of a bond attorney that they are marketable. The bonds "must be, in the opinion of counsel [the bond attorney], valid and binding obligations of the issuing city before a marketable opinion can be issued." The bond attorney will not give a marketable opinion because he is not certain that there is a legal obligation of Culver City to Los Angeles which would be a basis for issuance and sale of the bonds.

It appears from the evidence that the bond attorney would give a marketable opinion (1) if Culver City would enter into a contract to pay Los Angeles its share of the cost of the new plant pursuant to sections 55110 and 55112 of the Government Code, which provide for "an agreement with other local agencies for the joint construction, ownership, or use of sewage treatment plants" and for a bond issue to pay the cost of such construction, or (2) if, in the declaratory relief action of Culver City against Los Angeles which was authorized by the city council and which is now pending, it is determined that Culver City owes Los Angeles a sum certain on account of sewage disposal. Culver City urges that it has done and is doing, in good faith, everything it can to bring about a situation in which the bond attorney would give a marketable opinion.

The evidence as to why Culver City and Los Angeles have not entered into a contract pursuant to sections 55110 and 55112 of the Government Code is conflicting. There is testimony of individual petitioners that representatives of Los Angeles refused to enter into a new contract unless petitioners abandoned their claims under the 1922 and 1925 contracts.<sup>1</sup> This testi-

1. Los Angeles had no right to impose such a condition. As the District Court of Appeal stated in its opinion on appeal from the injunction decree, "Insofar as the judgment herein is concerned, if any of the appellants [including Culver City] have any rights against the city of Los Cal.Rep. 241-242 P.2d—9

Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action." (*People v. City of Los Angeles* (1948), supra, 83 Cal.App.2d 627, 648, 189 P.2d 489.)



mony was not directly denied, but a representative of Los Angeles testified that he told the council of Culver City that "we were not arguing or deciding the merits of the old contracts; Culver City certainly had the right to determine that in court whenever they saw fit to do so." This latter statement is obviously in accord with the rights of the parties as adjudicated in the injunction decree.

[1] In its declaratory relief action against Los Angeles, Culver City takes the position that its 1922 and 1925 contracts with Los Angeles obligate Los Angeles to dispose of all sewage of Culver City for fixed sums which have already been paid, and that Culver City cannot be required to pay Los Angeles further sums to aid in defraying the cost of a new sewage plant. Argument that the pendency of the declaratory relief action in any way shows a bona fide attempt to comply with the injunction decree is but a reiteration in a different form of the contention made by Vernon in relation to its contracts with Los Angeles. As in the Vernon case it is to be remembered that the basic suit (see page 648 of 83 Cal.App.2d, page 501 of 189 P.2d) "is a proceeding initiated by the \* \* \* State of California \* \* \* to abate a public nuisance. Therefore, the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other." The statement in the opinion of the District Court of Appeal that "Insofar as the judgment herein is concerned, if any of the appellants [including Culver City] have any rights against the city of Los Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action," does not mean that Culver City, or any other of the injunction defendants, may escape complying with the terms of the judgment by instituting further litigation. On the contrary, as declared in Vernon (241 P.2d 243), this ruling preserves to petitioners all contractual rights they may possess under the mentioned contracts but likewise it requires them to settle or litigate those rights independently of

compliance with the injunction decree. Culver City's continued reliance on its 1922 and 1925 contracts with Los Angeles is, in effect, a refusal to abandon contentions which were made and decided against it in the injunction suit. As in Vernon (241 P.2d 243), the judgment in the basic suit and the decision of the District Court of Appeal conclusively establish that the bringing of actions upon the old contracts is not compliance with the injunction and that such litigation remains open for determination on its merits, unaffected by the injunction decree. (Norris v. San Mateo County Title Co. (1951), 37 Cal.2d 269, 272, 273, 231 P.2d 493.)

[2] To negate Culver City's claim that it has done everything it can do to raise money to pay for its share of the cost of the new plant, respondent also relies upon evidence that other cities were able to make arrangements with Los Angeles whereby they issued marketable bonds and upon the admitted failure of Culver City to attempt to raise funds by tax or assessment. All that can be said in favor of petitioners in respect to the evidence of their asserted good faith attempts to comply with the injunction is that there is a substantial conflict. Since the conflict is substantial and has been resolved against petitioners by the trial court, the judgment cannot on that ground be annulled.

Petitioners also present arguments as to the uncertainty of the injunction and the charge of contempt which are answered in the opinion in City of Vernon v. Superior Court, Cal.Sup., 241 P.2d 243. They make another contention which arises out of the same uncertainty as that which, it is claimed, inheres in the injunction. It is urged that the commitments (quoted *infra*) of certain cities are void because they do not comply with section 1219 of the Code of Civil Procedure. That section provides, "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case *the act must be specified in the warrant of commitment.*" (Italics added.) The act must be specified with particularity. (In re Wells (1946), 29 Cal.

2d 200, 202, 173 P.2d 811; *In re Vallindras* (1950), 35 Cal.2d 594, 596, 220 P.2d 1.)

[3] Certain individual citees here are committed "until they and all of them have completed all arrangements necessary for the financing of the proportionate share of the City of Culver City of said new treatment plant or works, according to the gallonage allotted to the City of Culver City, and so that said share will be available as required; that they take such action (1) by the appropriation of the necessary funds as stated in said judgment or the levying of a tax, charge, assessment, imposing fees, tolls, rentals or other charges for the raising of the necessary funds, or (2) by any other system, method, plan or device, or combination thereof, or (3) the doing of such things as might be necessary for the sale of said bonds and the sale of said bonds to provide the means by which said municipal corporation could or might raise, accumulate or collect the moneys necessary for the payment of said city's proportionate share of the cost of construction of the new treatment plant and submarine outfall at Hyperion, so that its share might be available as required." It is urged that the foregoing is too vague a description of the act which the citees must do to purge themselves of contempt. Insofar as the specification permits alternative methods of compliance, it is to the benefit, rather than the detriment, of the petitioners. Nor is the omission to specify the precise sums to be paid and the dates on which they are to be paid a fatal defect. As in the *Vernon* case, there is a precise formula for computing the share of the cost, based upon gallonage allotted to the city (a figure which the petitioner city itself can specify) and the total capacity of the plant (a known figure), and the cost of the plant and the times when the funds are required can be determined by consultation with Los Angeles, which has proceeded with the construction of the plant despite the failure of some of the other parties to the injunction suit to comply with the injunction. As also pointed out in the *Vernon* opinion, the trial court in the basic injunction decree expressly reserved jurisdiction to super-

vise and settle any disputes which might arise in respect to fixing petitioners' share of the costs.

[4] Petitioners argue at some length concerning the distinction between civil and criminal contempt. From the beginning of this proceeding petitioners have urged that they should be advised whether the proceeding was for criminal contempt, civil contempt, or both, and that the proceeding is fatally defective because the two types of contempt were "scrambled." They say, vaguely, that they have been deprived of constitutional rights because they were not informed whether the contempt proceeding had as its object the punishment of petitioners or the enforcement of the injunction, but they suggest no respect in which the failure to so inform them affected them adversely or at all. The distinction between civil and criminal contempt is important in the federal and some state courts because there are procedural differences, particularly in the safeguards afforded the citee, and also, perhaps, differences in the nature of the intent which must be shown. (See, e. g., *Gompers v. Buck's Stove & Range Co.* (1911), 221 U.S. 418, 441, 444 et seq., 31 S.Ct. 492, 55 L.Ed. 797; *Garrigan v. United States* (7 Cir., 1908), 163 F. 16, 19, 22, 23 L.R.A., N.S., 1295, certiorari denied 214 U.S. 514, 29 S.Ct. 696, 53 L.Ed. 1063; *Bigelow v. RKO Radio Pictures* (D.C.1948), 78 F.Supp. 250, 254; *State ex rel. Indianapolis Bar Ass'n v. Fletcher Trust Co.* (1937), 211 Ind. 27, 32, 34, 5 N.E.2d 538; *Root v. MacDonald* (1926), 260 Mass. 344, 364, 157 N.E. 684, 54 A.L.R. 1422; see also *Joseph Moskovitz, Contempt of Injunctions* (1943), 43 Colum.L.Rev. 780; *Comment* (1950), 48 Mich.L.Rev. 860.) But in California the proceedings leading to punishment for failure to obey a decree (criminal contempt) and to imprisonment until the omitted act is performed (civil contempt) are exactly the same. (Code Civ.Proc. §§ 1209-1219; see *In re Morris* (1924), 194 Cal. 63, 67, 227 P. 914.) Although the sections which provide the procedure for both kinds of contempt are in Part III of the Code of Civil Procedure, which is entitled "Special Proceedings of a Civil Nature," contempt proceedings are said to be "crim-

inal in nature" and those procedural rights and safeguards which are appropriate to criminal contempt proceedings are also afforded, in California, in civil contempt proceedings. (See 5 Cal.Jur., Contempt, § 37.) Therefore, as in *Charles Cushman Co. v. Mackesy* (1938), 135 Me. 490, 494, 200 A. 505, 118 A.L.R. 148, "the distinction is not of importance, for the procedure in both cases, in so far as equity decrees are concerned, is governed by the statutory provisions above mentioned."

Arguments as to the undue severity of punishment of the individual petitioners are answered in *City of Vernon v. Superior Court*, Cal., 241 P.2d 243.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., TRAYNOR and SPENCE, JJ., and McCOMB, J. pro tem., concur.

EDMONDS, Justice (concurring and dissenting).

For the reasons stated in my concurring and dissenting opinion in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243, I concur in the conclusion that the petitioners were guilty of contempt because they did not comply with the injunction within the time specified.

However, the belated "arrangements" made by the petitioners to comply with the injunction are even more thorough than the action taken by the City of Vernon. Culver City has attempted, unsuccessfully, to sell bonds to meet its share of the cost of the new plant. Counsel for Culver City will not give an opinion as to marketability until its liability is determined in a pending declaratory relief action which it has brought against the City of Los Angeles. In the alternative, such an opinion probably could be secured if Culver City would contract with Los Angeles for payment of its share of the cost of the Hyperion plant. But the terms of such contract also are dependent upon the existing contractual rights of the parties. Thus, Culver City has reached an impasse in its efforts to comply with the injunction.

For these reasons, in my opinion, Culver City has made all "arrangements" necessary

to meet its obligations without abandoning its rights under existing contracts which are specifically preserved by the judgment in the abatement proceeding.

I would, therefore, modify the judgment by striking therefrom the order of continuing imprisonment for petitioners Thomas J. Carroll, Curtis J. Davis and J. Ray Klots.

CARTER, Justice.

I dissent for the same reasons as are set forth in my dissenting opinion in *City of Vernon v. Superior Court*, Cal.Sup., 241 P.2d 243.

Rehearing denied; CARTER, J., dissenting.



109 Cal.App.2d 648

ULRICH et al. v. SAN JACINTO  
ESTATES et al.

Civ. 18602.

District Court of Appeal, Second District,  
Division 1, California.

March 10, 1952.

Suit for rescission of land purchase contract on ground of fraud. The Superior Court of Los Angeles County, Arnold Praeger, J., sustained a demurrer to the complaint and plaintiffs appealed. The Court of Appeal, Hanson, J. pro tem., held that in absence of allegations showing that delay of 72 days in serving notice of rescission after actual notice of the fraud was inexcusable or that it would be inequitable to inquire into merits of the claim, the right to rescind was not eliminated as matter of law.

Reversed with instructions.

#### 1. Vendor and Purchaser ☞119

The time element alone is not a controlling factor in determining purchaser's right to rescission, and each case must be determined upon its own facts unless it is plain that time element is so prolonged that as a matter of law no sufficient excuse could be shown on trial on the merits.

#### 2. Vendor and Purchaser ☞119

In absence of allegations implying circumstances tending to indicate inexcusable



delay of purchasers in seeking rescission on ground of fraud or any reason why it would be inequitable to inquire into merits of the claim for rescission, right to rescind was not eliminated as a matter of law merely because purchasers delayed serving notice of rescission for 72 days after actual notice of fraud, and complaint was not demurrable.

---

Paul J. Otto, Irvin C. Evans, Los Angeles, for appellants.

Harry H. Licker, Charles A. Bank, Beverly Hills, for respondents.

HANSON, Justice pro tem.

The primary question presented in this case is whether there was a failure to state a cause of action for rescission based on fraud, as the trial court held, merely because the complaint disclosed that the notice of rescission was not served until 72 days after the fraud was actually discovered.

[1] In support of its ruling the trial court relied upon *Campbell v. Title Guarantee, etc., Co.*, 121 Cal.App. 374, 9 P.2d 264, 265, where the court said that, "From an examination of authorities, it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission, unless there are unusual circumstances in the case excusing longer delay." In ruling, as it did, in the instant case the trial court did not have the benefit of the Supreme Court's recent holding in *Williams v. Marshall*, 37 Cal.2d 445, 235 P.2d 372, even though we freely concede that that decision is not in every respect a controlling precedent. In that case the court held that the trial court upon a hearing upon the merits was not in error in granting a rescission even though more than 15 months had elapsed between the date of the actual discovery of the fraud and the date on which the notice of rescission was served. However, it was there shown that in the interval the parties

had negotiated to avoid litigation. If, as the court held the trial court properly granted rescission, even though more than 15 months had elapsed between the actual discovery of the fraud and the service of the notice of rescission, because of the negotiations of the parties in the interval, it follows that the time element *alone* is not a controlling factor and that each case must be determined upon its own facts, i. e., upon the merits unless it is plain that the time element is so prolonged that as a matter of law no sufficient excuse could be shown on a trial upon the merits.

[2] The complaint before us is devoid of any allegation implying that the land involved was improved; that the plaintiffs made any use of the land; that its value had decreased since the date the alleged fraud was discovered; that it was of a character subject to rapid fluctuation; that by any words or acts the plaintiffs had indicated an affirmance of the contract; that the vendors had changed their position or were prejudiced by the fact that a more prompt notice of rescission was not served upon them. Accordingly, we deem it plain that there is nothing shown in the circumstances disclosed upon the face of the complaint that tends to indicate an inexcusable delay on the part of the plaintiffs or any reason why it would be inequitable to enter upon an inquiry as to the merits of the claim.

As the trial court properly ruled that the complaint stated a cause of action for fraud, it follows that the right to a rescission on that ground was not eliminated as a matter of law, as the trial court ruled, merely because the plaintiffs delayed serving a notice of rescission for a period of 72 days after actual notice of the fraud. Cf. *Wadleigh v. Phelps*, 149 Cal. 627, 633, 87 P. 93; *Zakaessian v. Zakaessian*, 70 Cal. App.2d 721, 727, 161 P.2d 677.

The judgment is reversed with instructions to overrule the demurrer.

DORAN, Acting P. J., and DRAPEAU, J., concur.

109 Cal.App.2d 676

**PEOPLE v. WALLACE.**

Cr. 2752.

District Court of Appeal, First District,  
Division 1, California.

March 12, 1952.

Defendant was convicted in the Superior Court of the State of California, in and for the City and County of San Francisco, Wm. T. Sweigert, J., of unlawful possession of narcotics, and she appealed. The District Court of Appeal, Peters, P. J., held that even if narcotics were left in defendant's inadvertently, where defendant assumed control, dominion and possession of narcotics for purpose of using them herself, her possession was unlawful.

Affirmed.

**1. Criminal Law** ⇨1144(13)

On appeal from conviction for unlawful possession of narcotics, evidence must be considered in light most favorable to prosecution. Health and Safety Code, § 11500.

**2. Poisons** ⇨9

Possession of narcotics proves a prima facie case of violation of code provision prohibiting possession except on written prescription. Health and Safety Code, § 11500.

**3. Poisons** ⇨9

While person accused of unlawful possession of narcotics may defend on ground that possession was lawful because narcotics were secured by prescription issued to him, fact that the prescription was issued to another does not conclusively prove that accused's possession was lawful. Health and Safety Code, § 11500.

**4. Poisons** ⇨9

Possession as an involuntary custodian of narcotics inadvertently left in defendant's home by another would justify finding that possession was not unlawful. Health and Safety Code, § 11500.

**5. Criminal Law** ⇨260(11)

On trial to the court, credibility of witnesses and conflicts in evidence are to be resolved by trial court, and such rule

is applicable where conflicting testimony is that of a police officer.

**6. Poisons** ⇨9

In prosecution for unlawful possession of narcotics, evidence justified finding that defendant assumed control, dominion and possession of narcotics for purpose of using them herself. Health and Safety Code, § 11500.

**7. Poisons** ⇨4

Even if narcotics were inadvertently left in defendant's possession, where defendant assumed control, dominion and possession of narcotics for purpose of using them herself, her possession was unlawful. Health and Safety Code, § 11500.

Leslie C. Gillen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Patricia Wallace, in a trial before the court without a jury, was found guilty of unlawful possession of narcotics in violation of section 11500 of the Health and Safety Code. From the judgment of conviction she appeals. She admits possession of the narcotics, but claims that the evidence shows, without contradiction, that the narcotics belonged to one Levy, who had secured them by prescription, and that they had inadvertently been left in her home by Levy, and that she was merely keeping them for him until he could call for them. She urges that for this reason her possession of the narcotics was not illegal.

The record shows the following: On July 10, 1950, Dr. Anderson, in Berkeley, gave to one of his patients, Elious Levy, a prescription for thirty-six tablets of dolophine, a drug containing morphine. That same evening, or perhaps the next night, Levy and his wife visited Levy's brother-in-law, one Morel Marshall, who lived in the Patri Hotel in San Francisco. That hotel was operated by the defendant Patri-

cia Wallace, who leased the premises and owned the furniture. She also resided at the hotel. Marshall and Wallace were friendly. The Levys visited with Marshall and Wallace for several hours. According to Levy, during the visit, and while Wallace was present, Levy gave the prescription to Marshall and asked him to have it filled at a drugstore adjoining the hotel. Marshall had the prescription filled, and delivered the bottle of tablets, thirty-six in number, to Levy in the presence of Wallace. Levy took two of the tablets, and set the bottle on the kitchen table. He testified that when he left that evening he forgot to take the bottle with him.

Defendant Wallace testified that she did not see the bottle of tablets on the table before Levy left, or after he left. The next day, according to her story, her thirteen-year old son brought the bottle to her and told her that he had found it on the sink. Defendant then testified that she looked at the bottle, saw Levy's name on the label and immediately telephoned to Mrs. Levy, who told her to put the pills away, and that when Levy, who was a pullman porter, returned from a trip, they would come over and get the bottle. The bottle does not contain Levy's name on the label. Moreover, it is of some significance that Mrs. Levy was not called to verify this telephone conversation.

Defendant further testified that, after her telephone call to Mrs. Levy, she locked the bottle up in a jewelry box for the reason that she wanted to keep it away from her son.

The bottle of narcotics was found on July 26, 1950, when the police apparently found Marshall and others in unlawful possession of other narcotics in the hotel, and upon searching defendant's room found the bottle under Wallace's bed in the locked jewelry chest. Rinken, one of the officers, testified to finding the bottle in the locked chest in the room occupied by defendant. He testified that defendant then told the officers that the bottle was hers; that the pills were medicine used by her to pass kidney stones, and that it was called dolophine. The label on the bottle had the word "dolophine" written on it in ink when

the bottle was introduced into evidence, but it had no such word on it when it was found by the police, that word having been written on the label by the police chemist when he examined the contents of the bottle. When discovered by the police, the bottle had but twenty-seven tablets in it. Defendant also told the arresting officers, according to Rinken, that she had a prescription for the tablets which had been filled "downstairs."

Defendant denied this conversation almost in its entirety. She denied telling the police officer that the prescription was hers, that the bottle was hers, or that she used the medicine herself to pass kidney stones, or for any other reason. She stated that she could not have made such a statement because Levy's name was on the bottle—but, as already pointed out, it was not. She denied stating to the police, or even knowing, that the bottle contained dolophine. She denied that she had ever taken any of the pills. She admitted that she had not asked her boy if he had taken any of the pills.

As already pointed out, the bottle originally contained thirty-six tablets. Levy took two. When found by the police the bottle contained but twenty-seven tablets. Defendant could not explain this discrepancy.

The bottle was discovered about July 26, 1950, and defendant was not arrested until about ten days later.

On this evidence the trial court found defendant guilty of a violation of section 11500 of the Health and Safety Code. That section provides: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiroprapist, or veterinarian licensed to practice in this State."

[1] Appellant contends that when a guest legally obtains narcotics and inadvertently leaves them at the home of his hostess, who locks them up for safekeeping, it does not constitute a violation of the



section. If these were the facts there might be merit in the argument. But these are not the facts most favorable to the prosecution. According to officer Rinken, appellant admitted that she knew the bottle contained dolophine, claimed the bottle belonged to her, admitted that she consumed some of the tablets, and claimed to have a prescription for that purpose. The bottle contained seven tablets less than when Levy left it. Although the bottle was in appellant's possession for fifteen or sixteen days after Levy left it before it was found by the police, Levy made no effort to recover it in that period. Mrs. Levy was not called to corroborate the claimed telephone message. Thus, taking the evidence most favorable to the prosecution, as we must, we have possession by appellant, her admission that she knew it was a narcotic, and her admission that she consumed some of the pills.

[2-6] Possession proves a *prima facie* case. *People v. Physioc*, 86 Cal.App.2d 650, 195 P.2d 23; *People v. Cucco*, 85 Cal.App.2d 448, 193 P.2d 86; *People v. Graves*, 84 Cal.App.2d 531, 191 P.2d 32; *People v. Rumley*, 100 Cal.App.2d 6, 222 P.2d 913; *People v. Ramirez*, 104 Cal.App.2d 710, 232 P.2d 31. While the accused may defend on the ground that his possession was lawful because the narcotics were secured by a prescription issued to him, the fact that the prescription was issued to another does not conclusively prove that the accused's possession was lawful. If the trial court had believed the testimony that appellant was merely the involuntary custodian of the tablets inadvertently left in her home by Levy, it would have been justified in finding that her possession was not unlawful. But it was not required to believe that testimony. Credibility of the witnesses and conflicts in the evidence are to be resolved by the trial court, and that rule applies, of course, where the conflicting testimony is that of a police officer. *People v. Shafer*, 101 Cal.App.2d 54, 224 P.2d 778. In the instant case the trial court was justified in believing that, even if Levy did leave the narcotics in appellant's possession inadvertently, appellant assumed control, dominion and possession

of them for the purpose of using them herself. This would render her possession unlawful.

[7] There is nothing in *People v. Ard*, 25 Cal.App.2d 630, 78 P.2d 254, the only case cited by appellant, that supports her conclusion that her possession in the instant case was lawful. In that case Ard was a nurse, and came into possession of the narcotics for the use of a patient he was transporting to Texas. Shortly after arriving in Texas the patient died. Up to that time undoubtedly the possession of Ard was lawful. But Ard returned to California after the death of his patient, and was found in California in possession of the drugs some thirty days after the death of the patient. The court held that Ard's lawful possession ceased upon death of the patient and that his possession thereafter was unlawful. The case, rather than supporting appellant, supports the finding of guilt in the instant case. Even if appellant's possession here was originally lawful, by her exercising dominion over the tablets and consuming some of them, her possession became unlawful.

The judgment appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.



109 Cal.App.2d 696

CONAE v. CONAE.

Civ. 18849.

District Court of Appeal, Second District,  
Division 2, California.

March 12, 1952.

Hearing Denied May 8, 1952.

Proceeding to annul marriage wherein defendant moved for alimony, attorney's fees and costs pendente lite. The Superior Court, Los Angeles County, Departments 8 and 56, Mildred L. Lillie and Elmer D. Doyle, Judges, entered an order fixing alimony, attorney's fees and costs pendente lite, and plaintiff appealed. The District Court of Appeal, McComb, J., held that since notice of

the motion had been served on plaintiff's attorney of record, the court had jurisdiction to make the order appealed from notwithstanding that plaintiff had not been served with notice personally.

Affirmed.

### 1. Marriage ⇐62

Trial court had jurisdiction to make order fixing temporary alimony, attorney's fees and costs pendente lite where order to show cause was served on attorney of record of party affected by such order, though such order was not served upon such person personally. Code Civ.Proc. § 1015.

### 2. Marriage ⇐62

A court may not by rule change or add to procedural requirements established by statutory provision and an order attempting to add requirements to those prescribed by statute is to such extent a nullity and void, and therefore in view of Code of Civil Procedure section authorizing service of notice of motion for alimony pendente lite on attorney of record, provision in order to show cause that notice thereof be served personally upon person affected thereby was a nullity and properly disregarded. Code Civ.Proc. § 1015.

Leola Buck Kellogg, Rendondo Beach, Montgomery G. Rice, La Habra, of counsel, for appellant.

McLaughlin & Casey, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from an order fixing alimony, attorney's fees and costs, pendente lite, on the ground that he did not receive proper notice of the hearing at which the order was made.

*Facts:* On May 8, 1951, plaintiff filed suit to annul his marriage to defendant.

July 27, 1951, defendant filed her answer. At the same time she filed an affidavit as a predicate for alimony, attorney's fees and costs pendente lite.

An order to show cause was issued pursuant to the affidavit fixing the date of

hearing as August 8, 1951. Among other things the order contained this provision: "(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the Form denominated 'Husband's Questionnaire,' to the party affected at least five days prior to the date of hearing." The order to show cause was served on plaintiff's attorney but was never served personally upon plaintiff.

At the time of the hearing the court made the order from which the present appeal is taken.

[1] *Questions:* First: *Did the trial court have jurisdiction to make an order fixing temporary alimony, attorney's fees and costs pendente lite notwithstanding the order to show cause was not served on plaintiff personally?*

*Yes.* Section 1015 of the Code of Civil Procedure reads in part as follows: "But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. \* \* \*

In the present case plaintiff had appeared in the action through an attorney and the foregoing provision of section 1015, Code of Civil Procedure, authorized the service of the notice of motion for alimony pendente lite, etc. upon his attorney. (Moore v. Superior Court, 203 Cal. 238, 242, 263 P. 1009; Reynolds v. Reynolds, 21 Cal.2d 580, 583 [1], 134 P.2d 251; Benway v. Benway, 69 Cal.App.2d 574, 582 [8], 159 P.2d 682.)

[2] *Second:* *Was the provision in the order to show cause that notice be served personally upon plaintiff a nullity and void?*

*Yes.* Section 1015 of the Code of Civil Procedure prescribes the method of service of the notice of motion here in question, and it makes no provision that it should be served upon the party personally.

A court may not by rule change or add to procedural requirements established by statutory provision. An order attempting to add requirements to those prescribed by a

statute is to such an extent a nullity and void. (Cf. *Butterfield v. Butterfield*, 1 Cal. 2d 227, 228, 34 P.2d 145; *Henry v. Willett*, 60 Cal.App. 244, 252, 212 P. 698.) Therefore since the provision in the court's order that it be served upon plaintiff personally was a nullity it was properly disregarded at the time of the hearing.

*Armstrong v. Superior Court*, 63 Cal. 410 and *Hayes v. Butler*, 25 Cal.App. 743, 145 P. 553, deal with actions where the court was granted a discretion as to the relief to be allowed and was entitled to make conditions as a prerequisite to the granting of relief. Such cases are not here in point.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.



109 Cal.App.2d 651

PEOPLE v. SCHIVO.

Cr. 4722.

District Court of Appeal, Second District,  
Division 1, California.

March 10, 1952.

Criminal prosecution wherein the Superior Court, Los Angeles County, Charles W. Fricke, J., rendered a judgment of conviction, and defendant appealed. The District Court of Appeal, Doran, J., held that the record revealed evidence sufficient to support the judgment.

Affirmed.

### 1. Criminal Law ⇨563

Prima facie proof of corpus delicti is sufficient.

### 2. Criminal Law ⇨260(11)

In prosecution for violating gaming statutes, where jury was waived and issues were submitted on transcript of preliminary examination, issue as to whether corpus delicti had been established was for trial judge to determine. Pen.Code, § 337a, subd. 3.

### 3. Criminal Law ⇨260(11)

Where there is substantial evidence to support finding in respect to corpus delicti, the finding will not be disturbed on appeal.

### 4. Gaming ⇨98(1)

Evidence sustained gaming conviction. Pen.Code, § 337a, subd. 3.

John J. Bradley and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

Defendant was charged in the information with the violation of section 337a of the Penal Code; Count I for the violation of subdivision 2 and Count III for the violation of subdivision 3. A jury was waived and by stipulation the issues were submitted on the transcript of the preliminary examination. Defendant was adjudged guilty as to Count II and not guilty as to Count I. A motion for a new trial was denied.

It is contended on appeal that "The verdict is contrary to the law and to the evidence". In this connection it is argued that the corpus delicti was not established by independent evidence; that the "mere possession of betting markers not prima facie evidence of violation of subdivision 3 of section 337a".

Briefly, the records revealed that two officers entered defendant's establishment which was a "news stand and check cashing office" and found a number of papers which one of the officers after, "It was stipulated that officer Jones was qualified to testify as an expert in matters concerning the means and manner, books, papers and paraphernalia used in bookmaking", described as memoranda used by bookmakers; two were found on defendant's person.

[1-3] It is well settled that prima facie proof of the corpus delicti is sufficient. Manifestly this issue was for the trial judge to determine and it is also well settled that if there is substantial evidence to support



the finding the finding will not be disturbed on appeal.

The officers testified to the conversation with the defendant at the time of the arrest which it is unnecessary to recite.

[4] A review of the record reveals the evidence sufficient to support the judgment and no reversible errors appear.

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 703

**PEERLESS LAUNDRY SERVICES,  
Limited, v. CITY OF LOS  
ANGELES et al.**  
Civ. 18645.

District Court of Appeal, Second District,  
Division 2, California.

March 13, 1952.

Hearing Denied May 8, 1952.

Action by Peerless Laundry Service, Ltd., a corporation, against City of Los Angeles and another for injury to plaintiff's property which occurred when a city fire truck crashed into plaintiff's building. The Superior Court, Los Angeles County, Ingall W. Bull, J., rendered judgment in favor of plaintiff and the defendant city appealed. The District Court of Appeal, Moore, P. J., held that failure of defendant's driver to maintain sufficient control over fire truck to keep it on straight, coupled with defective brakes, could properly be found to be negligence and not result of disregard of any vehicle code regulation as to which driver was granted exemption by statute when in response to emergency call.

Judgment affirmed.

**1. Automobiles ⇐187**

Statute providing that operator of an emergency vehicle shall not be personally liable for any damages resulting in operation of such vehicle in line of duty in response to emergency call although relieving driver of municipally owned vehicle

from answering for detriment he may have caused while operating such vehicle on an emergency call does not abridge injured party's right of action against municipality under statute providing that municipalities are responsible for damages resulting in negligent operation of vehicles owned by them and operated by their employees. Vehicle Code, §§ 400, 401.

**2. Automobiles ⇐175(2)**

Statute providing that driver of city vehicle shall be exempt from certain driving regulations prescribed in Vehicle Code when in response to an emergency call he displays red light visible from front and proceeds along street with siren sounding relieves municipality from liability for negligence of operators of its emergency automobiles that could other wise be predicated on the violation of the Vehicle Code restrictions. Vehicle Code, § 454.

**3. Automobiles ⇐175(2), 187**

If harm caused results from negligence in operation of municipal motor vehicle while responding to emergency call is not based on an exempt restriction, statute providing that driver of city vehicle is exempt from certain driving regulations prescribed in Vehicle Code when in response to emergency call he displays red light visible from front and proceeds along street with siren sounding is inapplicable and city is responsible by virtue of statute making every municipality responsible for injury to personal property as result of negligent operation of any city owned motor vehicle operated by the agent or employer of city acting within scope of his employment. Vehicle Code, §§ 400, 454.

**4. Automobiles ⇐175(1, 4)**

Where city fire truck, while responding to emergency call, crashed into plaintiff's building and evidence revealed no disregard of speed regulations or violation of any rule with regard to manner of turning vehicle or that use of improper highway lane could have proximately caused accident and jury could have found that driver of fire truck failed to exercise ordinary care to maintain sufficient control over his vehicle to keep it on street and that such conduct coupled with defective brakes

caused collision with plaintiff's building, such conduct could properly be found to be negligence and not result of disregard of any driving regulation prescribed in Vehicle Code as to which driver was granted immunity by statute. Vehicle Code, §§ 400, 454.

**5. Automobiles** Ⓒ175(2)

Statute providing that driver of city vehicle shall be exempt from certain driving regulations prescribed in Vehicle Code when in response to emergency call he displays a red light visible from front and proceeds along streets with siren sounding, is to provide a clear speed pathway for municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned. Vehicle Code, § 454.

**6. Automobiles** Ⓒ175(2)

Statute providing that driver of city vehicle shall be exempt from certain driving regulations prescribed in Vehicle Code when in response to an emergency call he displays red light visible from front and proceeds along streets with siren sounding had no application to situation involved when city fire truck failed to make turn, traversed sidewalk and crashed into plaintiff's building, since screaming sirens and flashing red lights could in no way have given plaintiff an opportunity to protect his property or prevent crash which resulted. Vehicle Code, § 454.

**7. Automobiles** Ⓒ246(41, 57)

In action for damages to plaintiff's property which occurred when city fire truck crashed into plaintiff's building while responding to an emergency call, it was a reasonable inference from the evidence that brakes of fire truck were not functioning as required by statute and therefore giving of instructions to effect that if defendant operated vehicle with brakes that were not adequate to stop within 37 feet when travelling at 20 miles per hour and that if such brake failure was proximate cause of accident verdict was required to be in favor of plaintiff, was not error. Vehicle Code, § 670(a).

Deputy City Atty., all of Los Angeles, for appellant.

Schofield, Hanson & Jenkins, San Francisco, Wendell H. Davis, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment in the sum of \$5500 entered upon a verdict in favor of plaintiff for injury to property which occurred when a city fire truck crashed into plaintiff's building. The damage resulted when the vehicle's driver was responding to an emergency call.

The uncontradicted evidence establishes that the fire truck, a "pumper," proceeded south on Main street at a maximum speed of 40 to 50 miles per hour; the driver applied the brakes reducing speed to about 20 miles per hour as the vehicle entered Slauson street and attempted to go eastward; he again applied the brakes, but the truck sped on—leaping the six-inch curb and traversing the twelve-foot sidewalk. It came to rest with a violent impact against plaintiff's structure. The driver testified that he "attempted to apply the brakes" but that he may have stepped on the accelerator instead. One of plaintiff's employees testified that after the crash, the pumper driver declared: "I just lost control; couldn't make the turn."

Appellant impliedly concedes that such evidence is sufficient to support a finding that the driver's conduct reflected ordinary negligence but that it is entitled to a reversal on the ground that by virtue of Vehicle Code, section 454, recovery against the city cannot be founded on the general principles of law relating to negligence. Such contention requires an examination of the statutes applicable to municipally owned "emergency" vehicles.

[1] Section 400 of the Vehicle Code provides broadly that municipalities are "responsible" for damages resulting from the negligent operation of vehicles owned by them and operated by their employees. Section 401 provides that the *operator* of an *emergency* vehicle shall not be personally liable for any damages resulting from his operation of such vehicle in the line of duty "while responding to an emergency call".

Thus, although the driver of a municipally owned vehicle is personally relieved from answering for detriment he may have caused while operating such vehicle on an emergency call, yet section 401 does not abridge the injured party's right of action against the municipality.

However, the employer's liability is largely limited by the provisions of section 454. It is therein provided that the driver of a city vehicle shall be exempt from driving regulations prescribed in chapter 3 and chapters 6 to 13 of Division 9 of the Vehicle Code. Such driver shall be entitled to such exemption only when in response to an emergency call he displays a red light visible from the front and proceeds along the streets with siren sounding. Section 454 declares that the driver shall not be relieved from "the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

[2] Pursuant to this statute, it has been determined that the municipality is relieved from liability for any negligence of the operators of its emergency cars that could be otherwise predicated upon a violation of Vehicle Code restrictions. *Lucas v. City of Los Angeles*, 10 Cal.2d 476, 483, 75 P.2d 599; *Raynor v. City of Arcata*, 11 Cal.2d 113, 117, 77 P.2d 1054. Each of the cited cases involved a suit for damages against a municipality for injuries arising out of an intersectional collision between a private automobile and a city owned emergency vehicle. Judgments for the plaintiffs in each action were reversed for the reason that the court instructed the jury to base a finding of negligence on the failure of the emergency vehicle to adhere to certain speed or right of way rules. Appellant has emphasized the doctrine "that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable for injuries to another, unless the operator has made an arbitrary exercise of these privileges. In such cases speed, right of way, and all other 'rules of the road' are

out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges." *Lucas v. City of Los Angeles*, supra, 10 Cal.2d at page 486, 75 P.2d at page 604. Relying upon the quoted authority, appellant contends herein that (1) since the statutory warning signals were given, the city can be held liable only in the event it should be found that the driver was guilty of an arbitrary exercise of the privileges granted him; (2) the evidence cannot support such a finding; and (3) that, in any event, a reversal must be ordered inasmuch as the court instructed the jury that a finding of ordinary negligence would suffice to hold the defendant responsible.

[3] Such contentions find no support in the record. The liability of appellant can be founded upon general principles of negligence. Section 454 does not bar recovery under the circumstances presented. The vehicular regulations from which exemption is granted relate to speed, right of way, pedestrian duties, street cars and safety zones, stopping, standing and parking. There is no blanket exemption of municipalities from all the rules that govern the operation of motor vehicles. The legislature has not declared that negligence may not be predicated upon acts or conduct not exempt. Accordingly, if the harm caused results from negligence not based upon an exempt restriction, section 454 is inapplicable and the city must be held responsible by virtue of section 400 of the Vehicle Code which makes every municipality responsible for injury to person or property as the result of the negligent operation of any city owned motor vehicle operated by any agent or employee of the city acting within the scope of his employment; also, one injured in his person or property may sue the city.

[4] The evidence herein reveals no disregard of speed regulations, neither does it show a violation of any rule in regard to the manner of turning the vehicle or use of



improper highway lanes that could have proximately caused the accident. The jury could have found only that appellant's driver failed to exercise ordinary care to maintain sufficient control over his vehicle to keep it on the street. The accident is difficult to explain otherwise than on the theory that the driver while making his turn on Slauson looked to the east, as he testified, in an attempt to view other pieces of fire apparatus preceding him, and that in doing so he relaxed his vigilance over the progress of his own vehicle for too long a period. This coupled with defective brakes caused the collision with respondent's building. Such conduct could properly be found to be negligence and not the result of a disregard of any regulation as to which the driver is granted immunity by section 454.

[5, 6] Moreover, respondent's argument that section 454 was never intended to have application to a situation such as is here presented appears to be sound. The purpose of the statute is to provide a "clear and speedy pathway" for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned. *Lucas v. City of Los Angeles*, supra, 10 Cal.2d at page 483, 75 P.2d at page 602. Further indication that section 454 was not intended to be applicable to such a situation as is here involved is the fact that the exemptions come into play only when a siren and red lamp are in operation so as to give audible and visual notice to others to yield the right of way and thus protect themselves and all concerned. Screaming sirens and flashing red lights could in no way have given respondent an opportunity to protect its property or to avert the crash which resulted. Appellant's construction of section 454 would operate to give emergency-bound vehicles free rein to speed in disregard of persons and property so long as the statutory warnings are given. Such interpretation certainly could not reasonably have been the legislative intent in drafting the statute.

[7] Appellant also assigns as prejudicial error the giving of instructions to the ef-

fect that if defendant operated its vehicle with brakes that were not adequate to stop it within thirty-seven feet when traveling at 20 miles per hour and that if such brake failure was a proximate cause of the accident then their verdict must be in favor of plaintiff. It is asserted that the evidence is insufficient to permit liability to be predicated on the theory of defective brakes. The evidence on this point reveals that upon reaching the intersection at Slauson the fire truck was traveling approximately twenty miles per hour; the driver applied the brakes when midway into the intersection—more than sixty feet from the place of the subsequent impact; the truck did not immediately slow down but continued forward over the curb and did not reduce speed until ten to fifteen feet from the building. Its speed was about ten miles per hour when it struck respondent's wall. From the force of the impact the vehicle's fender was crushed, bumper dislocated and right front tire flattened. Appellant's only evidence on the point was that the brakes worked properly on a previous trip that day, and the pumper had been placed in service only twenty-five days prior to the accident. It was a reasonable inference that the brakes were not functioning as required by Vehicle Code, section 670(a). It is there provided that on dry asphalt or concrete pavement on a grade less than one per cent, brakes must be adequate to halt a vehicle going twenty miles per hour within thirty-seven feet. Where from the testimony received with reference to the driver's actions and as to the physical facts relating to the collision the jury might reasonably conclude that the statutory standards were not met, such instructions are not erroneous. *Cavagnaro v. City of Napa*, 86 Cal.App.2d 517, 520, 195 P.2d 25; *Vedder v. Bireley*, 92 Cal. App. 52, 58, 267 P. 724.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

109 Cal.App.2d 569

**LOST KEY MINES, Inc. v.  
HAMILTON et al.**

**GOODWIN v. LOST KEY MINES,  
Inc., et al.**

**Civ. 8009. Sac. 6181.**

District Court of Appeal, Third District,  
California.

March 4, 1952.

Quiet title action by the Lost Key Mines, Inc., against Tolbert Hamilton, and another. Josie Goodwin, who had leased premises involved to Gold Pan Consolidated, filed complaint in intervention against plaintiff, Gold Pan Consolidated, and others. The Superior Court, Tuolumne County, J. T. B. Warne, J., gave judgment quieting title in intervenor and Gold Pan appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that Gold Pan was in default under lease and implied finding that causes of defaults were not beyond control of Gold Pan.

Judgment affirmed.

#### 1. Appeal and Error ⇨931(I)

All intendments are in favor of judgment given and all conflicts in testimony are resolved in respondent's favor.

#### 2. Mines and Minerals ⇨68(1), 70(6)

In quiet title action, wherein lessor of mining lease intervened against former lessee, subsequent lessee and others, evidence sustained finding that subsequent lessee was in default under lease for failure to start mining work immediately, to pay royalties, to pay minimum payments and to post notices of nonresponsibility, and implied finding that causes of default were not beyond vendee's control.

#### 3. Appeal and Error ⇨1010(I)

Upon appeal, trial court's findings which are supported by adequate evidence are conclusive.

#### 4. Landlord and Tenant ⇨130

Statutory covenant of quiet possession on part of lessor means lessee will not be evicted or disturbed by lessor, or by persons deriving title from him, or by virtue of title paramount to his, and implies no warranty against acts of strangers. Civ. Code, § 1927.

#### 5. Mines and Minerals ⇨62(I)

Where first lessee terminated its interest under mining lease by quit claim to lessor who then leased to second lessee who was denied possession of premises by persons claiming under first lessee, such persons in possession were strangers to title and their acts did not constitute breach of implied covenant of quiet enjoyment on part of lessor. Civ.Code, § 1927.

#### 6. Appeal and Error ⇨1010(I)

In quiet title action which resulted in denial of defendant's claims under lease, where neither pleadings nor court's findings stated that mining equipment of defendant's predecessor had become part of real property and no evidence of such fact was introduced, and where no objection was made that findings were insufficient, record did not support contention that defendant's equipment was forfeited. Public Resources Code, § 2601.

Anderson & Peck, Oakland, for appellants.

St. Sure & Moore and Jesse M. Zimmerman, all of Oakland, for respondents.

VAN DYKE, Justice.

In this action plaintiff, The Lost Key Mines, Inc., a corporation, brought suit against certain defendants, seeking to quiet title against the claims of said defendants in respect to certain real property in Tuolumne County. It based its claims upon a mining lease. Josie Goodwin, respondent herein and admitted owner of the real property, filed a complaint in intervention against The Lost Key Mines, Inc., whom we shall hereafter refer to as "Lost Key", against Gold Pan Consolidated, a corporation, hereafter referred to as "Gold Pan", and against other defendants, in which she sought to quiet her title as against the claims of Lost Key, Gold Pan and others. The trial court gave its judgment quieting title in respondent Josie Goodwin and from that judgment Gold Pan has appealed.

[1] We shall state the facts in accordance with the rule that all intendments are in favor of the judgment given and that all conflicts in testimony are resolved in

respondent's favor. On July 30, 1946 respondent leased the subject property to Lost Key under a contract giving it the right to mine the property for an undetermined length of time in return for royalty payments. The lease was in the usual form of mining leases. Lost Key went into possession, installed mining machinery upon the property and commenced mining. Its operations continued for a period and then halted. In August 1947 those interested in the lessee's affairs fell into dispute concerning its operations and two factions developed. Leading one faction were a Mr. Hamilton and a Mr. Potter. They negotiated with respondent concerning the resumption of mining operations on the property. Lost Key was a Nevada corporation. Hamilton and Potter, who were president and vice-president respectively thereof, had been informed by the California Commissioner of Corporations that if it was desired to sell stock in the venture in California it would be required that a California corporation be formed and a lease given to it. Such a corporation was formed under the name of Gold Pan Consolidated. Just prior to its formation Lost Key executed a quitclaim deed of the property under lease to it, in favor of respondent Goodwin, and thereafter, and upon incorporation of Gold Pan, respondent Goodwin executed a lease to the new corporation, giving it mining rights equivalent to those that had been given by the first lease to Lost Key. By her complaint in intervention respondent claimed this lease also had terminated. Apparently challenging the validity of the corporate action of Lost Key in executing the quitclaim deed, certain parties remained in physical possession of the property and when appellant Gold Pan attempted to take possession under its lease, they were successful in forcibly resisting the attempt. These people, purporting to act for Lost Key, were instrumental in causing it to file the action hereinbefore referred to. When the case came on for trial plaintiff Lost Key did not appear. Appellant Gold Pan did appear and sought to establish its rights as a lessee under the lease given to it. So far as material here, therefore, the trial was confined to the contest between respondent and Gold Pan.

As to these issues so tried the trial court found as follows: That respondent was the owner of the real property and entitled to the exclusive possession thereof; that by the quitclaim deed the rights of Lost Key as lessee or otherwise in the real property terminated; that thereafter respondent had leased the property to appellant Gold Pan; that Gold Pan defaulted in its obligations in that it failed to start mining work immediately as required by the lease or at any time, failed to pay royalties to respondent, failed to pay minimum payments fixed by the lease to respondent, and failed to post notices of nonresponsibility on the property, in all of which respects it was obligated by its lease; that at no time had it either been ready or able to perform its obligations under the lease; that the lease provided that upon breach by appellant the respondent could record a notice stating that the lease was at an end and if she did so, and Gold Pan did not within 10 days after such recording commence an action in the Superior Court of Tuolumne County denying the notice of default, then the record should "stand clear of this agreement the same as if it had never been executed"; that such notice of default had been recorded and the stipulated action had not been commenced within the time allowed; that by reason of said defaults, the inability of Gold Pan to perform its obligations, the recording of the notice of defaults and the failure of Gold Pan to commence the stipulated action, the lease was at an end.

[2,3] Appellant contends that the evidence does not support the findings as to its defaults. In support of this assignment appellant first contends that the defaults found to have existed in respect of its performance of its obligations under the lease were excused by the terms of the lease itself. Appellant refers to a paragraph in the lease which provides that if defaults were "occasioned by act of God or other cause beyond the control of the party of the second part [the lessee] then in that event such failure or default shall be deemed waived" by the lessor. The argument is that from the evidence the physical possession of the leased premises by persons claiming under the lease to Lost Key con-



stituted circumstances beyond the control of Gold Pan. It appears that when the property was leased to appellant in 1947 physical possession was forcibly maintained by the recalcitrant faction of Lost Key, the force going so far as to include threats of gunfire; that respondent and appellant cooperated in attempts to remove these people from the property and that an injunction was issued in the original cause, enjoining the plaintiff therein, Lost Key, its officers and agents from in any wise interfering with or obstructing respondent in the use and enjoyment of the property. Notwithstanding this order, at least one of the resisting group refused to depart. However, no proceedings were taken to enforce the injunctive order through contempt proceedings and appellant made no further attempt to obtain possession, even though the area held by the resisters was only a few acres out of nearly 200 acres of property under its lease. This failure to act was undoubtedly considered by the trial court to be explained by the evidence that appellant had never obtained a permit to sell its stock and had been without assets from the time of its creation. It had never issued stock, had no money, owned no machinery and the court was justified in concluding that, having obtained its lease, its real reason for inaction over a long period of time was its own inability to proceed with corporate financing to a point where it could go forward. It was not denied that respondent, claiming defaults had occurred, recorded notice of termination of the lease and that appellant filed no action contesting her action. All of this supports the court's findings that appellant was in default and the implied finding that the causes of its defaults were not causes beyond its control. Whether or not the causes of default were circumstances beyond its control were questions of fact under the circumstances shown by this record and the trial court's finding against the appellant are conclusive here, since they are adequately supported.

[4, 5] Appellant next contends that any default of which it might have been guilty was excused because respondent had been guilty of breaching the implied covenant of quiet enjoyment. Appellant refers to

Civil Code, Section 1927 which provides that an agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired for the term of the hiring, against all persons lawfully claiming the same. But this covenant of quiet enjoyment on the part of the lessor means that the "tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers. It is equivalent to a stipulation that the lessee shall not be rightfully disturbed in his possession during the term, not that he shall not be disturbed at all." *McDowell v. Hyman*, 117 Cal. 67, 70-71, 48 P. 984, 986, citing 1 Taylor on Landlord and Tenant, sec. 305. It appears from the record that the persons resisting the possession of appellant were strangers to the title. In so far as they claimed under Lost Key and its lease, such claims were terminated by the quitclaim deed which Lost Key executed to respondent. Appellant does not even claim that this quitclaim was not the valid act of Lost Key, and consequently those who purportedly claimed under Lost Key were strangers to the title. Whatever effect their resistance may have had, the covenant was not broken by respondent, and appellant's redress was against the wrongdoers. *McDowell v. Hyman*, supra.

Next appellant contends that its performance was excused by the acts of the resisters which prevented their fulfilling their contract. Assuming that such acts might under certain circumstances amount to prevention of fulfillment by an adverse party, *City of Alturas v. Gloster*, 16 Cal.2d 46, 49, 104 P.2d 810, the contention here presents nothing but an issue of fact as to which the trial court has impliedly found against appellant. What we have already said demonstrates that this finding is supported by the evidence. But in addition to all that there was evidence that while the resisters were on the property when appellant, having obtained its lease, first sought to take possession, all departed after the injunctive order was obtained save one who, under order of court, remained to guard certain mining equipment that had been placed upon the property by Lost Key. The area thus occupied was but a few acres in

extent, and there was nothing to show that occupation of this small area in any way prevented performance of its lease obligations by appellant.

[6] Finally, appellant contends that it had a valid lease to the property; that it was the rightful successor to all of the assets of Lost Key, which included some \$65,000 worth of mining equipment placed by Lost Key upon the subject property and that as a result of the judgment quieting title in respondent its leasehold has been forfeited and further it has been deprived of all interest in the mining equipment which, by reason of Section 2601 of the Public Resources Code, had become affixed to the mine and therefore passed with the decree quieting the land to respondent to her unjust enrichment. It is sufficient reply to this contention to say that the record does not support it. There was no allegation along these lines in the pleadings nor any evidence from which it could be found that the mining equipment had become a part of the real property by the terms of the code section referred to and the court made no finding upon the matter. The record shows that findings as filed were served and no objections made that they were insufficient. Under these circumstances the contention made has no merit on appeal.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, J.  
pro tem., concur.



105 Cal.App.2d 714

**PEOPLE v. WHEELER,**  
Cr. 4757.

District Court of Appeal, Second District,  
Division 2, California.

March 13, 1952.

The defendant was convicted in the Superior Court of Los Angeles County, Ellis-

worth Meyer, J., of having issued a worthless check, and he appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Judgment affirmed.

# **1. Criminal Law** ⇨696(1)

In prosecution for issuing a worthless check, motion of defendant to strike testimony of assistant cashier of bank, on which check was drawn, that he had been unable to find an account with defendant on bank's record during the preceding 21 years, was properly denied, where the motion was based on no ground going to the relevancy or competency of the testimony. Pen.Code, § 476a.

## **2. Criminal Law** ⇨1036(1)

Where no valid objection was made in trial court by defendant to questions asked witness for the prosecution, defendant was foreclosed of right on appeal to complain even if there had been a legal objection available.

## **3. Criminal Law** ⇨693, 696(2)

An objection to a question must be timely, and unfriendly answer must be followed by a motion to strike it.

## **4. Criminal Law** ⇨1028

Advantage on appeal can be taken of a ruling at the trial only after attention of trial court has been directed to the specific subject matter deemed improper.

## **5. Criminal Law** ⇨452(1)

In prosecution for issuing a worthless check, assistant cashier, who knew those who arranged credit on behalf of bank on which the check was drawn, and who had searched records of rejected loans and had consulted those who had passed on applications for loans, was qualified to testify that defendant had made no arrangement for credit. Code Civ.Proc. § 1855, subd. 5; Pen.Code. § 476a.

## **6. Criminal Law** ⇨1159(2)

A conviction will not be reversed, on ground of insufficiency of evidence, unless the judgment is not supported on any hypothesis whatever.

## **7. False Pretenses** ⇨49(1)

Evidence was sufficient to sustain conviction for issuing a worthless check. Pen. Code, § 476a.

**8. False Pretenses** ⚡49(2)

In prosecution for issuing a worthless check, fraudulent intent of defendant was proved by evidence that he passed a check for a thing of value, and it was not necessary to show presentment of the check to bank. Pen.Code, § 476a.

**9. Criminal Law** ⚡570(1)

In prosecution for issuing a worthless check, defense of defendant that he was inebriated at the time of the offense was refuted by implied finding that defendant entertained a fraudulent intent. Pen.Code, § 476a.

Alexander L. Oster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of having issued in Los Angeles a worthless check drawn upon a branch bank at Colton. He wrote and signed the check in the presence of the lady who had served him in a department store, and delivered it to her. He gave as his address one that did not exist. After having waited 30 minutes for the check to be verified, he was led away by the house detective. In his interview with the arresting officer he stated that he had an account with the bank despite the advices from the Colton institution. He explained the false address he had given the saleslady with the declaration that he thought that was the correct address of his brother-in-law who lived in that vicinity. In explanation of his statement that he had given the Pacific Fruit Express as his place of employment he told the officer that he had been discharged two or three weeks previously. However, no record was found of his ever having been there employed. He persisted in his statement that he had a balance of \$25 in the bank named. He maintained that he had drawn the check for a wedding ring for the reason that he intended to be married "over the week end."

At his trial he testified that he made his first deposit in the bank in 1932 and the last

in 1940; that he knew of no other deposits and did not know how much he had to his credit on May 31, 1951, when he delivered the sterile document to the Los Angeles merchant for two wedding rings and a diamond of the aggregate value of \$173.51. He had "some money" but not quite the amount of his purchase; intended to take the jewelry in exchange for the check; expected the check to be paid "by arrangement with" the bank; was under the influence of liquor; did not intend to defraud the store; made his last deposit in 1940 in the same name signed on the check but could not recall the amount; had been convicted of three prior felonies.

The witness Blessent, assistant cashier, testified that there was no arrangement for extension of credit to anyone of appellant's name; that he had made a vain search of the bank's records from 1930 through July 23, 1951, for an account in appellant's name; that he made a search of the file of rejected loans.

The arresting officer testified that appellant was not intoxicated.

Appellant demands a reversal upon the grounds of (1) error in admitting hearsay evidence to establish that he had no credit arrangement with the bank and (2) insufficiency of the evidence to support the judgment.

### The Evidence Is Competent.

[1-4] After Mr. Blessent had testified that he had been unable to find an account with appellant on the bank's record during the preceding 21 years there was neither objection to, nor motion to strike, the testimony. After the witness had testified that no arrangements for credit had been made with the bank, that he had checked the bank records and had asked all the lending officers, appellant's motion to strike the answer was based upon no ground going to its relevancy or competency and was therefore properly denied. Since no valid objection was made in the court below to either question, appellant is foreclosed of the right now to complain even if there had been a legal objection available though not interposed. *People v. Calliham*, 81 Cal.App.2d 928, 933, 185 P.2d 342. It is commonplace



that an objection to a question must be timely and that the unfriendly answer must be followed by a motion to strike it. Advantage on appeal can be taken of a ruling at the trial only after the trial court's attention has been directed to the specific subject matter deemed improper. *People v. Larrios*, 220 Cal. 236, 247, 30 P.2d 404.

[5] However, there was no valid objection to the inquiry. The assistant cashier knew those who arranged credit on behalf of the bank. Having searched the records of rejected loans and consulted those who pass upon applications for loans, the witness was qualified to testify that appellant had made no arrangement for credit. *Code Civ.Proc.*, sec. 1855(5); *People v. Menne*, 4 Cal.App.2d 91, 107, 41 P.2d 383; *People v. Kawano*, 38 Cal.App. 612, 614, 177 P. 174.

#### Evidence Sufficient.

There is no hiatus in the evidence offered to prove appellant's violation of section 476a of the Penal Code.<sup>1</sup> He made, uttered and delivered the check, knowing he had no funds in the bank on which he drew the check. That he had no credit arrangement was established by the assistant cashier. That he intended to take merchandise valued at \$173 in exchange for the check amply proves his fraudulent intent. In addition thereto, he gave fictitious addresses for his home and his place of work, gave false answers to the officers and testified to an imaginary account with the bank and of de-

posits that were never made, and insisted that he was under the influence of liquor at the time of his offense.

[6] A conviction of crime will not be reversed unless upon no hypothesis whatever is the judgment supported. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Shafer*, 101 Cal.App.2d 54, 58, 224 P.2d 778.

*People v. Frey*, 165 Cal. 140, 131 P. 127, is not pertinent. The only evidence of the nonexistence of an account there was the returned check bearing the notation "no account." Such a notation was hearsay and on no theory was it competent to prove there was no sum on deposit and that no credit had been arranged. After the Frey decision the Legislature made "notices of protest" admissible as proof of insufficiency of funds or credit. *Stats.* 1929, p. 1940; see *People v. Bullock*, 123 Cal.App. 299, 303, 11 P.2d 441, 442. But neither the content nor form of a notation or notice is here involved. Appellant was apprehended in the very act of achieving his intention.

*People v. Becker*, 137 Cal.App. 349, 30 P.2d 562, is not applicable. It is authority for allowing one so accused to present evidence of his intent. Appellant was in no sense restricted in his attempt to disprove a fraudulent intent. He testified that he did not intend to defraud the merchant and was not denied the privilege of calling others to the stand.

1. "Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depository, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depository, or person, or firm, or corporation, for the payment of such check, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than fourteen years.

"Protest. Where such check, draft or

order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depository, or person, or firm, or corporation.

"*Credit defined.* The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository or person or firm or corporation for the payment of such check, draft or order.

"*Constitutionality.* If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect."

[7-9] The proof is abundant. The assistant cashier proved that appellant had no account at the bank. *People v. Menne*, supra, 4 Cal.App.2d 104, 41 P.2d 383; *People v. Sheridan*, 136 Cal.App. 675, 685, 29 P.2d 464. Presentment of the check to the bank was not necessary. *People v. Ekberg*, 94 Cal.App.2d 613, 616, 211 P.2d 316; *In re Harper*, 17 Cal.App.2d 446, 447, 62 P.2d 390. His fraudulent intent is proved by his passing the check for a thing of value. Penal Code, sec. 476a; *People v. Megladery*, 40 Cal.App.2d 643, 649, 105 P.2d 385; *People v. Boyce*, 87 Cal.App.2d 828, 829, 197 P.2d 842. That he did not gain possession of the coveted jewels is no credit to him. He brazenly carried his criminal scheme as far as he could. He uttered the check for things of value and would have received them but for the cunning of the intended victim. The plea of drunkenness is unavailing. Inebriation at the time of the offense is refuted by the implied finding that he entertained a fraudulent intent.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



**DECTER et al. v. STEVENSON PROPERTIES, Inc. et al. \***

Civ. 18556.

District Court of Appeal, Second District,  
Division 1, California.

March 12, 1952.

Rehearing Denied March 31, 1952.

Hearing Granted May 8, 1952.

William B. Decter and others brought an action against Stevenson Properties, Inc., C. H. Stevenson, and others, and defendants C. H. Stevenson and others filed a cross-complaint. From a judgment of the Superior Court of Los Angeles County, Edward R. Brand, J., for plaintiffs and cross-defendants, cross-complainants appealed. The District Court of Appeal, Hanson, J., pro tem., held

\* Opinion subsequent 247 P.2d 11.

that an order of a city Board of Zoning Appeals, sustaining the city zoning administrators revocation of plaintiffs' temporary zoning variance permit to manufacture clay models on premises leased to plaintiffs because of their failure to comply with a condition of the permit that they properly control emission of dust from the premises onto adjacent properties, did not terminate the lease under a proviso therein that if operation of lessees' business was determined by duly constituted authority to be contrary to a city ordinance, the lease should be terminated.

Judgment reversed, and lower court ordered to ascertain the amount due cross-complainants and enter judgment accordingly.

**1. Landlord and Tenant** ¶105

An order of city board of zoning appeals, sustaining city zoning administrator's revocation of lessees' temporary zoning variance permit to manufacture clay models on leased premises because of their failure to comply with condition of permit that they properly control emission of dust from premises onto adjacent properties, did not ipso facto terminate lease under proviso therein that, if operation of lessees' business was determined by duly constituted authority to be contrary to city ordinance, lease should be terminated, as no issue of lessees' violation of ordinance was before or decided by administrator or Board.

**2. Evidence** ¶450(4)

Evidence that lessors knew before execution of lease that city zoning administrator had notified lessees to discontinue use of leased premises for clay model manufacturing as violation of zoning ordinance, that more than five persons were engaged in such manufacturing on leased premises contrary to ordinance, and that proviso in lease that, if operation of lessees' business was determined by duly constituted authority to be contrary to ordinance, lease should be terminated, was intended to be operative if lessees could not conduct their business as they were then conducting it, was inadmissible under parol evidence rule, in absence of any ambiguity in lease.

Ben Gould, Los Angeles, for appellants.  
Averill C. Pasarow, Los Angeles, for respondents.

HANSON, Justice pro tem.

The basic question at issue in this case is whether under the terms of the lease here involved it terminated *ipso facto* when the Board of Zoning Appeals sustained an order of the Zoning Administrator revoking a zoning variance permit which he had granted to the lessees subsequent to the execution of the lease.

The lessees originally entered into possession of the premises involved in 1944, under a lease executed during that year. The lease which is here involved was executed September 6, 1946, to run for a term of five years at a total rental for the term of \$24,000 payable in monthly installments of \$400.

About 15 days prior to the execution of the last named lease the plaintiff lessees were notified by the Zoning Administrator that they were required within 15 days to discontinue the use of the premises for "clay model making" as the operation was not in accordance with the zoning ordinance applicable to the property located as it was in Zone C-2. Apparently the notice was not given because the ordinance prohibited the making of clay models, but because the dust created by their manufacture was not properly controlled so as not to annoy the neighborhood. Other uses to which the premises were then being put were not affected by the notice as such uses were permissible under the zoning ordinance. Before the expiration of the 15 days counsel for plaintiffs procured from the Administrator an additional

fifteen-day extension to respond to the notice. As the lease here involved had not yet been executed, although prepared by lessors and tendered to lessees, the latter at the instance of their counsel sought and obtained from the lessors two amendments thereto by adding the language we have italicized in our quotations from the pertinent terms of the lease which we have set forth in the margin.<sup>1</sup> The lease it will be observed makes no reference to clay model making, but merely authorizes the lessees to use the premises for "manufacturing" and certain other uses.

Subsequent to the execution of the lease the lessees sought and obtained a temporary zone variance permit which enabled them despite the notice to continue to manufacture clay models on the premises; in short, permitting them to do the type of manufacturing upon the premises in which they had at all times been engaged. Later on this temporary variance permit was revoked by the Zoning Administrator because of the failure of the lessees to comply with certain conditions therein stated, among others, that of failing to properly control the emission of dust on the outside of the building and onto adjacent properties. On appeal his action was sustained by the Board of Zoning Appeals. Almost immediately thereafter the lessees vacated the premises and refused to be bound by the terms of the lease contending that the revocation of the variance permit *ipso facto* terminated the lease by virtue of the terms of the proviso of paragraph 8 of the lease.

At all times mentioned herein the zoning ordinances permitted manufacturing in the C-2 zone in which the property was located

1. Paragraph one of the lease grants certain described premises, upon which store buildings were located, to be used by the lessees "for the purpose of conducting and carrying on the business of manufacturing, selling and repairing window display forms, figures, fixtures and mannequins, display backgrounds and for related purposes." The eighth paragraph of the lease, the proviso of which was drafted by counsel for lessees reads as follows: "Lessee further agrees to so conduct said business on said premises that the same shall not become a nuisance, and in ac-

cordance with all applicable regulations of city, municipal or other public authority; and shall maintain said premises at all times in reasonably good, clean and neat condition. *Provided, however, that if the operation of the type of business specified in Clause 1 hereof is determined, by duly constituted authority, to be contrary to Ordinance No. 90,500 of the City of Los Angeles, or any provision of the Los Angeles Municipal Code relating to zoning, the lease shall be terminated and the lessee excused and released from his obligations thereunder.*"



only if such manufacturing was done in a retail store, business or shop (1) where not more than 5 persons did the work of manufacturing (2) within a completely enclosed building (3) a majority of the products made upon the premises were sold at retail and (4) the operations were not objectionable due to odor, dust, smoke, noise, vibration or other causes.

[1] It is at once apparent that the revocation of the variance permit was based, not on the theory that the manufacture by lessees of mannequins and other enumerated items out of clay was prohibited by the zoning ordinance, but that the revocation was based on the manner and method of the manufacturing processes which created dust which was permitted to escape from the premises onto adjoining premises. This was a breach of the conditions laid down in the permit which warranted its revocation. This finding, assuming it was correct, would be ground for a holding in a proper case for a decision that the lessees were likewise violating the ordinance. But no such issue was before the Zoning Administrator or decided by him and the same is true of the appeal before the Board of Zoning Appeals. There was then, and never has been, a decision of that point "by duly constituted authority" which is a prerequisite to the operation of the proviso found in paragraph eight of the lease. Accordingly, the revocation did not terminate the lease.

[2] In an endeavor to overcome the hurdle imposed by the terms of the lease the lessees offered, and over apt objection, were permitted to introduce evidence that the lessors knew prior to the execution of the lease the contents of the notice of August, 1946, sent by the Zoning Administrator to the lessees; that they knew that more than five persons were engaged in the manufacturing end of the business contrary to the applicable zoning ordinance; that the proviso in paragraph 8 was intended to be operative if the lessees could not conduct their business as they were then conducting it; and other testimony of the same general character. The evidence was inadmissible under the parol

evidence rule as there was no ambiguity in the terms of the lease. *Achen v. Pepsi-Cola Bottling Co.*, 105 Cal.App.2d 113, 233 P.2d 74. If the lessees contemplated that the proviso would be operative if they found themselves unable to conduct the type of business they were conducting in violation of the zoning ordinance, they should have so provided by apt language in the lease. This they failed to do.

As the trial court's findings in favor of the lessees are based solely upon evidence violative of the parol evidence rule they must be and are ignored.

The judgment of the lower court is reversed and the court is ordered to proceed to ascertain the amount that is due the cross-complainants and enter judgment accordingly.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 673

WILSON v. WILSON.  
Civ. 14837.

District Court of Appeal, First District,  
Division 1, California.  
March 12, 1952.

As Modified on Denial of Rehearing  
April 11, 1952.

Action for divorce wherein decree was entered dividing community property and granting plaintiff free, uninterrupted and sole right to use, occupy and control all of the real property. Plaintiff moved for order to make decree more definite and to clarify the decree regarding ad valorem real property taxes due, and the Superior Court of the State of California, in and for the City & County of San Francisco, Twain Michelsen, J., entered an order granting the motion, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the omission was not a clerical error and could not be supplied by the court.

Order reversed.

**1. Judgment**  $\hookrightarrow$  306

An error of omission in a final decree can be corrected by court by supplying omission only if error is a clerical error.

**2. Judgment**  $\hookrightarrow$  306

An error which is one which cannot reasonably be attributed to exercise of judicial consideration or discretion is a "clerical error".

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Error".

**3. Divorce**  $\hookrightarrow$  254

Where decree in divorce case divided community property and granted plaintiff free, uninterrupted and sole right to use, occupy and control all of property but made no mention of ad valorem real property taxes which were due and of which court had no knowledge, decree denoted either intent to make no change concerning obligations of parties for such taxes or intent not to deal with subject one way or another, especially in view of decree provision requiring defendant to pay income tax liens, and hence omission was not a "clerical error" and such omission could not be supplied by court.

**4. Divorce**  $\hookrightarrow$  286, 287

Where divorce decree divided community property and granted plaintiff right to use and control property but made no mention of ad valorem property taxes due, and trial court on plaintiff's motion supplied asserted omission by requiring defendant to pay taxes due, on defendant's appeal, rights and duties of parties to pay past, present or future ad valorem taxes on property were not in issue and were not determined by holding that court had no authority to supply omission which was not clerical error.

Louis Ferrari, San Francisco, for appellant.

Lucille F. Athearn, San Francisco, for respondent.

FRED B. WOOD, Justice.

July 22, 1947, a final decree was entered nunc pro tunc as of December 5, 1946,

granting the plaintiff a divorce upon the ground of extreme cruelty, awarding her permanent alimony for support and maintenance, and dividing the community property between the parties. That decree was affirmed in *Wilson v. Wilson*, 88 Cal.App. 2d 382, 198 P.2d 916.<sup>1</sup>

In dividing the community property the decree awarded each party an undivided one-half interest in certain improved real property and granted plaintiff "the free, uninterrupted and sole right to the use, occupancy and control of all of said real property and all the improvements thereon, including that awarded and assigned to Francis A. Wilson [defendant], so long as she shall choose to so use, occupy or control the same."

May 25, 1949, plaintiff filed a notice of motion for an order to make the final decree more definite and certain and to clarify the decree, particularly the portion thereof which we have quoted. In her supporting affidavit, plaintiff alleged that the intent of the court in awarding the use of this property could only be executed by an order compelling the defendant to pay the real property taxes which were due and payable thereon as of December 5, 1946, the date of the decree, setting forth the amounts of accrued taxes for certain years.

May 23, 1950, an order was entered granting plaintiff's motion to clarify the final decree in respect to certain property taxes. Defendant appealed from that order. Subsequently and heretofore a motion by plaintiff to dismiss the appeal upon the asserted ground that the order is non-appealable was denied by this court.

[1,2] The main question upon this appeal is whether or not the asserted error of omission in the final decree was a clerical error. If a clerical error, the court had power to supply the omission; otherwise, not. "The test for determining whether a judicial error is a clerical one laid down by the Supreme Court in *Estate of Goldberg*, supra, 10 Cal.2d 709, 715, 76 P.2d 508, 512, is whether the error is one 'which cannot reasonably be attributed to exercise of judicial consideration or discretion'". *Wilson v. Wilson*, 88 Cal.App.2d 382, 384, 198 P.2d 916, 918.

1. The interlocutory decree had been modified and affirmed as modified, *Wilson v. Wilson*, 76 Cal.App.2d 119, 172 P.2d 568. An order of July 18, 1947, directing defendant to pay certain community property debts, was affirmed in *Wilson v.*

*Wilson*, 33 Cal.2d 107, 199 P.2d 671. An order made in 1949 increasing the amount of permanent alimony was affirmed except as to a direction for the posting of security, in *Wilson v. Wilson*, 104 Cal.App. 2d 167, 231 P.2d 128.

[3] Our examination of the record convinces us that the asserted omission was not the result of a clerical error.

The quoted portion of the decree, silent as to taxes, denotes, either (1) an intent to make no change concerning the respective obligations of the parties for the payment of taxes (past, present and future) upon this property; or (2), the absence of an intent to deal with that subject one way or another. The words "free, uninterrupted and sole right to the use, occupancy and control" of the property suggest, instead, an intent to award plaintiff the use of the property free of rent to the defendant in respect to his one-half ownership thereof "so long as she shall choose to so use, occupy or control the same."

The view is supported by the fact that in another paragraph of the decree the court directed defendant "to pay and discharge all bills of the parties contracted prior to the filing of the action herein, which the court finds to amount to the sum of \$4,829.00" and to "pay and discharge all income taxes levied by the government of the United States, or the State of California, against the plaintiff Barbara Wilson, or which constitute a lien upon any property awarded to her hereby, or in which she is granted any right, title, interest or control hereby, up to the 1st day of January, 1945." The express mandate to make such payments, particularly the income tax liens, if any, upon this very property, and the utter absence of any expression concerning the ad valorem taxes on that property, leave no room for any inference that the court intended to deal with the subject of ad valorem taxes which had accrued and were payable prior to the effective date of the decree, leaving the respective rights and duties of the parties concerning payment of such taxes to be determined in accordance with the applicable provisions of law.

[4] Upon the hearing of her motion for clarification of the decree, plaintiff relied in part upon an affidavit by the judge who presided at the trial and signed the final decree. In that affidavit he said, in part, "at the time of the making and entering of the above quoted excerpt from this Court's judgment [the portion quoted earlier in this opinion], affiant did not know that real property taxes were due, owing and unpaid against said improved real property \* \* \*." If at the time of making and entering the decree, the judge had no knowledge of the existence of taxes due, owing, and unpaid on this property,

we fail to see how the asserted omission could have occurred as the result of a clerical error. That lack of knowledge tends to support the view that the subject of payment or non-payment of these ad valorem taxes was not presented to the court for consideration. The respective rights and duties of the parties to pay ad valorem taxes (past, present or future) accrued or accruing upon this property are not in issue upon this appeal and are not determined hereby.

The order should be reversed. It is unnecessary to discuss the other points urged by defendant in support of his appeal.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



109 Cal.App.2d 594

**BROCK v. SUPERIOR COURT IN AND  
FOR CITY AND COUNTY OF  
SAN FRANCISCO et al.**

**WEST LOS ANGELES MILLING CO. et al.  
v. BROCK.  
Civ. 15052.**

**District Court of Appeal, First District,  
Division 1, California.  
March 5, 1952.**

West Los Angeles Milling Co., a corporation, and others, brought action against A. A. Brock, Director of Agriculture of the State of California, to review marketing order. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., issued a peremptory writ of mandate against the director, and pending appeal, the director filed a petition for writ of prohibition and writ of supersedeas against the Superior Court of the State of California, in and for the City of San Francisco, and Hon. Clarence W. Morris, Judge thereof, seeking to stay enforcement of the orders in the mandate proceeding. The District Court of Appeal, Bray, J., held that opponents of order failed to exhaust administrative remedies.

Peremptory writ of prohibition and writ of supersedeas issued.

Prior opinion, 236 P.2d 11.



**1. Administrative Law and Procedure**

⇨106, 108

**Agriculture ⇨2**

Action of director of agriculture under California Marketing Act of 1937 authorizing director to call public hearing and to execute and issue marketing order for standard agricultural products was "quasi-legislative" and not quasi-judicial. Agricultural Code, §§ 1300.10 to 1300.29.

See publication Words and Phrases, for other judicial constructions and definitions of "Quasi-Legislative Action".

**2. Agriculture ⇨1**

California Marketing Act of 1937 is not a price fixing statute. Agricultural Code, §§ 1300.10 to 1300.29.

**3. Administrative Law and Procedure ⇨751****Agriculture ⇨2**

While language of provision of Code of Civil Procedure authorizing judicial review of any final administrative order made as result of proceeding in which by law a hearing is required, evidence is required to be taken, and discretion and determination of facts is vested in the inferior tribunal, board or officer, is broad enough to include acts of director of agriculture in making findings after hearing and issuing marketing order for standard agricultural product, legislature did not intend that the provision should apply to such acts or any quasi-legislative acts of an administrative body. Code Civ. Proc. § 1094.5; Agricultural Code, §§ 1300.10 to 1300.29.

**4. Mandamus ⇨3(4, 9)**

Quasi-legislative action of director of agriculture in issuing order for standard agricultural product after hearing could be reviewed by writ of mandate, notwithstanding that action for declaratory relief would lie and there might be in a proper case remedy of injunction. Agricultural Code, §§ 1300.10 to 1300.29; Government Code, § 11440.

**5. Mandamus ⇨173**

Action of director of agriculture in issuing marketing order for standard agricultural product after hearing was not action in a situation where due process requires that party aggrieved by reason of ruling involving constitutional right be accorded an

opportunity to resort to judicial tribunal for redress, and hence the court in mandate proceeding to review order could not try case de novo but would be limited to determination of whether there was sufficient factual basis for order so that director could not be said to have acted arbitrarily or abused his discretionary power. Agricultural Code, §§ 1300.10 to 1300.29.

**6. Administrative Law and Procedure ⇨751**

In determining scope of review by courts of quasi-legislative acts of administrative officers, consideration must be given to fact that courts must not usurp legislative power and thereby violate separation of powers provision of constitution.

**7. Administrative Law and Procedure**

⇨754, 788

On review of judicial action of local administrative boards, court is limited to determining whether there was abuse of discretion, and findings based on evidence cannot be set aside by the court.

**8. Mandamus ⇨173**

De novo type of review on writ of mandate does not apply to quasi-legislative acts of administrative officers, and judicial review is limited to examination of proceedings to determine whether officer's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether officer failed to follow procedure and give notices required by law.

**9. Administrative Law and Procedure ⇨744****Agriculture ⇨2**

Hearing required under the California Marketing Act of 1937 to be held by director of agriculture on proposed marketing order for standard agricultural product was not of the judicial type, but was of same nature as that held by legislative committee in considering proposed legislation, and hence there could be no de novo review of the proceeding. Agricultural Code, §§ 1300.13(d), 1300.14 to 1300.16.

**10. Mandamus ⇨173**

In mandate proceeding to review order for standard agricultural product issued by director of agriculture after hearing, court could not permit introduction of new evidence, particularly evidence which was not

in existence at time of hearing before director. Agricultural Code, §§ 1300.10 to 1300.29.

#### 11. Mandamus ⇨22

Purpose of review by mandate of quasi-legislative proceeding and order of administrative officer is to determine if there has been any prejudicial abuse of discretion of the officer by action not based upon evidence produced before such officer.

#### 12. Prohibition ⇨12

Where, in mandate proceeding in superior court to review order of director of agriculture for standard agricultural product issued after hearing, opponents of order prevailed and had proceeding sent back to director to take additional evidence which was not in existence at time of hearing, and no examination was made of record to determine whether director abused discretion, on director's petition for writ of prohibition and writ of supersedeas to stay enforcement of orders remanding proceeding to director, opponents could not be heard, to contend that matter should be sent back to superior court for determination from record as to whether director abused his discretion, since a litigant cannot allow a proceeding to be heard piecemeal and after first piece has been heard, appeal. Agricultural Code, §§ 1300.10 to 1300.29.

#### 13. Administrative Law and Procedure

⇨229

Where an administrative remedy is provided by statute, relief must be sought from administrative body and this remedy exhausted before a court will act.

#### 14. Administrative Law and Procedure

⇨229

##### Agriculture ⇨2

Where director of agriculture under the California Marketing Act of 1937 held hearing and issued marketing order for standard agricultural product, and thereafter new facts allegedly came into existence which might require change of order, persons allegedly aggrieved by order should have applied to director to amend order before invoking action of the court. Agricultural Code, § 1300.16(c, d).

#### 15. Administrative Law and Procedure

⇨229

##### Agriculture ⇨2

Where marketing order for standard agricultural product issued by director of agriculture after hearing pursuant to California Marketing Act of 1937 provided that director shall, if facts show reasonable grounds, grant petition to review order and may review or revise order in any manner whatsoever, persons allegedly aggrieved should have sought relief pursuant to express provisions of order before bringing court action, notwithstanding that validity of order itself was attacked. Agricultural Code, §§ 1300.10 to 1300.29.

---

Doyle & Clecak, San Francisco, Tom F. Chapman, San Francisco, for Superior Court and West Los Angeles Milling Co.

Edmund G. Brown, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., for A. A. Brock.

BRAY, Justice.

This petition for a writ of prohibition and a writ of supersedeas raises the questions (1) whether section 1094.5 of the Code of Civil Procedure provides for a review by the courts of quasi legislative acts of administrative agencies, (2) whether, independently of that section there can be such a review, and (3) the extent of that review.

Record.

On the 14th day of September, 1950, petitioner, the Director of Agriculture, acting pursuant to the California Marketing Act of 1937 (Chapter 10, Division 6 of the Agricultural Code, comprising sections 1300.10 to 1300.29) upon the written request of a committee of lima bean producers, processors and handlers, called a public hearing to consider a proposed marketing order for standard lima beans. It is conceded that said hearing was called, held and conducted in all respects as required by law. Thereafter, and on or about the 3rd day of October, 1950, petitioner executed and issued a marketing order for standard lima beans to be submitted to

producers and handlers for written assent as required by section 1300.16 of the Agricultural Code. Thereafter and on the 2nd day of March, 1951, a finding was made that said marketing order for standard lima beans had been assented to in writing by the requisite number of producers and handlers of lima beans, and petitioner issued an order making said marketing order for standard lima beans effective as of March 10, 1951. Pursuant to said California Marketing Act of 1937 and said marketing order for standard lima beans, and after nominations were received from the industry, the Director of Agriculture, on or about March 19, 1951, appointed the members and alternate members of the advisory board provided by the act. All of the members so appointed have qualified and accepted such appointments and are now members of said advisory board.

Thereafter a mandate proceeding was filed in the San Francisco Superior Court for a review of the marketing order on the ground that the findings of the Director of Agriculture are not supported by the weight of, or substantial, evidence. Petitioners therein (referred to here as respondents) include dealers in and growers of lima beans. Several are members of the advisory board. A restraining order was issued restraining the enforcement of the marketing order pendente lite. At the hearing respondents offered, in addition to the record of the proceedings upon which the marketing order was based, certain new evidence. The court refused to admit such evidence but issued a peremptory writ of mandate, commanding the director to call a hearing pursuant to the provisions of Division 6, Chapter 10 of the Agricultural Code and at such hearing to permit the introduction of said evidence, and to reconsider his decision issuing the marketing order in the light of such evidence, and to make due return of his actions to the court. The restraining order was continued in force. The director appealed and the appeal is now pending. Thereafter the director filed this petition to prohibit the superior court from further proceedings other than to annul its previous actions. He also seeks a writ of supersedeas staying

the enforcement of the superior court orders. A stay pending determination of the issues has been granted.

Does Section 1094.5 of the Code of Civil Procedure Apply?

[1, 2] Although respondents contend that the action of the director in issuing a marketing order under the procedure provided in the Agricultural Code is quasi-judicial and not quasi-legislative, it is obvious that it is in the latter category. See *Ray v. Parker*, 15 Cal.2d 275, 101 P.2d 665. Pertinent sections of the Agricultural Code are known as "the California Marketing Act of 1937." The purposes of the act are declared to be: to enable agricultural producers, with the aid of the state, to correlate more effectively their commodities with marketing demands therefor; to establish their orderly marketing, uniform grading, and proper preparation; to provide means for maintenance of present, and development of new or larger, markets, and to prevent, modify or eliminate trade barriers in agricultural commodities; to eliminate or reduce economic waste in the marketing thereof, and to restore and maintain adequate purchasing power for California agricultural producers. It is not a price fixing statute. It provides for the promulgation of marketing orders after a public hearing. It sets forth the facts to be considered by the director at the hearing, the circumstances authorizing the issuance of a marketing order, the findings required to be made by him, and the provisions that may be contained in such order. It provides for the appointment of an advisory board of members of the industry to be appointed by the director. This board is to assist in the administration of the order. The order must be assented to in writing by 65 per cent of persons affected thereby. The act provides for administration, finances, enforcement, etc., in connection with the order.

[3] While the language of section 1094.5 of the Code of Civil Procedure is broad enough to include the acts of the director in making the findings and marketing order, an examination of the legislative history of the section convinces us that it was not



intended that the section apply to such acts or any quasi-legislative acts of an administrative body. This section, as well as the Administrative Procedure Act, was drawn and proposed by the Judicial Council under a directive of the 1943 Legislature to undertake a study of the procedure of California administrative agencies and of the judicial review of their decisions. Its Tenth Biennial Report, dated December 31, 1944, sets forth the scope of its study and the intent and purpose of the legislation proposed. That report makes it crystal clear that section 1094.5 of the Code of Civil Procedure, as well as the Administrative Procedure Act, was not intended to apply to the situation here. The value of the report in interpreting the legislation which the Judicial Council proposed is well stated by Mr. Justice Peters in *Hohreiter v. Garrison*, 81 Cal.App.2d 384, 397, 184 P.2d 323, 331: "This report is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the Council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the Council in its report."

There are many statements in the report dealing with the subject and demonstrating that the council and the legislation did not deal with quasi-legislative action. It is only necessary to make a few extracts from the report. "Because of the primarily judicial interest of the Council, it was thought that its most valuable contribution could be made in the field of administrative adjudication rather than in the field of quasi-legislative action. For that reason no attempt has been made in this report to include the agencies which are primarily rule-making in nature. \* \* \*

"\* \* \* It was not possible to cover this extensive field of administrative activity in complete detail, and the Council considered it far more desirable to offer a careful and detailed proposal with respect to a portion of the field of administrative adjudication than to attempt to cover the entire field with a general, less precise statute. It was determined, therefore, to select a portion of the field of administrative adjudication which seemed most in need of improvement. This, the Council concluded, was the one occupied by the agencies engaged in licensing and disciplining the members of the various professions and occupations. The decisions of such agencies have been challenged frequently before the California courts and this group seemed to furnish the largest single category of State agencies.

"The Council's survey of administrative procedure has been limited, therefore, to this particular type of administrative adjudication. The proposed legislation is designed to provide a solution for many of the difficulties and injustices arising in the administrative licensing and disciplining of private citizens. The theories underlying the Council's proposals in this limited field are susceptible, of course, of adaptation to other kinds of administrative action; and it is the Council's hope that this adaptation and extension of its work will be undertaken in the future."

"\* \* \* the Judicial Council, concerned primarily with judicial administration, would not be an appropriate body to supervise work in the field of quasi-legislative action." Pp. 10, 11-12.

Preceding the proposed section 1094.5 to be added to the Code of Civil Procedure appears: "Part 3. Act Providing Procedure for Judicial Review by Mandamus. This proposed amendment to the Code of Civil Procedure sets forth the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by any administrative agency. It would apply specifically to cases arising under the Administrative Procedure Act (Part 2 of this appendix), but would also apply to the quasi-judicial proceedings of local administrative agencies." P. 45.

"The major proposal consists of an amendment to the sections of the Code of Civil Procedure dealing with the writ of mandate. Without affecting the historic uses of the writ it is suggested that, by the addition of a new section to the statute, the Legislature could prescribe the details of procedure where the writ is used for reviewing the adjudicatory decisions of administrative bodies. \* \* \*

"The suggested amendment to the Code of Civil Procedure would be numbered Section 1094.5 and it is set forth in Part 3 of Appendix A in this report. The proposal is limited to cases involving administrative adjudication, \* \* \*" P. 27.

It is manifest that the words "adjudicatory decisions" wherever used in the report refer to decisions in quasi-judicial proceedings alone since those were the only kind of proceedings with which the entire report was concerned. In the "Conclusion" appears: "There are many problems in California administrative procedure untouched by the Judicial Council's survey or by its recommendations to the Legislature. Some of these problems may be more important or more complex than those which have already been examined. The recommendation that a Department of Administrative Procedure be established in the State Government is intended to provide a means for their ultimate solution but it might be useful to outline briefly the extent of the work which remains to be done.

"First, there are the fields of administrative action in which no investigation has been made by the Council. It has already been pointed out that no attempt was made to cover the quasi-legislative activities of State agencies. \* \* \* Many types of administrative adjudication were not covered by the Council's work, either because the function involved was not comparable to the disciplinary proceedings of licensing boards or because of the organization of the particular board. Thus, no attempt was made to cover preliminary investigatory

proceedings, routine examination procedure, informal adjudications, or the formal adjudications of such agencies as the Industrial Accident Commission, the Railroad Commission, the State Personnel Board, the California Employment Stabilization Commission and many others. The omission of these problems and these agencies from the Council's survey was a limitation imposed by practical considerations and did not result from the conclusion that no improvement was needed." Pp. 28-29.

#### Writ of Mandate.

This brings us to the question, to what extent, independently of section 1094.5 of the Code of Civil Procedure, can the writ of mandate be used to review the quasi-legislative action of an administrative body. The situation today, so far as determination of the matter is concerned, by the courts of this State, is the same as expressed in the before-mentioned report. "The courts have given no indication that the new mandate procedure is available where quasi-legislative administrative action is involved. The writ is available, however, to correct abuse of discretion on the part of an administrative agency where the action involved is quasi-judicial in nature. This is true whether the power is the limited quasi-judicial power of statewide administrative agencies, or the normal quasi-judicial power of local administrative agencies." P. 140.

"Historically, the writ of mandate was invented to provide a remedy where no other remedy existed. As is stated in 9 Halsbury's Laws of England, 744, section 1269, in speaking of the writ of *mandamus*:

"Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right." (See, also, 16 Cal.Jur. 764, sec. 4.)" *Drumme v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 82, 87 P.2d 848.

In the *Drumme* and other cases following it<sup>1</sup> our Supreme Court laid down some

1. *Laisne v. California St. Bd. of Optometry*, 19 Cal.2d 831, 123 P.2d 457; *Dare v. Bd. of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304; *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 196

P.2d 20; *Housman v. Board of Medical Examiners*, 84 Cal.App.2d 308, 190 P.2d 653, 192 P.2d 45; *So. Cal. Jockey Club etc. v. Cal. etc. Racing Bd.*, 36 Cal.2d 167, 223 P.2d 1.



rules concerning mandate which, although there referring only to the review of license cases, probably would apply to any administrative board action reviewable by the courts. In the Drummey case, *supra*, 13 Cal.2d 75, 82, 87 P.2d 848, 852, the court said: " \* \* \* in the absence of a proper statutory method of review, mandate is the only possible remedy available to those aggrieved by administrative rulings of the nature here involved." " \* \* \* of the nature here involved" referred, of course, to the board's acts in revoking the petitioner's license. However, there certainly must be some way of reviewing the quasi-legislative acts of an administrative officer, at least to the extent of determining whether in issuing the order in question the proceedings were as prescribed by law, there was any evidence upon which to base his action, etc., and if there is no other adequate remedy, then the historic remedy of mandate must apply. As late as *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784, the general rule that mandate could not be employed to control the exercise of discretion by an administrative officer was reaffirmed. Yet in the Drummey case the court said, 13 Cal.2d at page 83, 87 P.2d at page 853: "This rule applies only where a true discretion has been conferred by the statute. A proper illustration of this rule would be, where an administrative board is given power, if certain facts are found to exist, to take certain action, the statute providing directly or indirectly that the board is given discretion as to whether it will act after the facts have been ascertained, and providing that the board's determination shall be final. In such a case the determination as to whether the board will act is purely administrative, and its discretion cannot be controlled by *mandamus*."

Interestingly enough, when it came to determining the act of an administrative officer in the initial application for a license, the court came to an opposite conclusion from that reached in the Drummey case involving the revoking of a license, *McDonough v. Goodcell*, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, and held that mandate cannot be used to control the dis-

cretion of an administrative officer unless an abuse of discretion is shown.

[4] While originally mandate would not lie if there were other remedies available, that is no longer the situation in California. See *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425. Therefore, the fact that an action in declaratory relief lies (Gov.Code, § 11440) and there is some indication that in a proper case injunction will lie, see *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931; *Challenge Cream etc. Ass'n v. Parker*, 23 Cal.2d 137, 142 P.2d 737, 149 A.L.R. 1203; *Agricultural Prorate Comm. v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495 does not prevent the use of mandate.

#### Scope of Review.

[5, 6] In the Drummey case, *supra*, and allied cases, the Supreme Court held that in mandate proceedings of the kind there permitted, the superior court had the right to exercise its independent judgment on the facts, and even to consider evidence which had not been before the administrative officer, thus granting a trial *de novo*, on law and facts. But in the *McDonough* case, *supra*, 13 Cal.2d 741, 91 P.2d 1035, the court held that in mandate proceedings of type there being considered there could be no such trial *de novo* and that the superior court was limited to a determination of whether there was a sufficient factual basis for the conclusion of the commissioner and therefore he did not act arbitrarily or otherwise abuse his discretionary power. The court there expressly limited the Drummey type of mandate and hearing to situations where "due process required that a party aggrieved by reason of a ruling of the officer or board involving a constitutional right be accorded an opportunity to resort to a judicial tribunal for redress." 13 Cal.2d at page 753, 91 P.2d at page 1042. The type of action of the Director of Agriculture being considered here does not come within that definition. In determining the scope of the review by courts of quasi-legislative acts of administrative officers consideration must be given to the fact that the courts must not usurp legislative power and thereby violate the separation of powers provi-



sion of the Constitution. See Public Administrative Law, 42 Am.Jur. 563-568, §§ 190-191. "A statute conferring a power to review nonjudicial determinations of an administrative body is not invalid where the reviewing power is limited to questions of law which are the appropriate subject of judicial determination, particularly where the review provided is not de novo but is in the nature of certiorari and limited by the record made before the administrative body." 42 Am.Jur. pp. 565-566.

[7] It should also be pointed out that on review of judicial action of *local* administrative boards, the courts are limited to determining whether there was an abuse of discretion. Findings based on evidence cannot be set aside by the superior court. See *Mogan v. Board of Police Com'rs*, 100 Cal.App. 270, 279 P. 1080; *Hogan v. Retirement Board, etc.*, 13 Cal.App.2d 676, 57 P.2d 520; and *Murphy v. Retirement Board*, 49 Cal.App.2d 58, 121 P.2d 101.

In *Ray v. Parker*, supra, 15 Cal.2d 275, 101 P.2d 665, where the court was considering the Milk Stabilization Act and a stabilization marketing plan formulated thereunder, the court quoted from, *Assigned Car Cases*, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204: "It is not for courts to weigh the evidence introduced before the Commission \* \* \* or to inquire into the soundness of the reasoning by which its conclusions are reached \* \* \*. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' \* \* \* " 15 Cal.2d at page 305, 101 P.2d at page 681. The court also quoted from *Highland Farms Dairy v. Agnew, D.C.*, 16 F.Supp. 575, to the effect that proceedings before the Virginia Commission under the Milk Control Act of that state to establish a milk marketing plan were "not quasi-judicial, but legislative." After discussing a number of authorities the court said, 15 Cal.2d at page 310, 101 P.2d at page 684: "Under the foregoing authorities, and others cited earlier in connection with our discussion of the validity of the petition for formulation of a marketing plan, we cannot say that the action of the director in any particular has been arbitrary, capricious or so entirely

lacking in evidentiary support as to warrant judicial interference with his several orders. In an action of this character challenging proceedings and hearings of the type here involved, it is not for the courts to *weigh* the evidence and data adduced before and considered by the director preliminary to his issuance of the several orders here challenged. Under the circumstances here present, judicial interference should occur only when it can be said that administrative action has been arbitrary and capricious. *Silberchein v. United States*, supra [266 U. S. 221, 45 S.Ct. 69, 69 L.Ed. 256]; *Union Transportation Co. v. Bassett*, supra [118 Cal. 604, 50 P. 754]. As stated in *Maxwell v. Civil Service Comm.*, 169 Cal. 336, 339, 146 P. 869, 871, 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. \* \* \* Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.'"

[8, 9] While the proceeding in the *Ray* case was by way of injunction, the fact that the court there held that in determining the validity of the milk marketing plan put in effect by the Director of Agriculture, the procedure for establishing which was somewhat similar to that required to establish the marketing plan under consideration here, the court was limited in the scope of its inquiry into the acts of the commissioner, is quite persuasive of the limitation which should be applied here. In view of this and the express limitation of the de novo type of review laid down in *McDonough v. Goodcell*, supra, 13 Cal.2d 741, 91 P.2d 1035, it must be held that the de novo type of review does not apply to quasi-legislative acts of administrative officers and that the judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law. Particularly is this so when the type of proceeding provided by the Marketing Act is considered. First, there has to be a public hearing. Testimony and evidence must be received.

The director, by publication of a notice, may require all handlers of the particular agricultural commodity to file with him a report of the matters set forth in section 1300.13(d) of the Agricultural Code. The director's findings are based "upon the facts, testimony and evidence received at the public hearing together with any other relevant facts available to him from official publications or institutions of recognized standing." (Agr.Code, § 1300.14.) The marketing order issued by the director after the hearing provides for an advisory board comprised of both producers and handlers of the commodity, whose duties include the recommendation of administrative rules and regulations relating to the marketing order and amendments to that order (§ 1300.15). Then the marketing order must be submitted to the producers and handlers or assent obtained thereto from not less than 65 per cent of them (§ 1300.16). To permit a trial de novo of such a situation would be not only substituting the judgment of the court for that of the director, but also of the assenting producers and handlers. The hearing required to be held by the director is not of the judicial type, but as said in *Ray v. Parker*, supra, 15 Cal.2d 275, 307, 101 P.2d 665, 682; "\* \* \* this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation." Section 1300.14(d) above quoted, permits the director to do what the court in the *Ray* case quoted with approval that the Virginia Milk Commission had done in *Highland Farms Dairy v. Agnew*, supra, D.C., 16 F.Supp. 575, 586. "\* \* \* The Commission was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See *State Board of Milk Control v. Newark Milk Co.*, 118 N.J.Eq. 504, 179 A. 116, 125, 126; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 296, 308, 53 S.Ct. 350, 355, 77 L.Ed. 796.'" It has been held that "There is no constitutional requirement for any hearing in a quasi-legis-

lative proceeding" and "Where the proceedings are quasi-legislative in character, a hearing of a judicial type is not required; a hearing allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi-judicial adversary proceedings." *Franchise Tax Board v. Superior Court*, 36 Cal.2d 538, 549, 225 P.2d 905, 911.

For the proposition that the mandate proceeding here should be in the nature of a trial de novo, respondents rely on cases like *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033. However, the court in *Ray v. Parker*, supra, must have had those cases in mind and particularly the *St. Joseph Stock Yards* case because it is mentioned in the dissenting opinion. The majority opinion distinguished *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, where the holding was similar to that in the *St. Joseph Stock Yards* case.

#### Proceedings in the Superior Court.

Having in mind the type of review which the superior court could have made, let us see what actually occurred. In their petition for writ of mandate, respondents set forth that the director's findings were not supported by either the weight of evidence or substantial evidence, and that in the conduct of the hearing the director through his deputies showed such obvious favoritism and prejudice in favor of the order as to unfairly influence the vote thereon. Because of those matters, it is alleged, the issuance of said order was an abuse of the director's discretion. At the hearing in the superior court, the court could have determined the matters alleged. But respondents made no effort to have the court do so. At the very start the court asked if in determining whether the director abused his discretion, it was to review the record before the director, respondents said, "No, I don't quite go all the way with that, Judge." The court then said, "What else can I do?" Respondents then contended that the court could take additional evidence. The court asked upon what theory was it improperly refused. Respondents then stated that it was not offered in evi-



dence nor could it then have been produced as it was not even in existence. The court then stated that in its opinion all it could do was to look at the record. Respondents then contended that the court could remand the case to the director for further hearing. Considerable argument by both counsel followed, together with a statement of the new evidence which respondents proposed to produce. Finally the court stated that it was inclined to send the matter back to the director. Respondents' counsel replied, "That is satisfactory, Judge; *it's all I can ask.*" (Emphasis added.)

[10] As we have pointed out, the review which the court could have made is a limited one. It could not permit the introduction of new evidence, particularly of evidence which was not even in existence at the time of the hearing before the director.

The court did not examine the proceedings to determine whether the director abused his discretion, whether the public hearing was noticed or conducted as prescribed by the code, or whether the director showed favoritism or prejudice as charged. While the petition for writ of mandate alleged that the findings were not supported by the evidence, no effort was made to point out to the trial court any such deficiency.

The evidence sought to be introduced and which the court ordered the director to hear was the following, none of which, excepting No. 5, was in existence or had been ascertained prior to the promulgation of the marketing order. 1. The fixing by the United States government of the 1951 support price for large lima beans and the fact that such price assures the grower a fair profit. 2. The limited warehouse and cleaning facilities in the industry assure orderly marketing and prevent the dumping of the crop in a short period of time. 3. No carryover from the 1950 crop plus a prospective 1951 short crop. 4. The initiation by the National Dried Bean Council of an extensive sales and marketing program. 5. The change in the voting procedure in the course of the adoption of the marketing order was illegal and prejudicial to the petitioners.

No. 5, of course, was in existence prior to the marketing order, but no effort was made to point out on what facts such contention was based nor why the evidence in relation thereto could not, in the exercise of reasonable diligence, have been produced. An examination of the proceedings at the hearing in the trial court shows that no particular reliance was placed on No. 5. The stress was placed on the first ground. When asked by the court as to whether the proposed evidence (all five) was improperly excluded or even was offered, respondents stated that it was not. It was evidence which could not have been produced before the director "because it wasn't in existence." The support price was not fixed by the government until April 23, 1951, approximately one and a half months after the promulgation of the marketing order and more than 40 days after its effective date. As said by respondents, the fixing of the support price by the government "is the crux of the entire matter."

[11] The purpose of a review in this character of proceeding is to determine if there has been any prejudicial abuse of discretion of the administrative officer by action not based upon evidence produced before such officer.

In the Tenth Biennial Report of the Judicial Council appears the statement, p. 140: "The scope of review where administrative action is challenged by the writ of mandate may be stated generally to consist of the correction of abuse of discretion." How can an abuse of discretion be determined other than by an examination of the record upon which the action was taken?

[12] While it is true that the petition was broad enough to include an examination by the superior court of the record before the administrative officer, and while some mention of the court's doing so was made at the hearing, the reporter's transcript shows that respondents were proceeding wholly upon the theory that they were entitled to upset the director's action by events occurring subsequently to the proceeding before him. They practically said so when their attorney concluded with the statement when informed by the judge that he was



remanding the proceeding to the director, that "it's all I can ask." Respondents contend that the matter should now be sent back to the superior court for a determination from the record as to whether the director abused his discretion. There can and should be only one appeal from a single matter. A litigant cannot allow a proceeding to be heard piecemeal and after the first piece has been heard, appeal. Then if the appeal goes against him, return for the hearing of another piece of the case, and then, perhaps, appeal again. Respondents made no attempt to get the court below to examine the record and it is clear that they were willing to and did, rest their case on the contention that the after-discovered evidence, rather than the proceedings which he had theretofore taken, would prove the director abused his discretion.

It is true that as yet respondents have had no judicial review of the proceedings before the director, but that is due to their own actions.

#### Failure to Exhaust Administrative Remedies.

[13, 14] Section 1300.16, subdivision (d), of the Marketing Act provides: "The director may amend any marketing order if such amendments have been considered at a public hearing \* \* \*" and if such amendments are assented to in writing in accordance with the provisions of the section. Before invoking the action of the courts respondents are required to exhaust this administrative remedy by applying to the director to proceed to amend. "\* \* \* the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715. Had respondents in the trial court pursued their charges in the petition that the evidence did not support the director's findings, it would not have been necessary for them to seek an amendment of the order for the reason that they would be attacking the very validity of the order itself. But they did not do so. They elected to stand on the proposi-

tion that events occurring subsequently to the effective date of the order require a change or an elimination of the order. There is a provision (§ 1300.16 (c)) for suspension or termination (by the director) of the marketing order. However, it could not become effective until the end of the current marketing season and hence would be an inadequate remedy. But the amendment process has no such limitation and would give respondents adequate relief.

[15] The marketing order itself provides: "Section E. [Article VIII] *Appeals*. Any person subject to the provisions of this Marketing Order may petition the director to review any order or decision of the Advisory Board \* \* \*. The Director shall, if the facts stated show reasonable grounds, grant any such petition and may review or revise in any manner whatsoever any order or decision upon which an appeal is taken." Respondents did not avail themselves of this remedy. A somewhat similar situation is found in *United States v. Superior Court*, 19 Cal.2d 189, 120 P.2d 26. There a marketing order as to oranges was issued by the United States Secretary of Agriculture under the provisions of the Federal Agricultural Adjustment Act of 1933, as amended, 7 U.S.C.A. § 601 et seq. Certain shippers sought in the superior court to enjoin the enforcement of the order. Thereupon the United States of America brought in the Supreme Court a proceeding in prohibition to prevent the superior court from hearing the case on the ground that the shippers had not exhausted the administrative remedies provided in the act. The Supreme Court upheld this contention. While the federal act provides for different remedies than are provided in our statute, the principle is the same. Respondents here contend that the requirement of exhaustion of administrative remedies does not apply where the validity of the order is being attacked. In the United States case the court said, 19 Cal.2d at page 194, 120 P.2d at page 29: "The respondents apparently contend that the requirement of exhaustion of administrative remedies applies only to erroneous orders and does not preclude judicial interference, where, as here, an order is assailed as a

nullity because illegally adopted and where the agents for enforcement appointed thereunder are charged with being mere pretenders claiming powers which they do not lawfully possess. But there is no substantial difference, in so far as the necessity for resort to administrative review is concerned, between an erroneous order and one which, it is claimed, is being executed in violation of statutory authority."

Let a peremptory writ of prohibition and a writ of supersedeas issue.

PETERS, P. J., and FRED B. WOOD, J., concur.



109 Cal.App.2d 650

**RILEY v. PIG'N WHISTLE  
CANDY CO.  
Civ. 18676.**

District Court of Appeal, Second District,  
Division 1, California.

March 10, 1952.

Proceedings in the matter of the application of Lloyd Riley, individually and as member of International Union of Operating Engineers, Local No. 63, A. F. of L., against Pig'n Whistle Candy Company on arbitration award for wages due by defendant plaintiff. The Superior Court of Los Angeles County, Frank G. Swain, J., confirmed award in arbitration, and defendant appealed. The District Court of Appeal, Drapeau, J., held that when controversy was submitted by written agreement to arbitration, and it was stipulated that decision would be final and binding, and decision awarding employee wages was upon precise question submitted, award was binding and not subject to judicial review on merits.

Order affirmed.

**1. Arbitration and Award ☞**

Arbitration is favored as means of providing summary and expeditious determination of controversies out of court, and when submitted pursuant to stipulation of

parties in written contract, every reasonable intendment will be indulged to give effect to such proceedings. Code Civ.Proc. §§ 1280-1293.

**2. Arbitration and Award ☞73**

While courts will enforce awards in arbitration as valid, and, for cause, will annul them, the merits of such controversies are not subject to judicial review. Code Civ.Proc. §§ 1280-1293.

**3. Arbitration and Award ☞73**

Where written agreement between employer and employee provided that controversy was to be submitted to arbitration, and that arbitrator's decision would be final and binding, and amount of wages due employee was precise question submitted for decision, award to employee of two weeks' wages was final and not subject to review on merits. Code Civ.Proc. §§ 1280-1293.

A. J. O'Connor, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

DRAPEAU, Justice.

A dispute between plaintiff employee and defendant employer was submitted to arbitration. The employee was awarded \$150 for two weeks' wages due to him. The award was confirmed by the Superior Court, and defendant appeals.

Defendant contends that the arbitrator acted in excess of his jurisdiction and powers, that the award was contrary to the contract of the parties, and was not acknowledged as required for a deed for recordation.

[1,2] Upon fundamental and familiar principles it is well settled that arbitration is favored as a means of providing a summary and expeditious determination of controversies out of court. When submitted pursuant to a stipulation of the parties in a written contract, every reasonable intendment will be indulged to give effect to such proceedings. *Snyder v. Superior Court*, 24 Cal.App.2d 263, 74 P.2d 782; *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628, 204 P.2d 37. While courts will enforce

awards in arbitration if valid, and, for cause, will annul them, the merits of such controversies are not subject to judicial review. *Pacific Vegetable Oil Corp. v. C. S. T. Ltd.*, 29 Cal.2d 228, 174 P.2d 441. Following the modern trend favoring arbitration, our Legislature in 1927 amended the substantive rules applicable to this branch of the law. Sections 1280 to 1293 of the Code of Civil Procedure.

[3] A review of the record in this case convinces this court that none of defendant's contentions is sound. By written agreement the controversy was submitted to arbitration. And it was stipulated that the arbitrator's decision would be final and binding. The amount of pay due plaintiff was the precise question submitted for decision. Whatever the merits of defendant's position before the arbitrator may have been, this appeal presents an ill-considered attempt to harass an employee over an award of two weeks' wages.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 653

ISHAM v. ISHAM.

Civ. 18552.

District Court of Appeal, Second District,  
Division 1, California.

March 11, 1952.

Rehearing Denied March 24, 1952.

Hearing Denied May 8, 1952.

The Superior Court of Los Angeles County, Fred Miller, J., awarded a divorce to plaintiff husband, and the wife appealed. The District Court of Appeal, Per Curiam, held that the evidence sustained the decree.

Affirmed.

Divorce ☞ 130

Evidence sustained award of divorce to husband on ground of cruelty.

Russell H. Pray, and Eric A. Rose, Long Beach, for appellant.

Roy J. Brown, Long Beach, for respondent.

PER CURIAM.

This is an appeal from the judgment in a divorce action.

The parties were married in December, 1926; the action was tried in August, 1950. "In 1938, husband's nephew, Charles Isham, the son of husband's brother, came to the home of the parties and continued to live at the home to the time of trial. When Charles was received in the home he was thirteen years of age. From January 23, 1939 to September 2, 1947, the husband received monies from his brother for the upkeep of Charles Isham, and those monies were accepted and expended by the husband for the expenses of the home. Charles was treated like a member of the family by both husband and wife. Husband testified of frequent arguments and physical punishment given to Charles and complained that his nephew waited hand and foot on the wife. Husband testified further that in 1944, Mrs. Isham decided to sell the house in which they were then living and which was admittedly Mrs. Isham's separate property, but standing at that time in joint tenancy. Husband claims that he did not move to the new location at that time with his wife and Charles because the wife had stated that there was no room for him in the apartment to which they were moving. At that time, in 1944, Mr. Isham moved to his mother who was then sick, and he stayed with his mother until 1948 when she died. From 1944 to 1948, the husband paid to Mrs. Isham one-half ( $\frac{1}{2}$ ) of his salary each month, and further paid the taxes on the property in which his wife was then living and made payments on the furniture".

At the trial the plaintiff's corroborating witness was Warren Isham, brother of Charles.

At the conclusion of the trial the trial judge commented as follows:

"The Court: Well, I will decide this case now so we won't have it over longer, and that you won't have to file briefs, and I am



perfectly willing to do it rather than send out notices later.

"This case follows, more or less, the pattern you might say of these cases. There is a lot of family things; I think much of them are exaggerated. I am convinced of it. Things that happen every day in a family, like I mentioned, whether a husband will go to a football game or not with some neighbors—we have all refused to do that if we felt like it, and didn't feel we insulted our wives, or anybody else. Those things in and of themselves, when you get into a court room with its ceremonies and all, have a tendency to gather more emphasis than in my mind they should have. Regardless of all that, these people didn't make a go of it. They messed up their marriage pretty badly before they got through with it, and there is little use in trying to keep them together. I am convinced of that. I don't think they are interested in each other now at least; they don't show it, and they are not at all friendly.

"I think this nephew, Charles, coming into the home—I think, although he says that he didn't at first, I think it assisted in breaking up the family, and I think as a husband he had a right to complain about that; and it did come to a point where Mrs. Isham had to make her decision between the two, and I am not going to condemn her one way or another on that. We have to make choices in our lives, and she decided that the boy, for whatever reasons, meant more to her than Mr. Isham. They weren't intimate or friendly during these periods; as far as I can see there was too much quibbling about whether the eggs had been paid for, and all that sort of thing, and whether he paid enough to entitle him to breakfast—he made his own bed—he went through all that, and so on his side he did things too that were exaggerated.

"I think that he exaggerated some of this jealousy business, although I think he had a legitimate complaint to make that this boy had taken over a great deal of his wife's affections, and that he had a right to as a husband, and for that reason I am going to give him a divorce in this case."

It is contended on appeal that the evidence is insufficient to prove a legal resi-

dence, cruelty and the necessary corroboration thereof and, that the evidence shows "consideration". It is also contended that the "evidence was overwhelming in appellant's favor" and, that there is no evidence to support the court's finding with respect to a certain \$1,000 government bond.

A careful review of the record reveals no merit to any of the above contentions.

It would serve no useful purpose to review the arguments pro and con. The law with regard to these questions is well settled. The issue was a question of fact; the trial judge saw and heard the witnesses, observed and took into account the manner in which they testified and the character of their testimony, and decided the controversy as above noted. The record reveals neither prejudicial nor reversible errors and the evidence is sufficient to support the judgment.

The judgment is affirmed.



109 Cal.App.2d 637

**GRIFFITH v. KERRIGAN et al.**

Civ. 8022.

Sac. 6202.

District Court of Appeal, Third District,  
California.

March 7, 1952.

Myrtle Griffith sued T. J. Kerrigan and others for damages to her fruit crop resulting from water seepage from defendants' land. From a judgment by the Superior Court, Sutter County, Warren Steel, J., assessing one-third of the total damages against Kerrigan, the plaintiffs appealed and Kerrigan cross-appealed. The District Court of Appeal, Third District, Van Dyke, J., held that the apportionment of damages was proper.

Judgment affirmed.

**1. Waters and Water Courses** Ⓒ263

Where defendant flooded rice field adjoining plaintiff's orchard, thus contribut-

ing to water seepage from canals along or near other boundaries of plaintiff's property and damaging her trees by raising the water table, apportionment of damages was proper.

## 2. Torts ⚡22

Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm.

## 3. Evidence ⚡571(10)

In action for damages to plaintiff's fruit crop from water seepage from various sources, estimates by defendant's expert witness as to amount of damage attributable to each source, which estimates the witness called largely guesswork, furnished a sufficient basis for an apportionment of damages.

---

Arthur Wm. Coats, Jr., Hugh W. Ferrier, Yuba City, for appellant.

Rich, Carlin & Fuidge, Marysville, for respondents.

VAN DYKE, Justice.

Plaintiff brought this action against defendants, Kerrigan and wife and Sutter Butte Canal Company, to recover damages for injury to his peach orchard caused by excessive underground water seepage from adjoining lands which were controlled and operated by the defendants. The demurrer of the Sutter Butte Canal Company was sustained without leave to amend. Judgment was entered in favor of plaintiffs against the Kerrigans for the amount of damage found by the court to have been caused by them. Both the plaintiff and the Kerrigans have appealed from the judgment thus entered.

The injuries to plaintiff's orchard occurred in 1946. The defendants operated a 90-acre tract which adjoined plaintiff's property on the west. In 1946 defendants

planted rice in this acreage. The main canal of the Sutter Butte Canal Company runs east and west approximately one-eighth of a mile north of plaintiff's north boundary. A lateral canal runs north and south along the east boundary of plaintiff's property. These canals had been in operation since 1921. In 1946 water seepage from these canals and from irrigation in defendants' rice fields resulted in a rise of the water table beneath plaintiff's orchard to within twelve to fifteen inches of the surface. The raised water table caused sour-sapping of the tree roots, injuring the peach crop of that year, and the trees. In prior years injury had not been caused as a result of seepage from the canals, and in 1946 the seepage from this source was no greater than in previous years. It is thus apparent that the seepage from defendants' rice field combined with the seepage from the canals to produce the injury to plaintiff. In addition to these main sources, the court found that plaintiff's own irrigation, rightfully and carefully done, and leakage from an irrigation ditch along the south boundary of plaintiff's property, contributed to the raising of the water table.

The trial court adopted findings as to the amount of water contributed to the natural underground water from each of these sources as follows: Seepage from the Sutter Butte canals, one-half; seepage from defendants' land, one-third; seepage from other sources, one-sixth. The court found that the total loss to plaintiff was \$3,178.78. As a conclusion of law, the defendants were assessed one-third of the total damage.

[1] The plaintiff contends that defendants' wrongful act proximately caused the entire damage, and she was therefore entitled to a judgment against them for the entire amount. The court's findings on the amount of water seeping from the canals is not disputed by the plaintiff. However, plaintiff reasons that since the seepage from the canals had occurred in prior years without causing damage, the sole proximate cause of damage during 1946 was the seepage from defendants' rice fields. In other words, it is plaintiff's

view that the damage to the orchard would not have occurred *but for* the wrongful act of defendants Kerrigan.

The facts of this case do not present a problem of causation. It is true, as plaintiff points out, that damage would not have occurred *but for* the seepage from defendants' rice fields. It is also true that the damage would not have occurred *but for* the seepage from the Sutter Butte Company's canals. The question is whether defendants are responsible for the entire loss.

[2] The factual situation here required an apportionment of the damages. The rule applicable is stated in Section 881 of Restatement of the Law of Torts, as follows: "Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

This rule was followed in California *Orange Co. v. Riverside Portland Cement Co.*, 50 Cal.App. 522, 195 P. 694. In that case the plaintiff sought damages for injuries to an orange orchard caused by cement dust from defendant's cement mill. The orchard was situated between defendant's mill and the mills of another cement company. Cement dust in considerable quantities from the other mills, as well as dust from defendant's mill, settled upon the orange trees, causing serious damage. The court stated, 50 Cal.App. at page 524, 195 P. at page 695: "The California Portland Cement Company and defendant were not joint tort-feasors. Their respective torts—wrongfully operating their respective cement plants in such manner that deposits of cement dust, blown from the plants toward plaintiff's orange grove, were incrusting upon the leaves of plaintiff's trees—were several when committed, and did not become joint merely because of a commingling of the dust from the respective plants and a union of the consequences proceeding from the several and independ-

ent tortious acts. *Miller v. Highland Ditch Co.*, 87 Cal. 430, 215[25] P. 550, 22 Am. St.Rep. 254; *William Tackaberry Co. v. Sioux City etc. Co.*, 154 Iowa 358, 132 N.W. 945, 134 N.W. 1064, 40 L.R.A.,N.S., 102, Ann.Cas.1914A, 1276; *Sutherland on Damages* (4th Ed.) § 1059. Defendant is liable for only such proportion of the total damage resulting from the commingled dust emitted into the atmosphere from the plants of the two cement companies as was caused by its own plant. *Miller v. Highland Ditch Co.*, *supra*."

See also *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 653, 300 P. 31; *Summers v. Tice*, 33 Cal.2d 80, 85, 199 P.2d 1, 5 A.L.R.2d 91; *City of Oakland v. Pacific Gas & Elec. Co.*, 47 Cal.App.2d 444, 449, 118 P.2d 328. Plaintiff's contentions cannot therefore be sustained.

[3] The defendants have appealed from the judgment entered against them. It is contended by them that it was impossible for the trial court to ascertain the amount of damage attributable to the defendants. An expert witness for defendants testified that it was impossible to establish with mathematical exactitude the amount of water which each of the various sources contributed to the underground water. However, this witness estimated that one-half was attributable to seepage from the canals and one-third was attributable to seepage from defendants' rice fields. The trial court adopted this estimate in apportioning the damage. The witness stated that his estimate was largely guesswork, but was the best he could do, and was based on a consideration of comparative area, comparative head, and other physical factors.

Such evidence furnished a sufficient basis for an apportionment of the damage. In California *Orange Co. v. Riverside Portland Cement Co.*, *supra*, the court stated, 50 Cal.App. at pages 524-525, 195 P. at page 695: "In determining the amount of damage that should be assessed against this defendant, the trial court was at liberty to estimate as best it could, from the evidence before it, how much of the total damage caused by the operations of the two cement companies was occasioned by



defendant's plant, and in doing so might measure with a liberal hand the amount of damage caused by defendant's mill. *Learned v. Castle*, 78 Cal. 454, 18 P. 872, 21 P. 11; *Jenkins v. Pennsylvania R. Co.*, 67 N.J.L. 331, 51 A. 704, 57 L.R.A. 309; *City of Mansfield v. Bristol*, 76 Ohio St. 270, 285, 81 N.E. 631, 10 L.R.A., N.S., 806, 118 Am.St.Rep. 860 [852], 10 Ann.Cas. 767. Though in cases of this sort entire accuracy is impossible, and the difficulty of accurately proportioning and assessing the damage done by defendant's mill is great, still that difficulty would have been avoided had defendant but taken care that no occasion should arise requiring such proportioning and assessing of the whole damages."

Certain cases, notably *Slater v. Pacific American Oil Co.*, supra, have stressed the difficulty of proving the amount of damage attributable to various sources. Recovery of damages was denied in the *Slater* case upon the ground that there was no evidence of the amount which the defendant contributed to the total volume. Recent cases treating of the difficulties in apportioning damages in comparable situations are pertinent. In *Summers v. Tice*, supra, the court stated, 33 Cal.2d at page 88, 199 P.2d at page 5: "If defendants are independent tort feors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. See, *Colonial Ins. Co. v. Industrial Acc. Com.*, 29 Cal.2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tort feors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not in a position to complain of uncertainty. *California Orange Co. v. Riverside Portland Cement Co.*, supra."

See, also, *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 434, 218 P.2d 17.

The judgment is affirmed, each party to pay costs incurred by such party, except that as to the cost of Clerk's and Reporter's Transcripts on appeal each party shall bear half.

ADAMS, P. J., and PEEK, J., concur.



**FIREMAN'S FUND INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.\***  
Civ. 15103.

District Court of Appeal, First District,  
Division 1, California.

March 4, 1952.

As Modified on Denial of Rehearing

April 3, 1952.

Hearing Granted May 1, 1952./

Workmen's compensation proceeding by Fireman's Fund Indemnity Company against Industrial Accident Commission, and another, to review award by Commission based on injury resulting from strain on employee during 65 days of employment. Petitioner was insurance carrier only during early portion of period. The District Court of Appeal, *Bray, J.*, held that award had to be apportioned between petitioner and other insurer who was carrier during last part of period.

Award affirmed as modified and cause remanded.

**1. Workmen's Compensation ☞1535**

In workmen's compensation proceeding, evidence sustained finding that stroke arose out of and was incurred in course of employment.

**2. Workmen's Compensation ☞562**

Where employee suffers heart attack brought on by strain and overexertion incident to his employment, injury or death is compensable, even though idiopathic condition previously existed.

**3. Workmen's Compensation ☞1205**

Where employee worked 65 days prior to suffering stroke and during period was subjected to repeated physical and mental strains and tensions which became exces-

\* Subsequent opinion 250 P.2d 148.

sive in their cumulative effect and precipitated stroke, under limitations provision of Workmen's Compensation Act, injury, accident or exposure was accumulating during whole period and any day during period constituted date of injury although whole period constituted single injury. Labor Code, §§ 5405, 5411.

#### 4. Workmen's Compensation ⇨1205

Where employee suffered stroke at end of 65 days of work and injury or exposure was accumulating during whole period, application to Industrial Commission for compensation made one day less than year after stroke was not barred by limitations provision of Workmen's Compensation Act. Labor Code, §§ 5405, 5411.

#### 5. Workmen's Compensation ⇨1074

Where insurer was carrier only during first 52 days of 65 day work period during which injury, incident or exposure was accumulating so as to constitute single injury resulting in stroke to employee, application for compensation made one day less than year from date of stroke was sufficient to bind insurer, although more than one year had elapsed since it severed connections with employer. Labor Code, §§ 5405, 5411.

#### 6. Workmen's Compensation ⇨1074

Where employee was awarded compensation for stroke which resulted from strain that accumulated during 65 day employment period, award had to be apportioned between insurer who was carrier during first part of period and one who was carrier during last part. Labor Code, §§ 5405, 5411.

---

Keith, Creede & Sedgwick, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for respondent Industrial Acc. Commission.

Leonard, Hanna & Brophy, San Francisco, for Industrial Indemnity Co.

BRAY, Justice.

This petition for review of an award of the Industrial Accident Commission raises the question: where the accumulated effect

of strains and tensions over a period of approximately two months, due to the employment, precipitated a pre-existing heart condition into an active disabling condition, can an insurance carrier which insured the employer during the early portion of that period only be held liable with the later carrier?

#### Facts.

[1] There is no question of the compensability of the claimant's condition. The controversy is solely over the question of whether petitioner can be held jointly and severally liable with another insurance carrier. Frank C. Gregory, aged 65 years, was employed by the Waterfront Employers Association as Port Manager. On February 9, 1949, he suffered a cerebral vascular accident<sup>1</sup> resulting in partial right side paralysis. February 8, 1950 (one day less than one year from the stroke), he applied to the commission for compensation. The evidence shows that from December 5, 1948, to the date of the stroke (65 days) Gregory worked 11 hours per day, in an atmosphere of strain and tension, trying to conclude contract negotiations with certain unions. This work was tense and trying. Dr. Benson reported that long hours of work involving nervous tension could aggravate an existing hypertension which in turn could, and in this case did, produce damage to the blood vessels and precipitate a cerebral vascular accident in one who had a predisposing disease of the blood vessels. Dr. DeSilva stated that Gregory was a hypertensive and arteriosclerotic elderly man and that there was nothing in his work of negotiating with the unions which aggravated his condition. Dr. Lewis, too, felt that the stroke was uninfluenced by his general employment history. However, the commission found that Gregory's employment during the period from December 5 to February 9 "subjected applicant to repeated physical and mental strains and tensions which said strains and tensions became excessive in cumulative effect and precipitated cerebral vascular accident on February 9, 1949." It then held that the injury arose out of and was incurred in the course of employ-

1. Herein, for brevity, referred to as a "stroke".

ment. The opinion of Dr. Benson and the testimony of Gregory and others as to the character of the work constitutes substantial support for this finding.

During the period of Gregory's employment up to January 25, 1949, the employer's insurance carrier was petitioner, Fireman's Fund Indemnity Company. On that date the employer changed carriers and Industrial Indemnity Company became its carrier. The commission made an award against the two carriers jointly and severally.

#### Contentions.

Petitioner contends that since it ceased to insure the employer January 25, 1949, and Gregory did not receive his stroke until approximately 15 days thereafter, February 9, 1949, and moreover did not file his application to the commission until February 8, 1950, more than one year after petitioner contends its liability terminated, the commission had no power to hold it liable with the other carrier. Respondents do not contend that the situation here constitutes "an occupational disease" under section 5411 of the Labor Code. They do contend, as does the Industrial Indemnity Company, that there was but one single injury, although it occurred over a period of weeks, and that the statute of limitations, if it can be raised, runs from the last date or time of suffering of the injury. Section 5405 of the Labor Code fixes the period within which proceedings may be commenced for the collection of benefits as one year from "the date of injury" which according to section 5411, except in cases of occupational disease, "is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed."

[2] We start with the well established rule, "Where an employee suffers a heart attack brought on by strain and overexertion incident to his employment the injury or death is compensable, even though the idiopathic condition previously existed, and no traumatic injury is necessary. [Citing cases.]" *Lumbermen's Mutual Casualty Co. v. Industrial Accident Comm.*, 29 Cal.2d 492, 496, 175 P.2d 823, 826. In the same

case, 29 Cal.2d at page 498, 175 P.2d at page 827, the court held, where the employee had become partially paralyzed, "\* \* \* the evidence does show that the accumulated effects of the overwork ultimately culminated in the disability that manifested itself on February 8, 1945. The injury, the overwork, was developing the disease all during the period of his employment, and February 7, 1945, was the last day of that process which without further work or activity in the employment became disabling the following day."

[3, 4] It may be assumed from the foregoing authority and the facts of this case that the injury, or incident or exposure mentioned in section 5411, was accumulating for a period of approximately 65 days, and that while the whole constituted a single injury, any day during that period, or at its end, constituted "the date of injury". Certainly the exposure, under the commission's findings, continued for the 65 days. Still, any date within that period would be more than a year from the time when petitioner ceased to be the employer's carrier.

[5] This brings us to the question of whether, inasmuch as the employer could not raise the bar of the statute, his carrier can. Or, to put it another way, so far as the carrier is concerned, does the statute of limitations run from the date of its discharge as a carrier or from the date of the injury? Take the situation in *Lumbermen's Mutual Casualty Co. v. Industrial Accident Comm.*, supra, 29 Cal.2d 492, 175 P.2d 823. There the overwork was held to be the "injury" and its effects were accumulating over a period of time. On February 7 the employee returned home from work apparently in good health. His paralysis occurred the next day without further activity. Suppose that he quit work on February 7 and rested for a considerable time and then the paralysis occurred due to the prior overwork. The employee would have a year from that time to apply to the commission for compensation. The employer could not claim that the statute had run, nor could his carrier, even though that carrier had ceased to be the employer's carrier on the day following the day upon which the employee quit work. See *United*



*States Fidelity & Guaranty Co. v. Industrial Accident Comm.*, 195 Cal. 577, 234 P. 369. Thus, it is apparent that the statute of limitations in the Labor Code does not start to run from the time when a carrier severs its connection with the employer but from the date of injury which includes all dates during the exposure. The situation here is in some respects similar to, although different from the occupational disease situation. In the latter the statute, in effect, does not start to run until the accumulation of a number of exposures caused the disabling result. Here the disabling result must be the result of only one exposure, but which may have taken place over several days. It differs from situations like a broken limb in that in those cases the exposure and the result are joint and immediate, whereas here the exposure extends over a period of days. In *Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm.*, 36 Cal.App.2d 96, 96 P.2d 1009, an employee suffered an industrial injury which did not cause an impairment of his earning capacity until a date after the insurance carrier had ceased to act as the employer's carrier. Nevertheless, the carrier was held liable.

[6] The commission found petitioner to be jointly and severally liable with the Industrial Indemnity Company. This finding is appropriate as far as the employee, Gregory, is concerned. However, in view of the fact that as to the employer and Industrial Indemnity Company, petitioner after January 25 was no longer the insurance carrier, there should be an apportionment of the award. Whether this apportionment should be on the basis of a joint liability of both carriers for that portion of the injury attributable to the period prior to January 25, and then a sole liability of the Industrial Indemnity Company for the period thereafter, may depend on the determination whether medically the responsibility for the injury can be so divided. Other factors may be relevant. This is a matter for the commission to determine. See *Associated Indem. Corp. v. Industrial Accident Comm.*, 124 Cal.App. 378, 12 P.2d 1075, and *Colonial Ins. Co. v. Industrial Accident Comm.*, 29 Cal.2d 79, 172 P.2d 884. While

those were occupational disease cases, the principle set forth there would apply here, at least as to the period prior to January 25.

The award is affirmed so far as the employee is concerned. However, the matter is remanded to the commission with directions to make proper apportionment of the award between the two insurance carriers.

PETERS, P. J., and FRED B. WOOD, J., concur.



109 Cal.App.2d 583

**WEBSTER et ux. v. KLASSEN et al.**

Civ. 4331.

District Court of Appeal, Fourth District,  
California.

March 4, 1952.

Action by Ranson W. Webster and his wife, buyers, against G. L. Klassen and others, individually and as copartners doing business as G. L. Klassen & Sons, sellers. The Superior Court, Tulare County, Glenn L. Moran, J., rendered judgment for the buyers, and the sellers appealed. The District Court of Appeal, Griffin, J., held, *inter alia*, that under the evidence, the questions as to whether the buyers had requested a certain brand name of seed potatoes and as to whether they had obtained the brand requested were for the jury.

Affirmed.

#### 1. Sales $\S$ 88, 182(1)

In buyers' action against seller of seed potatoes, jury questions were presented as to whether buyers had requested certain brand name of seed and as to whether they had obtained said brand name of seed.

#### 2. Customs and Usages $\S$ 5

In order for party to contract to be bound by custom not inconsistent with terms of contract even though he is ignorant of custom, custom must be a general custom, and not an individual custom of an individual seller or a purely local custom.

**3. Customs and Usages** ⇨12(1)

To be regarded as part of contract, usage or custom must be both actually or constructively known and consistent with contract.

**4. Customs and Usages** ⇨17

In buyers' action against seller of seed potatoes, if there were sufficient evidence to sustain judgment for plaintiffs on basis of breach of express warranty, it would be immaterial whether or not there was custom in trade not to warrant productivity of seed. Civ.Code, §§ 1732, 1734.

**5. Sales** ⇨445(1)

In buyers' action against sellers of seed potatoes, question as to whether there was an express warranty or only an implied warranty was for jury under all evidence. Civ.Code, §§ 1732, 1734.

**6. Sales** ⇨270

Inspection does not necessarily waive all defects, and buyer still may claim breach of implied warranty as to defects which reasonable examination would not have revealed.

**7. Sales** ⇨439

In buyers' action against sellers of seed potatoes, on issue as to timely giving of notice of breach of warranty, burden would be upon sellers to show that buyers had information sufficient to put reasonably prudent persons upon inquiry. Civ.Code, §§ 1735, subd. 3, 1769.

**8. Sales** ⇨445(5)

In buyers' action against sellers of seed potatoes, question as to whether buyers' delay in giving notice of breach of warranty was unreasonable was question for jury under evidence. Civ.Code, §§ 1735, subd. 3, 1769.

**9. Appeal and Error** ⇨169

Question raised for first time on appeal should not be considered.

**10. Sales** ⇨441(4)

In buyers' action against sellers of seed potatoes, evidence would not sustain defendants' contention that buyers had failed to take reasonable steps to minimize their damage. Civ.Code, § 1789, subd. 1(a-d), 6.

Kendall & Howell, Bakersfield, Virgil C. Dowell, Visalia, for appellants.

Samuel Taylor, Los Angeles, Siemon & Siemon, Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs owned about 30 acres of potato land near Pixley. Defendant's business consisted of financing potato growers, selling potato seed and fertilizer, and the packing and selling of potatoes.

About July, 1949, plaintiff Mr. Webster (hereinafter referred to as plaintiff) went to defendants to obtain crop financing of his acreage. Defendants inquired about his experience in growing potatoes, etc., and agreed to finance him upon the giving of certain mortgages upon the crop and implements. He was referred to defendants' agent, Mr. Hall, who took plaintiff to the warehouse. There, according to plaintiff's story, he told Hall that he was interested in "a good cold storage B grade" (smaller size) seed potato with a good rest period, and that he would prefer a certified seed. An outline of plaintiffs' testimony in this respect is as follows:

"\* \* \* Mr. Hall showed me a slip of paper with the car numbers and government gradings of the different types of seed potato they had; and at that time they had in the warehouse, I think he said it was around five hundred and some odd sacks of these seeds they had left. They were Arthur Johnson, double O's rating, Washington seed, and which he informed me had a rest period of 90 days or better.

"Q. Did you examine the seed there?  
A. I did. They were very nice seed.

"Q. At the time, the potatoes were whole and uncut? A. That is right.

"Q. Did you have any further conversation with Mr. Hall? A. I told him those seed would be fine and he asked me about how many sacks it would take, and I said I felt around 510 to 520 sacks; and he stated *I would get those seed.*"

On cross-examination he testified:

"Q. Where, if anywhere, did you see the words 'Arthur Johnson Double O rating?' A. It was on a piece of paper Mr.

Hall showed me, and he said, 'That is the characteristic of the seed here, and here is the Government rating on it.' \* \* \*

"Q. And did you specifically request his seed? A. No, Mr. Hall said he had several types of seed over there, cold storage seed, and he said some of the Metler strain; and he also showed me different things he had, and I told him I would like to have *this Arthur Johnson B's double O rating*." (Italics ours.)

According to the testimony, Arthur Johnson Double O Washington seed, to the grower, had a definite meaning, i. e., it is considered one of the best, that it has a rest period between plantings of at least ninety days, which makes it exceptionally good for germination; that the B grade is only a smaller potato from the same stock, but it is not certified. On rebuttal, plaintiff stated:

"Q. And did you—was any statement made to you at the time to the effect the seed had been locally grown in the spring?

A. No, he showed me this slip of paper, which other growers also seen, stating it was Arthur Johnson double O rating Washington seed, grown up there, and that it had a 90 day or better rest period \* \* \*.

"Q. Did you see any B's there in the Arthur Johnson sacks? A. There were some B's in the Arthur Johnson sacks I am almost certain. He told me they were Arthur Johnson seed."

It was plaintiffs' contention that the seed furnished them was not the seed shown to them and was unfit for planting.

Defendants admit that plaintiff did not get the named brand of seed. A few days later, on August 3, 1949, plaintiff signed a note and mortgage for \$3,750, and an agreement whereby defendants were to advance certain money to plaintiffs and that plaintiffs were thereby compelled to buy seed potatoes from defendant company at the prevailing market price. They were to be cut for seed by defendants' agents. Plaintiff then testified that he prepared his land for planting, took his truck to defendants' place of business and picked up a load of cut seed potatoes to plant; that on arriving there, defendants' cutter, a Mr. Brad-

ley, stated he was not quite sure which potatoes plaintiff was supposed to obtain; that plaintiff told him he was to get "Arthur Johnson Washington seed" and the cutter said: "I don't think we got any of that cut". He then testified that Mr. Bradley had been cutting seed for others and that after some time he said: "This is the seed you are supposed to take". He then stated that he hauled away the necessary fertilizer and about 100 sacks containing cut seed potatoes, and planted them, and came back for more and later planted them; that after several weeks he checked the seed on the first eight acres planted and they showed up "very bad", i. e., rotted and spotted growth; that he called defendants about it and their field man felt it was due to a certain "gyp dip" they put on that batch, and accordingly defendants furnished additional seed to replant the eight acres; that he subsequently tested the other planting and found that much of the seed had failed to germinate and also found that "heat necrosis" was in most of it; that the crop was so sparse and spotty that he stopped cultivating it; that the defendants and their agent Hall, as well as other neighboring potato farmers, observed these conditions on two or three occasions; that he abandoned the crop and told defendants' agent that if he wanted to come and take over the crop he could do so; that the agent asked him to take it up with defendants and they would take care of it; that nothing was done by them and that his lawyer, on October 4, wrote to defendants, claiming damages for misrepresentation due to the furnishing of inferior seed; that his crop would have matured ordinarily in November or December; that no potatoes were harvested because it would not have paid to harvest them; that potatoes in that territory were averaging about 200 sacks to the acre and that the price obtained was about \$3.50 to \$4.25 per sack. This action followed, resulting in a jury verdict for plaintiffs for \$5,000, and against defendants on their cross-complaint.

Defendants testified generally that plaintiff did not order any particular variety of seed potatoes; that there was no such named brand as Arthur Johnson double O



Washington (B grade) certified; that the seed ordered by plaintiff and sold to him was a "B grade" potato raised from a strain of Arthur Johnson seed, in the previous year on land near Pixley; that plaintiff examined the seed potatoes and took that grade because they were less expensive than certified seed; that plaintiff saw some of them being cut and, according to his own statement, noticed that some were rotted and had evidence of "heat necrosis"; and that since he continued to plant the seed, knowing of that condition, he was obligated to reject it and inform defendants of its condition and not plant it; that plaintiff proved to be an inexperienced farmer; that his method of planting was the cause of the failure of the crop rather than the quality of the seed; that defendants had no notice of plaintiffs' claim of inferior quality until the receipt of the letter of October 4th; and that after that date defendants discovered the crop was too far gone to do anything with it.

Defendants sought, by cross-complaint, the recovery of \$3,442.00, representing cash, seed, and fertilizer advanced to plaintiffs. They produced certain testimony that it was the custom of the trade not to warrant the productivity of potato seed, whether certified or not. No recovery was sought on the mortgage because of the crop failure and due to the known fact that plaintiffs' implements were being bought on contract of purchase and were later reclaimed by the sellers.

[1] As to point number one, defendants claim that since plaintiffs base their case upon the allegation that they were to receive a certain brand name of seed and further allege that they failed to obtain this type of seed and by reason thereof they sustained damages, the verdict in their favor, based upon this allegation of express warranty, cannot be sustained where their testimony discloses that they requested and obtained a different type and grade of seed. We see no merit to this contention. The question of whether plaintiffs requested and obtained a certain brand name of seed was a question for the jury to determine.

As to point number two, defendants argue that in the absence of an express war-

ranty, where the plaintiffs base their cause of action upon an implied warranty as to the fitness of the seed, and where there is undisputed evidence that there is a custom in the trade not to warrant the productivity of the seed, a verdict for the plaintiffs cannot be sustained upon the theory that the seed sold to the plaintiffs was unfit and failed to produce a crop.

The complaint alleges the basic facts generally and also alleges that at the time plaintiffs entered into the contract with defendants, defendants "expressly stated, represented and declared that the seed potatoes which would be furnished would be Arthur Johnson (Washington) double-O seed from cold storage, with 90-day or better rest period; that plaintiffs then and there \* \* \* relied upon the sellers' skill and judgment as to the quality and fitness of said seed for such purpose \* \* \*. Thereafter, defendants delivered to plaintiffs certain seed potatoes under the terms of said contract to be used in planting said lands, and orally represented to plaintiffs that said seed so delivered was one of the quality above mentioned and fit for the purposes above stated; and the plaintiffs planted said seed in a good and farmerlike manner in accordance with the terms of said contract, \* \* \*. Notwithstanding the facts above alleged, said seed was unfit to be planted and utterly worthless \* \* \* and that by reason thereof the plaintiffs lost their crop \* \* \*. Defendants breached and violated the implied warranty that said seed potatoes were reasonably fit for the purposes for which they were sold, which arose out of the transaction above alleged; and that by reason thereof the plaintiffs have been damaged in the sum of eighteen thousand dollars (\$18,000.00)."

It is difficult to determine whether plaintiffs, in their pleadings, were relying upon the breach of an express warranty, the breach of an implied warranty, or the breach of a contract.

[2-4] Defendants rely principally upon *Miller v. Germain Seed & Plant Company*, 193 Cal. 62, 222 P. 817, 32 A.L.R. 1215, wherein it is held that evidence of custom is only admissible under the theory of implied warranty and must be considered in deter-

mining the intent of the parties and is, in fact, a part of the contract, unless the contract manifests a contrary intent. However, it is particularly stated that if there has been a written warranty or an expressed oral warranty of the character of the seed, the custom of the dealer in other cases not to give such a warranty would have no bearing on the terms of the express warranty. The evidence pertaining to the custom, if it may be considered at all, is quite unsatisfactory. The witnesses, in this respect, testified that the custom of the trade with reference to guaranty or warranty of performance of seed was that "they did not guarantee it; the custom is there is no guarantee on seed \* \* \*. Well, there is no warranty as to their production." As pointed out in *Miller v. Germain Seed & Plant Company*, supra, the custom must be a general custom, and not an individual custom of an individual seller, or a purely local custom, of which the buyer is ignorant. " \* \* \* 'To be regarded as part of the contract, however, the usage or custom must have both of the foregoing elements. (1) It must be actually or constructively known; and (2) it must be consistent with the contract. If either of these elements is lacking the usage or custom cannot be regarded as part of the contract. If the usage is neither actually or constructively known to one of the parties to the contract, it is not binding upon him.'" [193 Cal. 62, 222 P. 819.]

In *Security Commercial & Savings Bank v. Southern etc. Bank*, 74 Cal.App. 734, 749, 241 P. 945, it is stated that before a custom can enter into or affect the rights and liabilities of parties in their dealings with each other, such custom must be certain, uniform, and either known to those sought to be charged thereby, or so generally known and notorious that knowledge and adoption thereof must be presumed.

In this respect the jury was accordingly instructed. The matter was submitted to it and the verdict was against the defendants. Whether or not a certain custom existed becomes immaterial if there was sufficient evidence to sustain the judgment on the basis of a breach of an express warranty.

We have made independent search of authorities to determine whether or not a sale by description constitutes an *express*, as distinguished from an *implied* warranty. See 7 Southern California Law Review, 96, 100; 9 Southern California Law Review 169; 7 Cal. Law Review, p. 360; 12 Cal. Law Review 523; 164 A.L.R. 1321. Section 1732 of the Civil Code defines "expressed warranty" as: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. \* \* \*"

Section 1734 of the Civil Code recites that: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description \* \* \*."

The culmination of our efforts is disclosed in 46 Am.Jur. p. 563, sec. 385, wherein it is stated: "By the great weight of authority, the sale of seed, bulbs, trees, or nursery stock as of a certain variety—in other words, a sale by description—constitutes a warranty that the property furnished is of the variety described, \* \* \*. There is a difference of opinion as to whether such a warranty is express or implied."

Thirty or forty cases and references are cited for this general statement, including several California citations such as *Miller v. Germain Seed & Plant Company*, supra; and *Shearer v. Park Nursery Company*, 103 Cal. 415, 37 P. 412. See, also, *El Zarape Tortilla Factory, Inc., v. Plant Food Corporation*, 90 Cal.App.2d 336, at page 345, 203 P.2d 13, at page 19, where it is stated: "Where the terms of an agreement designate the particular quality of a commodity to be delivered in phrases which are well known in the trade of the particular commodity purchased and sold, such description and designation amounts to an *express warranty*," (Italics ours.) Citing *Brandenstein v. Jackling*, 99 Cal.App. 438, 446, 278 P. 880, and many other California cases holding such warranty to be an "express warranty".



[5] We do not wish to add to the confusion, but content ourselves with the general proposition that the testimony produced by plaintiffs indicates that a warranty did arise and that the evidence is sufficient to bring it within the definition of an express warranty, as defined in sec. 1732 of the Civil Code. A section of the Uniform Sales Act pertaining to warranties was construed in *Parrish v. Kotthoff*, 128 Or. 529, 274 P. 1108, 1110. It was there said: "Under the facts proven, it is wholly immaterial whether the action be considered as an action for breach of contract or for breach of warranty, for, if treated as one or the other, defendant is liable for his failure to furnish the kind or variety of seed which he had agreed to sell, and there is no difference in the damages recoverable therefor."

In *Brandenstein v. Jackling*, 99 Cal.App. 438, 278 P. 880 a somewhat similar situation arose, and the court held that considering appellant's failure to deliver all No. 1 rice as a breach of contract, instead of a breach of warranty of quality, the judgment appealed from would be equally supported under the pleadings.

In *Brock v. Newmark Grain Company, Inc.*, 64 Cal.App. 577, 222 P. 195, a case quite factually similar to the instant case, it was held that the warranty may be an oral warranty and that where the circumstances surrounding the sale are such as to amount to a representation of fact on the part of the vendor that the article sold is of a particular kind as ordered in terms, he will be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. (See, also, 46 Am.Jur. p. 495, sec. 313.)

While the evidence produced by defendants might justify a conclusion that only an implied warranty arose, the question whether there was an express warranty or an implied warranty was a factual question for the jury to determine.

In support of the judgment we must conclude that the jury adopted plaintiffs' evidence as opposed to defendants' evidence that an express warranty was established or that there was a breach of contract in

defendants' failure to deliver the named brand of seed potatoes ordered.

[6-8] Defendants next argue that plaintiff, upon his first ascertainment of the fact that the seed potatoes were not what he ordered or were "unfit to be planted and utterly worthless" as alleged in his complaint, he was obligated to immediately notify defendants of any breach of said warranty under section 1769 of the Civil Code.

In this connection it is argued that since plaintiff testified he saw potatoes being cut for seed by Bradley, and they bore some evidence of heat necrosis and rot, he was charged with knowledge of their condition before he planted them. His testimony is that he did not know who was receiving the seed that was being cut because they were cutting for other farmers at the same time; that after he hauled away the second load he told Hall he thought there "were some two's" in it and he asked him if he was getting Washington seed and Hall told him he was getting the seed he ordered; that being reassured of this fact plaintiff continued to plant the seed potatoes and did not discover that they had rotted or become infected with heat necrosis until they failed to germinate; that as to the first eight acres he did call defendants and they also discovered an unsatisfactory condition and furnished potatoes for replanting.

Inspection does not necessarily waive all defects. A buyer still might claim a breach of implied warranty as to defects which a reasonable examination would not have revealed. The burden was upon defendants to show that plaintiff had information sufficient to put a reasonably prudent person upon inquiry. 20 Cal.Jur. p. 239, sec. 7; 7 Southern California Law Review, p. 102; Sec. 1735, subd. (3), Civ.Code.

It is not reasonable to believe that plaintiff should have known that these particular seed potatoes, in their cut form, were not, in fact, Arthur Johnson Washington Double O seed potatoes or that before planting, he should have known they would not germinate, if planted. The evidence shows that plaintiff did call Hall's attention to the lack of germination at the earliest possible moment and he was told that defendants could take over the crop if they so desired,



otherwise, plaintiff was going to "take steps", and nothing was done by defendants other than to furnish other seed potatoes for the first eight acres. Thereafter, the written notice was given to defendants.

This question, as well as the question of the reasonableness of notice was submitted to the jury under proper instructions and resulted in a finding against defendants' contention. We are unable to hold, as a matter of law, that any delay in giving notice was unreasonable.

[9] It is next argued that since plaintiff continued planting defective seed potatoes after he discovered their defective condition, his measure of damages was limited to the cost of replacing the defective seed with other seed, citing sec. 1789, subd. 6, Civ.Code; *Oliver v. Hawley*, 5 Neb. 439; and *Buckbee v. P. Hohenadel, Jr. Co.*, 7 Cir., 224 F. 14, L.R.A.1916C, 1001.

The question assumes a false premise in this, that plaintiff knew the potatoes were defective and would not grow or germinate, or that they were not the particular brand ordered. Plaintiff submitted to the jury a proper instruction as to the measure of damages, predicated upon a breach of contract or warranty, as indicated in *Paul v. Williams*, 64 Cal.App.2d 696, 149 P.2d 284. No instruction as to any different measure was offered by defendants. This question appears to be raised for the first time on appeal and should not, therefore, be considered. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 91 P. 389; *Duffey v. General Petroleum Corp.*, 93 Cal.App.2d 757, 209 P. 2d 986.

[10] As to point five, defendants also contend that plaintiff, upon discovery of the defective seed, should have discontinued planting that seed and planted other seed in order to minimize or mitigate his damage, citing sec. 1789, Civ.Code, subdivision 1, (a) to (d) inclusive; and 8 Cal.Jur. p. 782, sec. 43. Plaintiff, apparently, did this very thing in reference to the eight acres, and from his testimony, he did not discover that the seed would not germinate until he had planted it, awaited the germination period, and then made the inspection. According to defendant's own testimony, it

was then too late to plant another crop. We see no merit to this argument.

The last point is that since plaintiff admitted that he received the amount of cash, the fertilizer and seed potatoes as set forth in the cross-complaint, and that since he admittedly had never paid any part of it, it was error for the jury to fail to find in defendants' favor on their cross-complaint, citing *Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 P. 201.

The court instructed the jury as to the legal measure of plaintiffs' damages, if any, less "the amount they owe defendants for fertilizer, the amount they owe defendants for the seed potatoes, and the amount of cash advanced to them by defendants."

Since the testimony as to the damages suffered by plaintiffs exceeded the amount of the judgment allowed, plus the amount of the claim on the cross-complaint, there is no merit to the argument that the jury did not follow the instructions given on the subject matter.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,  
concur.



109 Cal.App.2d 524

**PEOPLE v. BURNS.**

Cr. 2761.

District Court of Appeal, First District,  
Division 1, California.

March 3, 1952.

Hearing Denied March 31, 1952.

See 242 P.2d 9.

Homicide prosecution wherein the Superior Court, in and for the City & County of San Francisco, Twain Michelsen, J., rendered a judgment of conviction of murder in the second degree, and the defendant appealed. The District Court of Appeal, Bray, J., held that defendant had been denied a fair trial by the atmosphere of hostility created by the trial judge, if not towards the defendant, at least towards his counsel.

Reversed.

**1. Homicide** ⇨254

Evidence sustained conviction of murder in the second degree.

**2. Criminal Law** ⇨1159(2)

Mere fact that evidence is susceptible of two inferences, one of innocence and one of guilt will not warrant a reversal of conviction, and appellate court is bound by findings of jury where it rejects hypothesis of innocence if there is substantial evidence to support finding of guilt as more reasonable of two hypotheses.

**3. Homicide** ⇨23(1)

Death resulting from unmerciful beating administered by defendant constitutes murder in second degree.

**4. Criminal Law** ⇨370, 371(1)

Where a felonious intent is an essential ingredient of crime charged, and act done is claimed to have been done innocently or accidentally or by mistake, or when result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such inference, it is proper to characterize act by proof of other like acts producing same result, as tending to show guilty knowledge and intent or purpose with which particular act was done and to rebut presumption that might otherwise obtain.

**5. Criminal Law** ⇨372(1)

When defendant's conduct in connection with previous crime bears such similarity in significant respects to his conduct in connection with crime presently charged as naturally to be explained as caused by general plan, similarity is not merely coincidental, but indicates that conduct was directed by design, and therefore evidence of such previous crime is admissible.

**6. Criminal Law** ⇨370, 371(4), 372(4)

In homicide prosecution, where there was evidence tending to show that death had resulted from unmerciful beating of woman victim, evidence as to conviction of defendant for assault upon another woman 13 years previously under similar circumstances was admissible.

**7. Criminal Law** ⇨369(2)

Remoteness of prior offense affects only weight of evidence and not its relevancy or admissibility.

**8. Criminal Law** ⇨1169(8)

In homicide prosecution, any error, in admitting victim's clothing, resulting from gap in evidence relative to custody of such clothing was not prejudicial, where no contention was made that clothes were in different condition than when first discovered after alleged fatal assault and where, as evidence, they were more favorable to defendant than to prosecution.

**9. Criminal Law** ⇨412(1)

Where inspector, who had previously questioned defendant, testified that he had examined reporter's transcription of interrogation and that it correctly set forth questions which he had asked defendant and defendant's answers thereto, inspector was properly permitted, in subsequent prosecution of defendant, to read such transcript to jury, especially in absence of any objection from defendant. Pen.Code, § 1340.

**10. Criminal Law** ⇨1170½(5)

In homicide prosecution, any unnecessary curtailment of cross-examination of inspector, who had testified as to interrogation of defendant after his arrest, on matter of publication of certain photographs in detective magazine, by which cross-examination it was sought to show bias or prejudice on part of inspector in obtaining publicity, was not prejudicial, where no attempt was made to refute inspector's denial that he had been responsible for photographs being published.

**11. Criminal Law** ⇨438

Admission of photographs of homicide victim is within sound discretion of trial court.

**12. Criminal Law** ⇨438

In homicide prosecution, trial judge abused his discretion in admitting in evidence photographs of victim, taken after autopsy, where it was obvious that only purpose of exhibiting such photographs was to inflame jury's emotions against defendant.

**13. Criminal Law** ⇨489

In homicide prosecution, trial court erred in sustaining objection to cross-examination of autopsy surgeon as to whether, in performing autopsy, he started with head or trunk of deceased, where it

was sought by such questioning to test doctor's memory as to his findings at autopsy.

#### 14. Criminal Law Ⓒ465

Where a witness testifies as to the sobriety of another, his test of sobriety, or of intoxication, may be inquired into.

#### 15. Criminal Law Ⓒ655(1)

In homicide prosecution, record established that defendant had been denied fair trial because of atmosphere of hostility created by trial judge, if not toward defendant, at least towards his counsel.

#### 16. Criminal Law Ⓒ855(5)

In homicide prosecution, it could not be said that defendant had been deprived of a fair trial because certain of jurors had read certain newspaper articles concerning case, where such jurors expressly stated that they would not be influenced by such articles and that they had not formed therefrom any opinion concerning case.

#### 17. Criminal Law Ⓒ706

In homicide prosecution, record established no misconduct on part of District Attorney.

---

Hugh E. Burns, in pro. per., and Emmet F. Hagerty, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Dep. Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals in propria persona from a conviction by a jury of murder in the second degree and an order denying a new trial. He was represented by counsel at the trial and on argument here.

Questions Presented.

1. Insufficiency of the evidence, particularly to prove second degree murder. 2. Errors in admission of testimony, particularly evidence of the commission of a crime 13 years prior. 3. Alleged misconduct of the judge and district attorney.

Facts.

It is the theory of the prosecution that deceased died from being beaten about the head by defendant. The defendant contends that her death was due to injuries from falls.

Defendant, 37 years of age, married and father of two children, is a sergeant in the United States Army and was stationed at Camp Stoneman. On Saturday, in uniform, he with a couple of other soldiers came to San Francisco after stopping at Orinda for a couple of drinks. About 6 o'clock he was in Brownie's Tavern where he met Mrs. Myrna Stewart, aged 39, whose husband was absent from the city. Burns testified that she smiled at him, and he bought her drinks. Both he and she drank ginger ale and whisky. In the course of their conversation she gave him the name of a hotel which was not "too fussy" and stated she would go there with him later in the evening. He then went to the hotel, checked in, and returned to Myrna at the tavern. They had more drinks. Defendant does not know how long they remained in the tavern, nor does he remember leaving the tavern. In a statement to the police given on Monday he stated that the next thing he remembered was the cab driver telling him "we couldn't fight in his taxicab." He also stated that he did not remember hitting Myrna, but he must have because of the driver's statement, and then he stated that he did remember striking her in the cab. He also stated that after they got out of the cab, he apologized to her for hitting her. He further stated that the driver put them out of the cab. The driver testified that about 9 p.m. the couple got into his cab at the Mark Hopkins Hotel. They were not drunk but evidenced that they had been drinking. Defendant directed him as to particular streets to drive on, and had him stop at a drug store which defendant entered, returning in approximately three minutes. Defendant first told him to drive to Twin Peaks and then told him to drive to the beach. Arriving at the beach defendant directed him to drive to the left, along the Great Highway. The couple were quiet all the way until then, when the driver heard Myrna say, "No, don't." The couple were embraced and he said, "No rough stuff in the cab." Defendant replied, "All right." Near Fleishacker Zoo the driver made a "U" turn and started back. At Wawona Street defendant said, "Stop here. We are going over to have a drink." The couple got out. "They appeared



friendly." At no time did the driver notice any marks on Myrna's face. There was no fight in the cab and the driver did not put the couple out. Defendant's testimony at the trial differed with his statement to the officers. His testimony concerning the ride from the time when he claims he first remembered being in the cab up to this point was substantially the same as that of the driver. The place where the cab stopped was opposite a bar called Mac's Hitch Rack. On the other side of the street was a concrete pedestrian tunnel under the Great Highway to the beach.

Defendant testified that after leaving the cab Myrna suggested a swim before they had another drink. They started up the embankment to go across the Great Highway. Defendant fell in some bushes there. He claimed that the scratches found on his ear were caused by his fall or in his getting up, although when asked by Inspector Nelder if they were from a finger nail he replied that he did not know. (There were three scratches on the back of his right ear. He then noticed the tunnel and they started through it. Myrna fell against the cement side of the tunnel. He did not know whether she hit her head, although she fell head first towards the side. In his statement to the police he said "she slipped" and fell on "that cement." He had told Inspector Nelder that the floor was concrete. (Actually the floor is loose sand, not concrete.) He helped her up. They walked out of the tunnel on to the beach. A short distance from the tunnel they undressed to go swimming. Myrna was a short distance from him. She asked him to help her with her brassiere. He helped her unhook it. Then she started for the water. They were both completely nude. By the time he caught up with her she had fallen forward. She did not answer him. He thought she had passed out, due to her drinking. He decided to take her down to the water to revive her. She was limp and he had difficulty in lifting and carrying her. He fell with her several times, tripping over debris. Once he fell on top of her on a log. He finally got her near the water and started to splash water on her. A breaker hit him from be-

hind and he rolled on top of her. He eventually got her out of the surf and to the dry sand. He saw a couple walking along the beach (Mr. and Mrs. Baron). He called to them, asking that they give him a hand. Baron came over. Defendant explained that the woman had passed out from drinking and what he had tried to do to revive her. Together they carried her to where her clothes were. Baron and he started to dress her. Mrs. Baron approached so he got his clothes off to one side and dressed. The Barons dressed Myrna. Baron and he carried her through the tunnel to the street. Baron said something about getting an ambulance. Defendant said he did not want to get involved, knowing that the woman was married and so was he. Baron told him he was already involved. Defendant went across the street to Mac's Hitch Rack and asked a man and woman sitting at a counter to call an ambulance, as there had been an accident. He returned to the Barons and Myrna. The Barons left to go to Mac's for a cup of coffee. When the Barons entered the place, defendant decided that he had done everything he could for the woman. Defendant went towards Mac's but continued on to the next street and hailed a taxi which had just debarked some passengers. He then went to his hotel and changed into civilian clothes. He then noticed that his ear was bleeding more than he had realized. He next went back to Brownie's Tavern and asked Reilly, the bartender, to do him a favor, that if anyone asked if he were in there earlier in the evening to say he did not see him. He then went to another tavern, had a drink and left in a taxi, which took him to his hotel where he got his suit case. He was then driven to Cooper and Varni's bar where he waited while the taxi driver, at defendant's request, took his suit case to the Greyhound bus station from which the buses leave for Camp Stoneman, checked it, and brought back to him the key to the receptacle. Defendant had one drink there. He asked the bartender for a flashlight, saying that he thought he had lost his watch at the beach and he wanted to go out and look for it. This was

about 2 o'clock Sunday morning. At his request he was driven to the 365 Club, taking with him in the cab a woman he met in Cooper and Varni's. When they closed the bar at the 365 Club he returned to his hotel. He left his hotel Sunday morning about 8 o'clock and after drinking at a couple of bars, and getting his suit case at the bus station, he went to the beach and looked for his wristwatch and glasses which he had lost there the night before. He also had lost one of his socks there. He then went to a couple of bars and then to a restaurant. He had had nothing to eat since 5 o'clock Saturday morning. He returned to his hotel and went to bed. That afternoon Sergeant Feller who had come down from Stoneman with him waked him up and they started back to camp. Defendant contended that in the statement testified to by Inspector Nelder the questions and answers were not complete and that some of them were twisted around.

Mr. and Mrs. Baron testified that while walking along the beach between the hours of 10:30 and 11:30 that Saturday evening they passed eight or ten yards beyond a nude man standing, who called, asking Baron to give him a hand. Lying at his feet was a nude woman, who was unconscious but breathing heavily. Defendant stated that he and she had been drinking; she had passed out from drinking, and he had brought her to the beach to revive her in the water. He and defendant carried her to the spot where defendant's clothes were. The woman seemed to be shivering and Baron took defendant's jacket and shirt and placed them over her.

Then Mrs. Baron and he started looking for the woman's clothes. Mrs. Baron found them and he and she put the woman's coat and dress on her. Mrs. Baron put the underclothes in the woman's hat. Baron suggested getting an ambulance or calling the police. Defendant said he did not want to get involved in anything. Baron told him he was already involved. Defendant suggested that they carry the woman where they could get a cab. Baron and defendant, who by then had dressed, then carried her through the tunnel to the street, Mrs. Baron bringing the under-

clothes and hat. In carrying the woman from the place where she was lying on the wet sand Baron did not observe any obstacles on the sand. Mrs. Baron noticed some sort of log, although it did not obstruct their path. When they got through the tunnel Baron noticed that the woman had a "very stout or fat face or her face was swollen." He did not notice anything about her mouth. Mrs. Baron also noticed that the face was puffy and fat and there was blood on it. Mrs. Baron had gone up over the highway and brought a taxi to the place where the men had laid the woman by the side of the road. The taxi driver refused to take the woman because she was unconscious but he said he would look for a police car. Baron told defendant to go over to Mac's and phone for an ambulance. Defendant went into Mac's. In less than half a minute he returned and stated that some men said they would phone. Baron suggested to his wife that they go get coffee. Baron indicated to defendant that he stay with the woman. Mr. and Mrs. Baron went into Mac's, found several men there, and asked them if they had seen a soldier come in. They said they had not seen anyone. Baron then saw two policemen standing there, and took them back to the woman. Defendant had disappeared. Baron had observed an odor of alcohol about defendant. His speech was a little heavy as though he had been drinking, but he walked steadily and was coherent.

Myrna was taken by ambulance to the hospital, and died the next day. Dr. Webb, a specialist in neurological surgery, saw Myrna at the emergency hospital about 10 a. m. Sunday. She was deeply unconscious. (The evidence indicates that she never regained consciousness from the time the Barons saw her on the beach until her death.) She was bruised about the face; there was evidence of a recent hemorrhage in the right eye and her reflexes indicated brain damage. She had lacerations of the inner lip. The witness and other doctors concluded she had had a severe injury to the brain. He operated, finding a sub-dural hematoma and a bleeding beneath the membrane surrounding the brain and in the brain itself. The cause

of death was intrinsic brain damage. In his opinion it was caused by some blunt object which carried weight but would not cut. The human fist by repeated blows to the face could have caused it. A fall to the sand could not have caused it, nor a single overwhelming blow. Nor could it have been caused by Myrna repeatedly falling with 200 hundred pounds of weight on her back (defendant's weight), and repeatedly striking a block of concrete.

Dr. Moon, the pathologist to the coroner, examined deceased's brain tissues and found contusions and lacerations. In her neck organs he found hemorrhages caused in his opinion by traumatic injuries caused by pressure exerted deep in the neck by fingers pressed to the neck. The condition of the brain was traumatic and in his opinion could have been caused by a minimum of four forceful impacts of the human fist to the face.

Dr. Rosenthal, the autopsy surgeon for the coroner, testified that on his examination of the body he found contusions of both cheeks and jaws extending down into the neck on the sides; lacerations on the inner aspects of both the upper and lower lips, that is, inside the mouth; multiple tiny excoriations, which are tiny punctures or scratches, over the cheek and upper part of the neck; bleeding under the skin of the left upper eyelid and of the ridge of the right ear, and bleeding of the right arm. He described the injuries he found on autopsy of the brain. His testimony in this respect was similar to that of Dr. Moon. There was blood in the nostrils. There was considerable hemorrhage to the larynx, the throat, the thyroid gland, and in the muscles surrounding the windpipe. The injuries to the neck structure extended from a position approximately under the chin down almost to the shoulder bone. The injuries to the neck were traumatic injuries due to a compressive or squeezing force and could have been done with human hands. The brain injuries were also traumatic, caused by forceful and multiple collision with a blunt object and could have been caused by blows with the fist to the face. Death was due to the injury to the brain. The injuries could not have been

caused by a fall to the sand. The puncture excoriations about the face and neck could have been made by falls on the sand.

Reilly, the bartender at Brownie's, testified that when defendant returned to the tavern about midnight he requested the witness to say if anyone asked if witness had seen him in uniform that night, to say no. The witness stated that when defendant was in the tavern earlier that night with Myrna he was in uniform, but was wearing civilian clothes when he returned at this time. Reilly testified to serving drinks to the couple, and that defendant was sober when he saw him when he left earlier.

Sergeant Feller testified that Sunday afternoon while they were returning to camp defendant told him that he lost his watch and glasses and that he had a fight.

Cooper, of Cooper and Varni's bar, testified that about 1:15 or 1:30 Sunday morning defendant came into his bar and told him that "he had a little trouble out at the beach and had slapped a girl around."

One Pens, a taxi driver, testified that defendant hailed him and asked if he had a flashlight which he needed to use at the beach where he had lost his watch. Pens said he did not have one. He drove defendant to the hotel, where defendant got his luggage. He then drove defendant to Cooper and Varni's. On the way defendant stated that he was glad that San Francisco taxi drivers were more or less close-mouthed. He also told about being at the beach swimming with a woman and she was hurt or drunk, the driver did not remember which; she passed out and he tried to revive her in the water; that a couple came along and that he told the couple to wait there while he went to call an ambulance, but he managed to hail a cab and left the vicinity. While defendant was in Cooper and Varni's, the driver, at defendant's request, checked his bag at the bus station and gave the key to defendant at Cooper and Varni's. Defendant came out with a woman and they both got in the cab. The woman stated to defendant that she heard him tell the bartender that he had slapped another woman around, and she wanted to caution him not to use the



same tactics on her. The driver did not recall whether or not defendant replied.

On Monday morning, two soldiers in the Criminal Investigation Division of the United States Army talked to defendant. One, Puckett, testified that defendant told him that on the night in question he had a quarrel in a taxicab with a woman; that he had struck her in the cab; also that he had quarreled with her after they got out of the cab. The other, Beazley, testified that after asking the witness if the woman was really dead, defendant said, "\* \* \* it was that ginger ale that caused all this. When I just drink whiskey or whiskey with water I am O. K., but when I drink ginger ale with it I get to feeling mean and anything can happen." A short time later defendant said, "I guess I will get the gas chamber for this."

Defendant denied making the statements and admissions testified by the above-mentioned witnesses, except that he admitted giving a complete statement to Inspector Nelder, but characterized it as hereinbefore set forth. There was no evidence of rape on Myrna's body. The clothes she had worn were examined and there was no evidence of tearing or indication that she had not undressed herself, except, as defendant testified, in the removal of her brassiere.

Dr. Berger, a former autopsy surgeon for the coroner, called by defendant, testified in effect that all of Myrna's injuries could have been caused by the falls described by defendant and contact with the sand or the objects which photographs of the beach showed were there.

Defendant makes some point of the fact that Dr. Webb bored some holes in Myrna's skull, although she had no skull fracture, and that such operation may have caused her death. Dr. Webb explained that the operation was necessary to relieve the pressure on the brain from the hemorrhages within the skull. There is no evidence that the operation caused the death. On the contrary, all the evidence of the medical experts, including the one called by defendant, is that she died from the brain injury, caused either from defendant's blows or her repeated falls.

[1,2] It is obvious from the foregoing recital of the testimony that there was sufficient evidence to justify the jury in finding that Myrna met her death as the result of blows administered by defendant. Assuming that the evidence is also susceptible of the inference that her death might have been due to falls, that does not justify us in reversing the verdict. "\* \* \* the mere fact that the evidence is susceptible of two inferences, one of innocence and one of guilt would not warrant a reversal of conviction. \* \* \* The appellate court is bound by the findings of the jury where it rejects the hypothesis of innocence if there is substantial evidence to support the finding of guilt as the more reasonable of the two hypotheses. Under this rule, the conviction of the defendant herein is amply supported by the evidence." *People v. Crawford*, 41 Cal.App.2d 198, 205, 106 P.2d 219, 223.

#### Second Degree Murder.

[3] Defendant contends that the evidence fails to prove second degree murder. It is not clear exactly what defendant's contention in this respect is, other than his general contention that the evidence proves that Myrna's injuries were caused by falls rather than blows. From the evidence the jury could have inferred that defendant gave deceased an unmerciful beating. That death resulting from such a situation constitutes murder in the second degree is held in *People v. Cayer*, 102 Cal.App.2d 643, 228 P.2d 70, and *People v. Tubby*, 34 Cal.2d 72, 207 P.2d 51.

#### Admission of Testimony. (a) Prior Crime.

A serious question in the case is the admissibility of the evidence of a prior crime. Over defendant's objections, the testimony of a Mrs. Qualtieri, and Kane, the Chief of Police of Scituate, Massachusetts, was admitted. Their testimony disclosed that on June 17, 1937, Mrs. Qualtieri was living at Scituate, a summer resort. While she was sitting on the beach defendant came along and spoke to her. That evening he took her to a dance. After the dance, where defendant had two drinks and she one, defendant took her in.

his car towards her home, then drove into a wooded area off the road, struck her with his fists, forced her out of the car, held her by the throat, told her that she would either do what he wanted or she would have to put his "private" in her mouth. When she refused he kept hitting her in the face while he was holding her down on the ground by the throat. He kept hitting her and she kept pleading with him. Finally, he let her go. He was later arrested and stated that he had tried "to make her" but he did not realize what he was doing as he had been drinking at the time. Defendant claimed that the incident did not occur, but admitted that he had pleaded guilty to a charge of assault brought by the girl. He said he did so because her father was on the police force and he would have been railroaded unless he so pleaded.

People v. Peete, 28 Cal.2d 306, 169 P.2d 924, contains a long list of California cases and certain law review articles on the subject of the admissibility of evidence of other crimes than the one upon which the defendant is being tried. It sets forth the exception to the general rule that evidence of another and distinct offense is not admissible. It points out that such evidence may not be admitted merely to show criminal disposition. " \* \* \* But, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." 28 Cal.2d at page 315, 169 P.2d at page 930. It says further, 28 Cal.2d at page 316, 169 P.2d at page 930: "The relevance of evidence that proves crimes other than that charged, however, must be examined with care. People v. Albertson, 23 Cal.2d 550, 577; 145 P.2d 7; see Stone, supra, 46 Harv.L.Rev. 954, 983." As to the test: "The general tests of the admissibility of evidence in a criminal case are: \* \* \* does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does,

then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." 28 Cal.2d at page 315, 169 P.2d at page 929. In the Peete case the evidence of the prior crime coupled with that of the one for which the defendant was on trial indicated strongly that the second murder was part of a scheme by defendant to acquire property by murder.

In People v. Cassandras, 83 Cal.App.2d 272, at page 279, 188 P.2d 546, 550, we stated, concerning the exceptions to the general rule: "In recent years these exceptions have been so extended that the rule appears to have become the exception and the exceptions the rule. [Citations.] One exception that is well settled in law is that evidence of other crimes is admissible to show a *pattern*, scheme [design], project or plan of which the two crimes are a part. See discussion 8 Cal.Jur. p. 69, § 173. In such cases, inasmuch as the defendant has pleaded not guilty and thus put in issue all facts relating to the commission of the offense the evidence of the prior crime of a similar character is of value and admissible in that it tends to show a general plan, scheme or design which is of some direct probative value in proving that the crime of which defendant is charged was in fact committed by him." (Emphasis added.) See also People v. Zatzke, 33 Cal.2d 480, 202 P.2d 1009. In the Cassandras case there is listed a number of cases holding, 83 Cal.App.2d page 280, 188 P.2d at page 551: "The general pattern, scheme and plan exception has frequently been held applicable to show previous burglaries, larcenies or thefts, where the prior offenses were committed under circumstances similar to the one charged". As to rape cases the court says 83 Cal.App.2d at page 281, 188 P.2d at page 551: "But where the prior rape or attempt is committed under circumstances remarkably similar to the one charged the evidence is admissible to show a plan or scheme to commit the crime in that fashion, even though the prior rape or attempt was committed on a person other than the prosecutrix. In such cases the evi-

dence that defendant committed the prior offense tends to prove that he committed the offense charged."

In 23 Cal.L.Rev. 531, the following appears: "There is no doubt that evidence of other criminal acts is admissible to prove the intent of the defendant to commit the crime charged. The cause of similar acts is usually the same. Recurrence of similar happenings tends to negative accident, mistake or good faith. \* \* \*

"When evidence is offered to prove intent or knowledge, the act is assumed to have been done by the defendant. When, however, evidence is offered to prove a plan, system or design, the purpose of admitting it is to show that defendant did the act charged. From proof of a plan made, or a general system used, an inference may be drawn that the defendant did the act charged and also had a particular state of mind. \* \* \*

"Because of the difference between knowledge or intent and plan, system, or design, evidence of other acts when offered to prove the latter should be restricted to other acts with a sufficiently high degree of common features to warrant the inference that defendant committed the crime for which he is being prosecuted. A lesser degree of similarity of features of the other acts will warrant an inference that the person doing the act did not do it innocently. Ample authority exists for holding that a plan, system or design to do a criminal act may be proved by evidence of other acts similar in nature to the offense charged, though the other acts constitute separate offenses."

[4-6] With these rules in mind, let us examine the similarity of the two offenses. In both, defendant "picked up" the victim in a public place. He spent considerable time with the women before the assault. He drank with the women. Both women were taken to secluded places. Mrs. Qualtieri was severely beaten about the face by defendant's fists. There was evidence tending to show that Myrna was severely beaten about the face by a blunt object or by repeated blows by a human fist. There was a similarity in the injuries. Chief Kane testified that Mrs. Qualtieri's

face was swollen; her lap was cut on the inside. Myrna's face was also swollen and her lips cut on the inside. Mrs. Qualtieri was choked or throttled. There was evidence tending to show that Myrna also was choked or throttled. In both cases defendant blamed his acts upon drinking, but denied the assault. In both cases defendant left the scene. Defendant claimed that the injuries to Myrna were accidental. The similarity of the circumstances under which the injuries were received as well as the similarity of the injuries themselves tend to negative accident. As said in *People v. Morani*, 196 Cal. 154, 160, 236 P. 135, 138, quoting from *People v. Hickok*, 56 Cal.App. 13, 204 P. 555, which in turn quotes from *People v. Seaman*, 107 Mich. 348, 65 N.W. 203: "'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is *claimed to have been innocently or accidentally done*, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain.'" This similarity indicates a pattern which defendant has followed on these two occasions. "When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design." *People v. Peete*, supra, 28 Cal.2d 306, at page 317, 169 P.2d 924, at page 931. Therefore the evidence was admissible, limited, of course, by proper instructions of the court, as was done in this case.

Defendant has cited *People v. Glass*, 158 Cal. 650, 112 P. 281, for the proposition that the prior offense was not admissible here. That case and others which could be cited held under the facts of the par-



ticular case that evidence of prior offenses was not admissible. So far as our case is concerned, the statement in *People v. Kynette*, 15 Cal.2d 731, 104 P.2d 794, referring to the *Glass* case, applies to it and them: "While factually distinguishable that case recognizes the exception to the general rule." 15 Cal.2d at page 746, 104 P.2d at page 802.

[7] Defendant contends that the prior offense, having occurred approximately 13 years prior to the one for which he was on trial, was too remote. Remoteness of the prior offense has been held to affect only the weight of the evidence, and not its relevancy or admissibility. *People v. Morani*, supra, 196 Cal. 154, 236 P. 135; *People v. Hall*, 25 Cal.App.2d 336, 77 P.2d 244; *People v. Bolton*, 215 Cal. 12, 8 P.2d 116; *People v. Zatzke*, supra, 33 Cal.2d 480, 202 P.2d 1009. In *People v. Miner*, 96 Cal.App. 2d 43, 214 P.2d 557, in an abortion case, evidence of abortions committed 11 years prior to the ones charged was held "not rendered inadmissible by the lapse of time \* \* \*." 96 Cal.App.2d at page 52, 214 P.2d at page 563.

Where a prior crime is otherwise admissible to show a pattern and similarity, its remoteness should not cause it not to be considered, for if a person has once acted in a particular manner with particular results, and then again acts in the same manner and with the same result, but claims that the second result was accidental, it cannot be said that the first incident is not of significance in determining the truth of the second incident.

(b) Clothes of Deceased.

[8] Inspector Nelder testified that he had received deceased's clothes from the coroner on Wednesday following the arrest of defendant; that they had been in the Homicide Bureau ever since. Prideaux, the coroner's investigator, testified to getting them from the hospital on Sunday night; that they were kept untouched at the coroner's office until turned over to Inspector Nelder. Mrs. Baron identified the hat and coat and dress as those she saw in a pile near Myrna's body at the beach. She testified that the slip, garter belt and bras-

sieres were similar to those she saw that night. Defendant objected to the introduction of the clothing on the ground that the clothing had not been traced from the beach to the hospital. (He did not object that there was no evidence that the clothes were in the same condition as when picked up by Mrs. Baron at the beach.) The district attorney offered to connect up the evidence. The clothes were then marked for identification. Later the district attorney again offered them in evidence. Defendant objected on the ground that there "is a substantial conflict in testimony of witnesses relative to the clothes" and there was a gap between the time when Mrs. Baron picked them up at the beach and when they arrived at the hospital. The court admitted them. Just what defendant meant by the first ground of the objection does not appear. Technically the second ground was correct. However, no harm was done as no contention is made that the clothes are in any different condition than when Mrs. Baron last saw them. Actually, as evidence they were more favorable to defendant than to the prosecution. They show no evidence of having been forcibly removed, and support defendant's testimony that deceased undressed herself. If there was error in admitting them it was error without prejudice.

(c) Defendant's Statement.

After defendant was returned from Camp Stoneman he was taken into the office of the Homicide Detail and was questioned by Inspector Nelder in the presence of another inspector. The questions and answers were taken down by a shorthand reporter. Defendant contends that this action was improper because there was no attorney present to represent him. Defendant cites Penal Code § 1340, which has no reference to an examination of a prisoner by the police. There is no evidence that defendant asked to have an attorney present, or objected to answering the questions put to him on that or any other ground.

[9] Inspector Nelder testified that he had examined the transcribed statement made by the reporter and that it correctly set forth the questions which he had asked defendant and defendant's answers thereto.

Defendant objected on the ground that the typewritten statement constituted hearsay, and also because it was not shown that the reporter was not available. The district attorney stated that he was not and that he would give the reasons for his non-availability to the judge and defendant's counsel in the absence of the jury. After further discussion, including the citation of Fricke on California Criminal Evidence, page 315, counsel approached the bench and there was "discussion off the record." Then counsel and the court repaired to chambers. What happened there does not appear. On return to the courtroom defendant's counsel stated: "I appreciate the problem they have in connection with the certain situation about the reporter and I don't think we should hold it over their head as a weapon. I will withdraw it and be glad to cooperate with the District Attorney." When the Inspector started to read the statement defendant stated that the principle of the matter was established by *People v. Zammora*, 66 Cal. App.2d 166, 152 P.2d 180, and that he thought the foundation should be laid as there "are other matters that I consider which pyramid upon this and which I will not want to be circumscribed in my case at all." Thereupon the inspector was asked questions prompted by the procedure set forth in the *Zammora* case, 66 Cal.App.2d at page 224, paragraph 26, 152 P.2d 180. Defendant then asked the witness if it was necessary for him to refresh his memory of the transaction from the statement. The witness replied that it was. Thereupon the statement was read by the inspector without any objection from defendant. This procedure was proper, first, because not objected to, and secondly, because, as said in the *Zammora* case, 66 Cal.App.2d at page 224, 152 P.2d at page 209: "\* \* \* it must be held that the witness occupied a position similar in all respects to that which would have been presented had the stenographer read from the transcript—the only difference being that the stenographer would have been the person who made the stenographic notes."

(d) Magazine Photographs.

[10] On cross-examination, defendant sought to cross-examine Inspector Nelder concerning photographs which appeared in a certain detective magazine in November, 1950. Apparently they were duplicates of certain exhibits which had been introduced in one of the prior trials. This was the third trial, the juries having disagreed in two.

By his cross-examination defendant tried to show that Inspector Nelder had given these photographs to the magazine and had possibly posed for that purpose. The inspector denied doing either. It was pointed out that the photographs were in the custody of the clerk and if anyone other than the newspaper man who took them gave the photos to the magazine it would have been the clerk. While there may have been some unnecessary curtailment of the cross-examination on this subject, defendant wanting to show bias or prejudice on the part of the inspector in obtaining publicity, there was no prejudice in the court's ruling. No attempt was made to refute the inspector's denial that he was responsible for the magazine article or the photographs being published therein.

(e) Pictures.

[11, 12] Over defendant's objection three photographs of deceased were admitted in evidence. They were pictures of the face, neck, and torso, taken after the autopsy. They were particularly horrible because the head was completely shaved. The head shows large incisions which had been made for the autopsy and were thereafter sewn together. In two pictures the lips were practically turned inside out and held with instruments to show the cuts. Both arms showed marks or punctures made by the surgeon, one being particularly ugly. Bruises and abrasions appear on the face, neck and arms. Most of them are quite faint. No one disputed that the deceased received them. Defendant contended that they came from the falls and striking the objects on the beach. The prosecution claimed that they came from defendant's fists and hands. How looking at the pictures would help the jury understand what caused them or how they could

cause death, it is difficult to understand. The completely bald head, the surgical cuts and sutures, the ugly punctures, the inverted lips with the instruments attached, make the body so grotesque and horrible that it is doubtful if the average juror could be persuaded to look at the pictures while the witness pointed out the bruises and abrasions. In view of the fact that no question was raised as to these bruises and abrasions, and the fact that a view of them was of no particular value to the jury, it is obvious that the only purpose of exhibiting them was to inflame the jury's emotions against defendant. In Pennsylvania these photographs would be inadmissible for that reason. *Commonwealth v. Ferry*, 326 Pa. 129, 191 A. 130; *Commonwealth v. Dreamer*, 324 Pa. 220, 188 A. 117. In California it has been held that photographs of this kind are admissible even though they show marks of the incisions for the autopsy, *People v. Gomez*, 209 Cal. 296, 286 P. 998, and even though they might inflame the minds of the jurors against the defendant. *People v. Burkhardt*, 211 Cal. 726, 297 P. 11. However, in every case in which they were admitted, with the possible exception of the Burkhardt case, *supra*, where the "evidence points positively and unmistakably to the defendant as the perpetrator of the homicide", 211 Cal. at page 730, 297 P. at page 13, there was some necessity for exhibiting the wound or wounds to the jury. In *People v. Elmore*, 167 Cal. 205, 212, 138 P. 989, the court pointed out that photographs should not be offered or admitted for any purpose other than to help the jury. The admission of photographs of this type is within the sound discretion of the trial court. Surely, there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case. The error was not waived by the fact that after the court had admitted the photographs and the district attorney asked the doctor to point out on them the injuries shown thereon, defendant objected on the ground that the photographs speak

for themselves. There was an abuse of discretion here.

#### Fair Trial.

For some reason not apparent from the record, the trial judge created an atmosphere of hostility, if not towards the defendant, at least towards his counsel. The judge was highly critical of the latter's actions, most times without justification. Frequently where the district attorney had not objected to the testimony the court would interrupt defendant's examination or cross-examination of a witness and rule that the subject was not admissible. At no time did he so act when the district attorney was examining or cross-examining a witness. While it is true that from time to time the judge admonished the jury that they were the sole judges of the evidence and that they must draw no conclusions as to guilt or innocence from the court's remarks, it is difficult to understand how these admonitions could have overcome the evident attitude of the judge throughout the trial. While there was substantial evidence to support the jury's verdict, it was the type of case, particularly with reference to the degree, which made such attitude of the judge and the erroneous rulings hereafter mentioned prejudicial. There were some rather unusual features to the case, such as the fact that the deceased apparently voluntarily undressed herself, and yet it is contended that the beating which defendant gave her was because she was unwilling to submit to sexual intercourse. There was, too, the question of the extent of defendant's intoxication as bearing on the matter of intent. There had been two disagreements before this trial.

Some instances of the attitude of the court follow. Perhaps no one of them is important in itself but when added together their influence increases as does the size of a snowball rolling downhill.

The district attorney was examining the prosecution witness Reilly on redirect. Reilly stated that he had never had a conversation with defendant on that day. The district attorney then asked him: "Did the defendant Burns state to you at that



time that he—" Defendant's counsel interrupted to object that the witness had just answered that he had had no conversation with defendant and that the question was leading and suggestive. The court then said, "Ask him if the statement was made by the defendant." Defendant again objected and said, "he [the witness] has gone over this testimony in advance [he had admitted talking to both the deputy district attorney and Inspector Nelder], he knows what is wanted—" Thereupon the court stated, "don't make that statement again—don't you *dare* make that statement again" (emphasis added): that such statement tended to impugn the integrity and probity of the witness. "There has been nothing in this record to indicate that this man's testimony has been rehearsed \* \*." The court continued lecturing counsel stating, "I can't have the integrity of any witness \* \* \* questioned." Then, "don't stand there and make gratuitous observations." Counsel protested the statement of the court, whereupon the court said, "Let the record speak for itself." The court lectured counsel further on the subject and allowed the district attorney to ask if the defendant had made any statement to the witness. He replied "no." The district attorney then stated he wanted to ask one further question along the same line. Defendant's counsel stated that he objected to this line of examination. The court said, "No, you are only going to object to only one question." He then sustained the objection.

Referring to a certain photograph, defendant asked the inspector if it was his picture. He replied that it was. A little later defendant asked him practically the same question. The district attorney objected on the ground that it was incompetent, irrelevant and immaterial. (It actually was not.) After sustaining that objection the court stated: "He already answered that it is, Mr. Hagerty [defendant's counsel], and the re-emphasis you seek to place upon it is prejudicial to the case of the People, *and in the Court's opinion it is meant to be just that.*" (Emphasis added.)

In cross-examining the Massachusetts chief of police defendant's counsel asked if

the witness had been assured by the police officials here that his expenses would be paid. The witness stated that he had not been so assured. Unfortunately counsel started to ask, "But your vengeance was so great against this man that the—" The court then interrupted, and said: "That is a most objectionable question, Mr. Hagerty. \* \* \* There is no evidence of vengeance on the part of this witness, and it is most improper and highly prejudicial that you should have used that term. \* \* Mr. Hagerty, there has been no use of the word 'vengeance' except by yourself and it is most improperly employed. \* \* \* Let the jury determine, in relation to the direct and cross examination, if there is any vengeance in the heart of this man. He is here like every other witness, he has taken the stand, he has been sworn to speak the truth, and the legal presumption is that he is testifying to the truth and nothing but the truth." Again on cross-examination of the same witness defendant asked if defendant was wanted or was there a warrant for him in Massachusetts. The court sustained an objection. Defendant, apparently desirous of arguing the matter, said, "If your Honor please—" The court then interrupted to say, "Just a minute. Mr. Hagerty, not by the wildest or widest stretch of the imagination could you expect under the rules of evidence an answer to such an absurd question."

The district attorney was cross-examining defendant, and asked him to examine some clothes (the clothes defendant had worn on the day in question). Defendant's counsel asked to be permitted to see them before they were shown to defendant. Some discussion between counsel occurred and then defendant's counsel stated, "I just want to know if there are any tricks involved." The district attorney then stated that if there were any tricks involved defendant's counsel would know it; whereupon the following occurred:

"The Court: Just a minute, Mr. Hagerty, that is such an unwarranted observation, I am surprised that a man of your professional standing would make it. You have seen the clothing, you saw Mr. Brown [the deputy district attorney] walk up to

the witness with the clothing, and you put this observation to Mr. Brown: 'Isn't it customary for the District Attorney or the other side to show the attorney the matters with which the witness is confronted?' You wanted to see the clothing; now you are talking about tricks. Now, Mr. Brown, I am going to suggest that you put the clothing in front of Mr. Hagerty and let him observe them as long as he wants, study them as long as he wants, analyze them as long as he wants, and then dispense with such verbage [sic] as 'tricks.' Now, again I admonish you, Mr. Hagerty, to refrain from such trick observations on your part. Now, proceed to look at the clothes and then let us proceed in an orderly fashion. I am surprised that a man of your standing before this bar should make such an observation when you know it is proper for Mr. Brown, or for anyone else, to show an object of this kind to a witness preparatory to questioning the witness. Now, all you wanted to do was to see the clothing. Now, look at it.

"Mr. Hagerty: Well, if your Honor please, I now ask you to instruct the jury to take no attitude or impression toward me or my case or the defendant from your remarks.

"The Court: I will let the jury determine what your conduct merits, Mr. Hagerty, and in due course I will instruct the jury in relation to any and all remarks that the court has made and may hereafter be called upon to make.

"Mr. Hagerty: Then I further ask your Honor to instruct the jury that it is the normal procedure, before presenting any exhibit to any defendant for identification, to show it to his counsel.

"The Court: It is. That is the procedure, Ladies and Gentlemen of the jury, and I have already so remarked, and that was the suggestion and the request that you made yourself, Mr. Hagerty. And I also tell the jury now that it is not the procedure for any counsel, whether for the People or for the defendant, to engage in gratuitous [sic] observations in reference to tricks. If any tricks are being attempted in this court, I will be the first one to expose them, you may rest assured, regard-

less from which side they may come. This court wants orderly procedure to obtain in this and all other matters."

After some discussion between counsel, at the end of which defendant's counsel stated that he would take the district attorney's word that the clothes were all right, which should have ended the matter, the court took it up again.

"The Court: Mr. Hagerty, do you feel because Mr. Brown was about to show this clothing to the witness, that he was engaging in the perpetration of any tricks?

"Mr. Hagerty: I feel this—That Mr. Brown was carried away, from the interest in his case, and neglected to follow the usual courtesy of trial procedure.

"The Court: And in doing that, he was playing a trick on you?"

Near the end of the case, defendant's counsel called defendant for further direct examination and asked him concerning an incident in the office of the Homicide Detail when the district attorney asked him certain questions about the case. The defendant testified that the district attorney picked up a shotgun which was in a corner of the room, aimed it at the wall, broke it open, put it down and went through some similar procedure with another shotgun. On cross-examination defendant admitted that he was not unfairly treated in this interview nor did the district attorney threaten him in any way. After the witness was excused the court asked defense counsel the materiality of the testimony. Then the following occurred:

"Mr. Hagerty: The materiality of the testimony, as far as I got the inference from the defendant,—

"The Court: Inference?

"Mr. Hagerty: Yes. Well, I don't understand your Honor's question. Do you think I shouldn't have put him on the stand for that purpose when he told me that occurred?

"Mr. Brown: Your Honor, if there is going to be an argument, I think it should be outside the presence of the jury.

"The Court: Did the defendant, seated as he is now on your left, tell you that Mr.

Thomas Lynch, now District Attorney for the City and County of San Francisco, had threatened him during the interview?

"Mr. Hagerty: He not only told me that, I think I have a written note to that effect. A day or so ago—

"The Court: Very well, then, we will let his testimony stand that he wasn't threatened by Mr. Lynch. Next witness.

"Mr. Brown: That is as far as we can go at this time, your Honor.

"The Court: Very well. You see, your client apparently led you into a position, Mr. Hagerty, which wasn't sustained by himself under oath."

In ruling on defendant's objection to a question as to whether the photographs of the back of defendant's ear correctly showed the scratches on his ear, considerable discussion between court and counsel took place. The following then occurred:

"Mr. Hagerty: Well, I will object to the question as calling for speculation on the part of the witness because he couldn't see the scratches.

"The Court: Mr. Hagerty, the picture is not before you now. The picture is now in the hands of the witness. You are not in the witness chair. The witness has been asked this question and the objection is overruled.

"Mr. Hagerty: May I see it?

"The Court: Now, just a moment. The witness is now under examination, you are not—he has been asked a question and he is to answer the question and you are not to interrupt him until he has answered the question. Now, will you answer the question?

"Mr. Hagerty: May I see the photograph?

"The Court: Not at this—

"Mr. Hagerty: I haven't seen it.

"The Court: Not at this—

"Mr. Brown: You mean you are objecting without seeing the photograph, Mr. Hagerty?

"Mr. Hagerty: I am objecting purely on the statement of your own terms, that it is the back of his head. How can he see it?

"The Court: Mr. Hagerty, if you will kindly follow the instructions of the court and cease arguing on matters that are for the determination of the jury. Again you are trying to place yourself, in the court's opinion, in the jury box. Let them determine if any scratches can be seen on this photograph."

There were many other incidents of a nature akin to those herein set forth. With that background let us consider the rulings which were erroneous.

[13] In cross-examining the autopsy surgeon defendant asked him whether in performing the autopsy he started with the head or the trunk of the deceased. (Defendant claimed that at a former hearing the doctor had stated that he was not sure where he started.) The court sustained an objection. Obviously this was error as defendant was entitled to test the doctor's memory as to his findings at the autopsy in this manner. The manner of the court's ruling was improper. After the objection was sustained the following occurred: "What difference does it make?"

"Mr. Hagerty: On what basis, your Honor? I am entitled to test this man's credibility.

"The Court: May I suggest one thing to you, Mr. Hagerty?

"Mr. Hagerty: Certainly, your Honor.

"The Court: Don't you begin to lose your temper in this courtroom. Don't you ask the court on what ground I have ruled. It is not competent nor relevant nor material on what part of the trunk or body the Doctor began his examination. It is so patent even to a layman that I am surprised you asked on what ground."

The court erred in curtailing the cross-examination of the witness Pens, as to whether in his talk with Inspector Nelder wherein he reported the incident between defendant and the woman in his cab he related the conversation between her and the defendant, to which he testified on the stand. It was defendant's theory that in reporting the matter to the inspector the witness had failed to report that conversation. The witness testified that he did not believe he mentioned it to the inspector



and further examination as to what he did tell the inspector was prevented by the court's ruling. The defendant had a right to show the jury that as affecting the credibility of the witness this very vital matter had not been told to the inspector when the witness was reporting the incident. The question asked of the witness was: "Q. At that time, did you relate to him the conversation you overheard in the taxicab wherein this woman made certain statements or accusations against the defendant?" Immediately upon his answering that he did not believe he mentioned "that" to him, the court broke in: "To what do you refer when you use the word 'accusations' against the defendant, Mr. Hagerty? Mr. Hagerty: I have general reference to the conversation he related on the stand. The Court: Has this witness testified on either direct or cross-examination that the woman companion of the defendant who left with him, as testified to, from Cooper & Varni's accused him of anything, or was it not a warning that the witness has testified to?" The conversation referred to was the one which Pens testified took place in his cab between defendant and the woman who went with him to Cooper and Varni's in which the woman said to defendant that she had heard him tell the bartender "that he had slapped another woman around \* \* \*." The question was quite clear and did not need the rather antagonistic help of the court. Defendant then sought to inquire further concerning the witness' report to Inspector Nelder and the court without any action by the district attorney interrupted to state that "none of this" was covered by direct examination. Considerable discussion ensued, and then the court ruled that while it was not proper cross-examination, defendant could make the witness his own and examine him on the subject. Then when the defendant followed the court's suggestion the court refused to allow him to go into the matter on the ground that it was hearsay. The fact that in reporting to the inspector the occurrences when defendant was present in his cab, the witness omitted mentioning a conversation as important as the one involved, was a matter which defendant

should have been permitted to bring out fully.

[14] On the cross-examination of Reilly, the bartender at Brownie's Tavern, defendant asked him if the Board of Equalization rules prohibited him from serving an intoxicated person. This was directed to the question of the witness' credibility in testifying that defendant and Myrna were sober when in the bar. The court sustained objection to this line of testimony. In arguing the matter defendant's counsel stated, "No man is going to testify he violated the law on the stand." Thereupon the court said: "Now, Mr. Hagerty, you know that observation is most improper. You are assuming, by implication, that this man does violate the law in the operation of his business and no such assumption is justified at all.

"Mr. Hagerty: Oh, your Honor—

"The Court: The court can only assume that this witness here, as a bartender, is complying with the law. The doctrine of presumption of innocence which has been enunciated with emphasis in this case clothes this man. He is not on trial, he is not to be presumed to be a law violator. The saloon business, the liquor business, is a licensed business and this court certainly is not going to assume nor can the jury, that he is violating the law when he is serving liquor at that bar."

The court also refused to permit defendant to ask the witness "what the state of intoxication meant to him." Certainly where a witness testifies as to the sobriety of another his test of sobriety, or of intoxication, may be inquired into.

The court erred, too, in refusing to permit the introduction by defendant of certain photographs of the beach area in question offered by defendant. These showed more debris on the beach than in those taken by the police, all of which were admitted at a prior trial. Inspector Fitzpatrick had testified at a prior trial that the photographs were a fair impression of the beach and the oceanside end of the tunnel the morning the police photographs were taken. At this trial, he testified that the police photographs looked more like

the scene than did these. The witness then went on to compare the two sets of photographs and stated that the police ones "were more representative" of the area than some of those offered by defendant. The court admitted those which the inspector testified were as representative as the police ones, but refused to admit those which he said were not as representative. He did not testify that the latter did not represent the condition at the beach but that they were not as representative as those of the police. In view of his statements at the prior trial, which he admitted making, and his testimony here, plus the testimony of defendant that they truly depicted the scene, the court erred in not admitting the photographs.

The second time defendant offered these photographs defendant's counsel stated that they were photographs he took in the course of the last trial. Thereupon the court said: "\* \* \* your offer is rejected by the court and again I request that you not refer to any activity of yourself that took place during the last trial or any trial of this case. It doesn't make any difference when these were taken, Mr. Hagerty, and certainly reference shouldn't be made to any other trial whatsoever. The fact is that the officer testified to these photographs and in effect rejected them by way of comparing them with pictures which he said did more or less faithfully depict the condition at the beach at the time and place in question, eliminating these as not so depicting the condition of the beach at the time and place in question. We are not concerned with what was done at the previous trial or any of the previous trials; constant reference to those trials, I don't believe should be made." Counsel then called the court's attention to the fact that Inspector Fitzpatrick had admitted at this trial that he had stated at a prior trial that the photographs were representative. Thereupon the court said: "But he has stated his opinion here, Hr. Hagerty, and that is all that this jury can take into consideration, the testimony as given on this trial."

While defendant was cross-examining the autopsy surgeon, in a hypothetical ques-

tion, he asked the doctor that, assuming certain matters and "that the decedent collapsed at that spot and that the defendant feeling that maybe she would be revived by putting her in the water, the ocean—" The district attorney interrupted with an objection. Thereupon the court proceeded to take defendant's counsel to task because the proof did not exactly correspond with something said by him in his opening statement.

"The Court: Mr. Hagerty, may I call your attention to one part of your opening statement? That when the decedent got close to the water's edge she was washed into the water and by super human strength the defendant had to rescue her.

"Mr. Hagerty: That is after—

"The Court: You said nothing about the defendant taking her to the water's edge to revive her. You said in your opening statement you would show that she was washed into the water and by super human effort, the defendant rescued her from the water.

"Mr. Hagerty: If I said that, your Honor—

"The Court: You did say that.

"Mr. Hagerty:—that is a complete oversight.

"The Court: You said it. It wasn't an oversight. It was a declaration. The record shows that." It is true that when defendant assigned this as a prejudicial statement the court instructed the jury to disregard it completely as if it had not been said. But in view of the court's entire attitude throughout the case, coupled with this rather unusual action of the court, it is doubtful if the jury could draw any other conclusion but that the court was rather skeptical of defendant's side of the case. Particularly is this so when the court a few moments later stated: "\* \* \* you are in no better position now, no stronger position put it that way, than you were when you stood before the jury and made your opening statement when, as I have already said, you made a certain statement, that is why I asked you a moment ago what your theory was."

The court ruled that certain questions asked the witness Reilly at a prior trial did not impeach anything said by him on the subject at this trial. In discussing the ruling the court said: "\* \* \* we are not here to read transcripts of testimony in any other trial—otherwise, we might as well take all our transcripts of the first and second trials and sit down and read them to the jury, and we don't do business that way."

The court was over-meticulous about the form of defendant's questions. Here is an instance. Dr. Rosenthal testified that he examined Myrna's body "for findings on rape." He was then asked if those findings were negative. The district attorney objected on the ground that the question was ambiguous. After some discussion between court and counsel the district attorney said his only objection to the question was that it was "general." Further discussion followed. The court indicated that it would overrule the objection and asked that the question be reread. This was done, and then the court stated: "Well, that is argumentative. You are arguing with the witness in the form of that question, Mr. Hagerty. Ask him the plain question." Obviously the question was not argumentative. Following the court's suggestion defendant asked: "Those findings were negative, *weren't* they? A. That's right. The Court: '*Were* they,' that's the question." (Emphasis added.) The district attorney then objected (apparently to the preceding question) that no foundation was laid. The court sustained the objection. Defendant then examined the doctor concerning certain tests made by him. The last answer was that a certain test was negative. Thereupon the following occurred:

"Q. And then, Doctor, of your own knowledge, you know—

"The Court: Now, that is arguing, Mr. Hagerty. Ask the question, Mr. Hagerty.

"Mr. Hagerty: I am asking of his own knowledge if he knows.

"The Court: The form of your question, the very words with which you begin your question are argumentative. Put an unqualified question to him, Mr. Hagerty.

"Mr. Hagerty: Q. Then you know, Doctor, that your findings on those points—

"The Court: That is—

"Mr. Hagerty: Q.—were confirmed by the pathologist?

"The Court: Just a moment, Mr. Hagerty. If Mr. Brown isn't going to object, I am going to object because I want the record to be clear. You are arguing with the witness. Ask him, 'Do you know whether or not.'"

[15] Taking the sum total of the errors (no one of which, standing alone, probably is sufficiently prejudicial to cause a reversal), coupled with the attitude of the court throughout the trial, an examination of the transcript shows that defendant was denied a fair trial. The hostility evidenced by the court, and its frequent criticism of defendant's counsel (only occasionally merited) in a case which at least on the degree of the crime was a close one, must have had its effect on the jury.

#### Newspaper Articles.

[16] Defendant contends that he was denied a fair trial because a couple of the jurors, on voir dire, stated that they had read certain newspaper articles concerning the case, which articles were unfriendly to defendant, but of which they held merely vague impressions. Also during the trial it appeared that a newspaper referred to a purported confession to Army authorities in which defendant was reported to have admitted murdering Myrna, and other matters possibly unfavorable to defendant. There is no evidence that the jurors read the articles published during the trial, nor that they were influenced by those they read before the trial. Those who had read them expressly stated they would not be influenced thereby, nor had they therefrom formed any opinion concerning the case. The court, during the trial, expressly admonished the jury that it must disregard any statements in the newspapers concerning the case, nor should it be influenced by them. It might have been advisable for the court to admonish the jurors not to read any accounts of the trial. But we cannot say that defendant



was deprived of a fair trial because of the newspaper articles. See *People v. Feld*, 149 Cal. 464, 86 P. 1100.

**Alleged Misconduct of the District Attorney.**

[17] Defendant has charged the district attorney with a number of incidents of alleged misconduct. These charges are mainly based upon the introduction of certain evidence which defendant contends was not admissible and upon alleged improper cross-examination of witnesses. We have examined the record and find that in practically every instance (with the exception of the photographs of the deceased) the evidence was admissible and the cross-examination was proper. We find no misconduct by the district attorney.

**Instructions.**

Defendant claims that the court refused to give some 45 instructions, many of them being alternate instructions, offered by him and taken from the California Jury Instructions, Criminal, and two sections of the Code of Civil Procedure. Defendant fails to give any detail concerning these instructions. However, we have compared the instructions with those given by the court and find that practically all those which defendant requested and which were applicable to the case were given either in *haec verba*, in substance, or were covered by other instructions.

The judgment and order denying a new trial are reversed.

FRED B. WOOD, J., concurs.

PETERS, Presiding Justice.

I concur in the reversal of the order denying the motion for a new trial and of the judgment.

I agree with the majority opinion that the evidence, while highly conflicting, is sufficient to sustain the conviction. I further agree, for the reasons set forth in that opinion, that the defendant was denied a fair trial. I further agree that the introduction into evidence of the photographs of the deceased, under the circumstances here existing, was error of a most serious nature. But I cannot agree that the evi-

dence of the assault committed some thirteen years before the offense here involved is claimed to have been committed, was admissible.

The majority opinion has collected the cases that indicate that many exceptions exist to the rule that evidence of other crimes is normally not admissible. No doubt those exceptions have been greatly extended in recent years. See *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *People v. Westek*, 31 Cal.2d 469, 190 P.2d 9; *People v. Dabb*, 32 Cal.2d 491, 197 P.2d 1; *People v. Zatzke*, 33 Cal.2d 480, 202 P.2d 1009. But those cases at least recognize that the rule exists. See, also, *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7. The reason for the rule is obvious. The defendant in a criminal case is not being tried because he is a man of bad character, but because he is charged with having committed a specific offense. He is called upon to meet the charge contained in the indictment or information, and is not called upon to meet charges that sometime in the past he committed, or may have committed, other offenses. Even a very bad man should not be convicted on general principles. Even such a person must be proved guilty of the offense charged. Thus, the normal rule is and should be that the prosecution is prohibited from introducing evidence that will show, or that may tend to show, that the accused has committed any crime wholly independent of the offense for which he is on trial.

To that rule there are certain exceptions, all based on the fundamental premise that where evidence of another crime is directly relevant to proving some element of the crime charged or in disproving some defense, such evidence is admissible. Thus, if the evidence of the other crime tends to establish, as to the crime charged, motive, knowledge or intent, the absence of mistake or accident, a common pattern, plan or scheme, or the identity of the person charged, evidence of other crimes is admissible. In determining whether proof of a prior crime falls within one of these exceptions, a rule of common sense must be applied. This is particularly true where the prior crime is remote as to time. While it

no doubt is the law that, generally speaking, where the evidence may fall within one of the exceptions, remoteness goes to weight rather than to admissibility, *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *People v. Morani*, 196 Cal. 154, 236 P. 135; *People v. Hall*, 25 Cal.App.2d 336, 77 P.2d 244; *People v. Miner*, 96 Cal.App.2d 43, 214 P. 2d 557, and that considerable discretion in this regard must be allowed the trial court, *People v. Arrangoiz*, 24 Cal.App.2d 116, 74 P.2d 789, it is obvious that there is a line of reasonableness beyond which the evidence is not admissible. That line was passed in the present case.

Here the evidence of the prior assault is sought to be justified on the ground that it falls within the common pattern, plan or scheme exception. In other words, because defendant was charged and convicted some thirteen years before of assaulting a woman, while under the influence of liquor, in which case she charged that he had first attempted sexual intercourse and then threatened to commit an unnatural sex act, it is now claimed that those facts are relevant in proving that, while under the influence of liquor, some thirteen years later, he brutally beat the deceased and murdered her. While sex, in a general sense, was undoubtedly present in both cases, there is not one word of testimony that defendant attempted sexual intercourse in the instant case or threatened or attempted to perform any unnatural sex act. The evidence is to the effect that the deceased undressed herself, and the condition of her clothes is mute and potent evidence that this was true. If intercourse was intended, it quite evidently would have been voluntary on the part of the deceased. But even on the question of intercourse, the prosecution witnesses conceded that there was no evidence that such had been accomplished. While there are some general similarities between the two offenses, there is not sufficient similarity to indicate a common plan, pattern or scheme.

Thirteen years elapsed between the first offense and the one here claimed to have been committed. There is no evidence of any connecting link between these two offenses. So far as the record is concerned, defendant never committed any similar of-

fense during the thirteen-year interval. Does evidence that a man assaulted a woman in 1937 logically tend to rebut his denial that he beat another woman to death in 1950? Does evidence of that one step from rectitude thirteen years ago tend to show a common plan, pattern or scheme? I think not.

Every court that has considered this problem recognizes the highly inflammatory and prejudicial effect of such testimony, but admit it in some cases because of its direct relevancy in proving some fact properly before the court, or in disproving some defense proffered by the defendant. But certainly there is a limit beyond which the prosecution may not go. The connection between the two offenses must be so direct that evidence of the commission of the prior offense reasonably tends to prove that the accused committed the offense with which he is charged. It must do more than merely raise a suspicion that such is the fact. The inference must be a reasonable one.

In the instant case, while the admissible evidence is sufficient to sustain the finding of guilt, the evidence is highly conflicting. This was a close case. This is demonstrated by the fact that two prior juries disagreed. The prosecution, in evident recognition of the weakness of its case, produced this woman and the arresting officer, to testify as to this prior offense committed thirteen years before. The prosecution must be charged with knowledge that these witnesses would testify not only to the prior assault, but would also testify that the defendant threatened the woman there involved with committing upon her a revolting, disgusting and unnatural sexual act. There is not one word of evidence that this factor existed in the present case. It is quite apparent that this evidence was produced solely for the purpose of discrediting this defendant in the eyes of the jury. It is equally evident that it would tend to and did have this effect. Under such circumstances I believe that this evidence was not relevant, was too remote, and should have been excluded. In my opinion, this is an additional ground for the reversal.

Hearing denied; CARTER, J., dissenting.





38 Cal.2d 609

PARKS v. SUPERIOR COURT IN AND  
FOR ALAMEDA COUNTY et al.

S. F. 18524.

Supreme Court of California, in Banc.

March 18, 1952.

Petition for writ of prohibition to prevent the Superior Court of State of California, in and for the County of Alameda, and the Honorable Charles Wade Snook, Judge thereof, from taking further proceedings against petitioner on information filed against him charging grand theft and violation of worthless check act. The Supreme Court, Shenk, J., held that an information which designates a crime or crimes unrelated to or unconnected with transaction which was basis for magistrate's commitment order is contrary to constitution.

Writ issued.

Prior opinion 236 P.2d 874.

## 1. Indictment and Information ☞1

Under constitutional provision that offense heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by magistrate, or by indictment, with or without such examination and commitment, person is protected from prosecution in absence of prior determination by either magistrate or grand jury that such action is justified. Pen.Code, § 739; Const. art. 1, § 8.

## 2. Indictment and Information ☞122(2)

Information which designates a crime or crimes unrelated to or unconnected with transaction which was basis for commitment order by magistrate is contrary to constitutional provision requiring examination and commitment by magistrate as prerequisite to prosecution by information. Pen.Code, § 739; Const. art. 1, § 8.

## 3. Indictment and Information ☞41(1)

Where single transaction or course of conduct is involved in preliminary hearing, district attorney does not have power to file information after petitioner has been discharged by magistrate because of showing that no public offense was committed, but such procedure would be contrary to

constitutional guarantees of accused. Pen. Code, § 739; Const. art. 1, § 8.

## 4. Indictment and Information ☞41(1)

Where examining magistrate dismissed grand theft counts and discharged accused as to same on ground that no public offense had been committed, inclusion by district attorney of charge of grand theft, which was unrelated to any other offense, in information was unwarranted and contrary to constitutional guarantees of the accused. Pen.Code, § 739; Const. art. 1, § 8.

## 5. Indictment and Information ☞122(2)

Where magistrate ordered commitment of accused on charge of having intentionally written bad check in payment for lumber purchased, charge as to theft of such lumber was related to charge of giving worthless check in payment therefor, arose out of transaction which was basis for commitment, and might be included in information subsequently prepared by district attorney, if necessary elements of offense reasonably appeared from evidence before magistrate. Pen.Code, § 739; Const. art. 1, § 8.

## 6. Prohibition ☞27

In proceeding on petition for writ of prohibition to prevent court from taking further proceedings on information filed against petitioner, charging grand theft and violation of worthless check act, record established that evidence had been insufficient to hold petitioner to stand trial on charge of grand theft. Pen.Code, § 476a.

## 7. False Pretenses ☞9

Issuance of check on insufficient funds in payment for lumber to which drawer already had title and possession could not support charge of theft by false pretenses, since issuance of check was not inducing cause for parting with property. Pen. Code, § 476a.

---

Robert H. Kroninger, Oakland, Davis & Barber and Robert K. Barber, all of San Francisco, for petitioner.

J. F. Coakley, Dist. Atty., John J. Schauer, Jr., and Lloyd H. Burke, Deputy Dist. Attys., all of Oakland, for respondents.

SHENK, Justice.

Petitioner seeks the writ of prohibition to prevent the Superior Court in Alameda County from taking further proceedings on an information filed against him.

A complaint was filed against petitioner which charged grand theft of \$2463 from one Palmer; grand theft of 12,000 board feet of lumber of the reasonable value of \$843.76; and the intentional writing of a bad check for \$843.76 in payment (Penal Code Section 476a). A preliminary examination was held and evidence was introduced as to each of the three counts.

Evidence as to the first grand theft count indicated that petitioner secured \$2,463 from a Mrs. Palmer on the basis of misrepresentations concerning the value of a certain security he gave for the repayment of that sum.

Evidence on the second grand theft count and the violation of Section 476a indicated that petitioner bought some lumber from Heacox in September 1950; that he had the lumber sent to a mill during the same month, and that on November 3, 1950, he caused the issuance of his check for \$843.76, the balance then due on the purchase price of the lumber. His balance at the drawee bank was \$892 as of the close of business on November 2, 1950, and \$666.45 as of the close of business on November 3, 1950. The balance was \$245.14 on the day the check was presented for payment. The account was completely depleted by December 4, 1950.

The magistrate dismissed the two grand theft counts and discharged the petitioner as to these counts on the ground that no public offenses had been committed. He did, however, order the petitioner held to answer on the charge that he had violated Penal Code Section 476a.

The district attorney then filed an information, charging the commission of all three offenses alleged in the complaint. The information asserted that the alleged

theft of the lumber from Heacox and the issuance of the partially worthless check were acts which were connected in their commission, but no contention is made that there was any connection between them and the Palmer transaction. Petitioner moved the superior court for an order setting aside the information pursuant to Section 995 of the Penal Code on the grounds that he had not been legally committed and that he had been committed without reasonable or probable cause. The respondent court denied the motion, set a trial date, and will proceed with the trial on all three counts unless restrained.

Petitioner contends (1) that the information is invalid insofar as it charged two instances of grand theft since these offenses constituted counts in the complaint which were dismissed by the magistrate and (2) that it is invalid as to all three crimes charged since the evidence at the preliminary examination failed to show reasonable cause to believe that he had committed a public offense.

The first ground of the motion brings into question the legality of the commitment pursuant to section 8 of Article I of the State Constitution and Section 739 (formerly Section 809) of the Penal Code.

Section 8, Article I, of the Constitution provides: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. \* \* \*" Section 739 of the Penal Code requires the district attorney to file within fifteen days after examination and commitment an information which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.

[1, 2] In the decisions which outline the duties of the district attorney pursuant to the foregoing provisions of the law there has been no departure from the proposition that the constitution protects a person from

prosecution in the absence of a prior determination by either a magistrate or a grand jury that such action is justified. The legislative history and various claimed grounds of unconstitutionality of the provisions of former section 809 were rather extensively treated in *People v. Bird*, 212 Cal. 632, 300 P. 23. The effect of the court's declarations of the constitutional operation of the section was to approve the filing of an information charging a different but related crime shown by the evidence taken before the magistrate bearing on the transaction involved in the commitment order. The court stated or plainly implied, 212 Cal. at pages 643-645, 300 P. 23, that an information would be contrary to the constitution if it designated a crime or crimes unrelated to or unconnected with the transaction which was the basis for the commitment order.

The holding of the *Bird* case has been followed or applied in other cases in this court and in the District Courts of Appeal. *People v. McGee*, 31 Cal.2d 229, 187 P.2d 706; *People v. Tallman*, 27 Cal.2d 209, 163 P.2d 857; *People v. Griffin*, 106 Cal. App.2d 531, 235 P.2d 424; *People v. Sturman*, 56 Cal.App.2d 173, 132 P.2d 504; *People v. Dal Porto*, 17 Cal.App.2d 755, 62 P.2d 1061, 63 P.2d 1199; *People v. Shutler*, 15 Cal.App.2d 704, 59 P.2d 1050; *People v. Malowitz*, 133 Cal.App. 250, 24 P.2d 177; *People v. Lee*, 125 Cal.App. 709, 13 P.2d 943; *People v. Sanders*, 102 Cal.App. 237, 283 P. 136; *People v. Barnett*, 99 Cal.App. 409, 278 P. 885.

[3] In the present case as to the Palmer transaction the discrepancy between the crime named in the commitment and the crimes charged in the information concerns more than the mere designation of the crime or crimes as they relate to the transaction upon which the commitment was based. The information charges grand theft based on the Palmer transaction which has no relation to or connection with the transaction on which the order of commitment was based. As to the Palmer transaction the magistrate discharged the petitioner on the ground that the evidence showed that no public offense had been committed. As to that transaction there

was no commitment order. It may not be contended that where a single transaction or course of conduct is involved in the preliminary hearing the district attorney has power to file an information after the petitioner has been discharged by the magistrate because of a showing that no public offense has been committed. Such a procedure would be contrary to the protection afforded by the constitutional provision and is not within the permissive powers under the code section. Those powers depend on the issuance of an order of commitment. No exception to this dependence may be made because of the circumstance that the defendant in the same proceeding was charged and heard on two separate, unrelated and unconnected transactions. As indicated in the *Bird* case the constitutional provision would be nullified if by this device the district attorney might proceed without first having obtained an order of commitment.

Cases such as *People v. Sanders*, 102 Cal.App. 237, 283 P. 136, and *People v. Malowitz*, 133 Cal.App. 250, 24 P.2d 177, above cited, cannot be deemed to have sanctioned a departure from that conclusion. In the *Sanders* case there was no discussion as to whether the several counts related to separate transactions. In fact the opinion suggests that they related to the same transaction and that the question was solely one of identity of the victim. In the *Malowitz* case the court followed the *Bird* decision on the assumption that the facts were parallel. There was no disclosure in the stated facts that the additional crimes charged by the information were based on transactions as to which an order of commitment had not been made. Greater doubt attaches to the decision in *People v. Wyatt*, 121 Cal.App. 180, 8 P.2d 901. There the defendant was held to answer on three counts of grand theft. The district attorney added five similar counts. In the final outcome the defendant was convicted on one of the added counts as to which there was evidence at the preliminary hearing that the offense had been committed. The transaction involved was one of several concerning which there was evidence at the preliminary hearing to



show a common scheme or plan for the commission of a series of similar transactions within a period of two years. But there is nothing in the opinion to show that these transactions were in any way related or connected. Therefore language in that opinion which may be deemed inconsistent with the views herein expressed is disapproved.

[4] No indictment was involved in the present case. It follows from the foregoing that in the absence of the required commitment the inclusion in the information of the charge of grand theft based on the Palmer transaction was unwarranted and contrary to the provisions of the constitution and Section 739 of the Penal Code.

[5] The foregoing conclusion does not apply to the charges based on the lumber transaction. As to it a commitment was ordered. As indicated herein the district attorney might include a related offense although the magistrate concluded impliedly or otherwise that the evidence did not show probable cause that such offense had been committed. The charges as to the theft of the lumber and the giving of a worthless check in payment thereof were related, arose out of the transaction which was the basis for the commitment and, depending on the evidence, could result in conviction on one charge or the other. The district attorney was therefore within his right to include the grand theft charge in the information if the necessary elements of that offense reasonably appeared from the evidence before the magistrate. Consequently as to this transaction the petitioner has not shown that he was not legally committed.

We are thus brought to a consideration of the ground of the petitioner's motion that he was committed without reasonable or probable cause. (Secs. 995, 999a, Pen. Code.) Examination of the evidence taken before the magistrate discloses that there was reasonable or probable cause to commit the petitioner for the offense of issuing the worthless check in payment of the lumber. As stated, the inclusion in the information of the charge of grand theft of the lumber was warranted only if it was

"shown by the evidence taken before the magistrate to have been committed." (Sec. 739, Penal Code.) Its inclusion is therefore also subject to scrutiny on the motion and in this proceeding on the ground that probable cause did not exist for the commitment on the charge stated in the information. Section 999a Penal Code; *People v. Bird*, supra, 212 Cal. 632, 300 P. 23. In either event, whether pursuant to commitment or by inclusion in the information in proper cases, the constitution and the statute protect the petitioner from trial on the criminal charge until probable cause has been established by the taking of evidence under oath.

[6, 7] Without the necessity for reviewing what quantum, weight or sufficiency of evidence is required to justify the conclusion that probable cause exists, see *People v. Mitchell*, 27 Cal.2d 678, 681, 166 P.2d 10, we conclude that the evidence at the preliminary hearing failed to show probable cause for holding the petitioner to stand trial on the charge of grand theft of the lumber. The petitioner purchased about 20,000 board feet of lumber in Alameda County by partial payment of \$600 on September 20, 1950. It was thereupon shipped to Fresno for his account. There was no evidence or circumstance from which the inference could reasonably be drawn that at that time the petitioner did not intend to pay the balance of \$843.76. The information charged grand theft of 12,000 board feet on November 2, when the petitioner issued his check for the balance due. There is neither allegation nor proof of a taking of the lumber at the time so stated nor a dispute as to the petitioner's previous acquisition of title and right to possession of the lumber on that date. The petitioner's issuance of a check on insufficient funds on November 2 cannot alter the fact that at that time he owned and had rightful possession of the lumber. Since the petitioner already had title to and possession of the lumber the issuance of the check was not the inducing cause for parting with the property so as to support a charge of theft by false pretenses. *People v. Wasservogle*, 77 Cal. 173, 175, 19 P. 270; *People v. Cravens*, 79 Cal.App.2d 658, 662,

180 P.2d 453. The conclusion is inescapable that there was not sufficient evidence upon which to base a reasonable belief that he committed the crime of grand theft. (Section 487, Penal Code.) As to the lumber transaction the petitioner has been held for trial on an information charging the offense of grand theft without reasonable or probable cause.

The respondent court therefore is without jurisdiction to proceed against the petitioner on the charge of grand theft involving the Palmer transaction (Sec. 995, Penal Code; cf. *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713), and is without jurisdiction to proceed against him on the charge of grand theft relating to the lumber transaction. (Secs. 995, 999a, Penal Code.)

Let a peremptory writ of prohibition issue restraining the respondent court from taking any proceedings against the petitioner on either of the charges of grand theft contained in the information.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 616

**WEMYSS et al. v. SUPERIOR COURT IN  
AND FOR ALAMEDA COUNTY et al.**

**S. F. 18508.**

Supreme Court of California, in Bank.  
March 19, 1952.

Mandamus proceeding by Edwin D. Wemyss, doing business under the fictitious name and style of Coca-Cola Bottling Company of Stockton, against Superior Court of the State of California, in and for the County of Alameda, and another, to have Court of Alameda County ordered to quash subpoena requiring plaintiff to attend before notary public in Oakland, Alameda County, to testify by deposition. The Supreme Court, Carter, J., held that the Clerk of the Superior Court of Alameda County had no jurisdic-

tion to issue the subpoena and that therefore it should be quashed.

Peremptory writ granted.

Edmonds, J., dissented in part.

**1. Appeal and Error**  $\hookrightarrow$ 104

**Mandamus**  $\hookrightarrow$ 4(3)

There is no appeal from order denying petitioner's motion to quash subpoena requiring petitioner to attend before notary public and to testify by deposition, and mandamus is a proper remedy.

**2. Statutes**  $\hookrightarrow$ 207

Where possible, all parts of the statute should be read together and construed to achieve harmony between seemingly conflicting provisions, rather than as irreconcilably inconsistent.

**3. Depositions**  $\hookrightarrow$ 57

Statute providing by whom and how a subpoena should be issued authorizes the clerk of court in county where the action is pending to issue subpoena for taking of deposition in cases where the witness resides in that county or within 100 miles of court, but where the witness resides beyond reach of subpoena of court in which action is pending it is issued by clerk of court of county in which his attendance is required, with the limitation, that witness resides in that county or within 100 miles of that court. Code Civ.Proc. § 1986.

**4. Depositions**  $\hookrightarrow$ 57

Where action was pending in Superior Court in San Joaquin County and plaintiff resided in San Joaquin County, Clerk of the Superior Court of Alameda County had no jurisdiction to issue subpoena requiring plaintiff to attend before a notary public in Alameda County and to testify by deposition. Code Civ.Proc. § 1986.

Lafayette J. Smallpage, Stockton, Carl M. Gould, Los Angeles, and Harold J. Willis, Stockton, for petitioner.

James F. Galliano and C. Paul Paduck, Oakland, for Real Party in Interest.

CARTER, Justice.

An action was commenced in the Superior Court in San Joaquin County by plaintiff

against several labor organizations for injunctive and damage relief for picketing by defendants. On the application of one of the defendants, the Clerk of the Superior Court of Alameda County issued a subpoena requiring plaintiff, petitioner here, to attend before a notary public in Oakland, Alameda County, to testify by deposition and to produce certain documents. Plaintiff made a motion in the Alameda County Superior Court to quash the subpoena on the ground that the clerk of that court had no authority to issue it, as plaintiff resides in San Joaquin County and the action is pending in the court there. Plaintiff resides within 100 miles of Oakland where the subpoena required attendance. The court granted the motion insofar as the subpoena required the production of documents, but denied it with respect to its order that he appear to testify. Petitioner, by this proceeding in mandamus, seeks to have the court of Alameda County ordered to quash the subpoena in all respects on the same ground advanced in his motion.

[1] There is no appeal from the order of denial and mandamus is the proper remedy. See *Brown v. Superior Court*, 34 Cal.2d 559, 212 P.2d 878; *Strauss v. Superior Court*, 36 Cal.2d 396, 224 P.2d 726; *Carnation Company v. Superior Court*, 96 Cal.App.2d 138, 214 P.2d 552.

The question presented requires an interpretation of section 1986 of the Code of Civil Procedure, which reads as follows:

"1. A subpoena is issued as follows: To require attendance before a court, or at the trial of an issue therein, *or upon the taking of a deposition* in an action or proceeding pending therein, it is issued *by the clerk of the court in which the action or proceeding is pending*, under the seal of the court, or if there is no clerk or seal then by a judge or justice of such court;

"2. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by the clerk of the superior court

of the county in which the witness is to be examined, under the seal of such court;

"3. To require attendance out of court, in cases not provided for in subdivision one, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or other officer before whom the attendance is required.

"If the subpoena is issued to require attendance before a court, or at the trial of an issue therein, it is issued by the clerk, as of course, upon the application of the party desiring it. If it is issued to require attendance before a commissioner or other officer *upon the taking of a deposition*, it must be issued by the *clerk of the superior court of the county wherein the attendance is required* upon the application of the party desiring it upon proper showing by affidavit to be filed with said clerk." (Emphasis added.)

Petitioner contends that under the facts presented the only court which may issue the subpoena for a deposition is the clerk of the court in which the action is pending, relying upon the italicized portion of the first subdivision. Defendants rely upon the italicized portion of the last paragraph in the third subdivision, urging that the clerk of the court in the county in which the attendance for the deposition is required must issue the subpoena.

In 1872, when the Code of Civil Procedure was adopted, the first subdivision made no mention of taking a deposition and the process was issued under the seal of the court before which the attendance was required or in which the issue was pending. Subdivision three read substantially the same as the present second subdivision, except that it required that the subpoena be issued by the judge. Subdivision two was substantially like the first paragraph of the present third subdivision, except that no mention was made of excepting cases not provided for in subdivision one. In 1907 (Stats.1907, p. 730) the section was amended, stating subdivisions one and two and the first paragraph of subdivision three in the same language as



is now used. The last paragraph of subdivision three was different in that the last sentence required an order of the court or judge for the issuance of the subpoena. The code commissioner's note on the 1907 amendment recited: "By this amendment and the amendments to § 1991, it is intended to change the rule as to the issuance of subpoenas so as to provide that a subpoena to give testimony by deposition must in all cases be issued by the court in which the deposition is to be used, and to provide an adequate process for the punishment of contempts committed in disobedience to a subpoena." Section 1986 was last amended in 1929 (Stats.1929, p. 197) to read as it does now, that is, to authorize the clerk to issue the subpoena without court order, thus changing the last sentence in the second paragraph of subdivision three.

It might appear from a cursory reading of section 1986 that the first italicized portion conflicts with the last italicized part, because in the first it says the clerk of the court in the county where the action is pending issues the process, and in the latter, the clerk of the county where the attendance is required. The commissioner's note on the 1907 amendment seems to indicate that only the clerk of the former court was to have the issuing power.

Factually the same question was before this court in 1925, where we construed the statute as it existed after the 1907 amendment. *Pollak v. Superior Court*, 197 Cal. 389, 240 P. 1006. As we have seen the later amendment in 1929 did nothing more than eliminate the necessity of a court order before the clerk could issue the process as provided in subdivision three. Hence, the statute was the same as it now is for our purposes. In the *Pollak* case the action was pending in a justice's court of the City and County of San Francisco. Pursuant to section 2031 of the Code of Civil Procedure plaintiff in the action gave notice that defendants' deposition would be taken before a notary in Napa in Napa County. Defendants resided in San Francisco County, but less than 50 miles from Napa. At that time section 1989 of the Code of Civil Procedure provided that a witness was not obliged

to attend as a witness before any court or officer outside the county where he resided, unless the distance was less than 50 miles. Since then the distance has been increased to 100 miles (Stats.1935, p. 942). Plaintiff, under Code of Civil Procedure, section 1986(3), obtained an order from the Napa County Superior Court to the clerk of that court for the issuance of a subpoena for attendance at the taking of the deposition in Napa. Subpoenas were accordingly issued and defendants, petitioners in this court in the case, sought to have them set aside by the Napa County Superior Court. Relief was denied and they petitioned for certiorari to annul the order of denial in this court. The petition was denied despite petitioners' claim that the Napa County court had no jurisdiction to order the subpoenas, because the action was pending in San Francisco where they resided. The court said: "That portion of subdivision 3 of said section 1986, which forms the basis for the granting of the order herein complained of, declares that a subpoena issued in accordance therewith, requiring the attendance of a witness before an officer upon the taking of a deposition, 'must be issued by the clerk of the superior court of the county wherein the attendance is required upon the order of such court or of a judge thereof, which order may be made ex parte.' In the case of *Scott v. Shields*, 8 Cal.App. 12, 96 P. 385, in dealing with an apparent conflict which arose between certain provisions of said section 1986, as a result of an amendment added thereto in 1907 (St.1907, p. 730), it was held to be proper for a judge of a superior court, upon the request of a plaintiff, in an action pending in another county, to grant an order directing the clerk to issue a subpoena requiring a witness to attend before a notary public for the taking of the deposition of said witness to be used in said action, and that, if the witness refused to answer, it was mandatory upon said judge, under whose direction the subpoena issued, to compel said witness to answer and to complete his deposition.

"The only limitation placed upon the territorial force and effect of a subpoena

issued out of a court of record is found in section 1989 of said Code, which reads as follows:

"A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial."

"And in the case of *Merrill v. Superior Court*, 33 Cal.App. 55, 164 P. 340, it was expressly held that a subpoena issued by the clerk of the superior court, pursuant to the provisions of said subdivision 3 of said section 1986, as amended in 1907, had the same territorial force and effect as a subpoena issued by the clerk requiring the attendance before the court, and 'may require the attendance of a witness even though he resides outside the county but within the fifty-mile limit.'

"\* \* \* it is apparent, in view of the law as interpreted in the two cases above cited, that the judge of the superior court of Napa county was authorized by said subdivision 3 of section 1986 of said Code to grant the order for said subpoena, and that the subpoena issued pursuant to said order carried sufficient territorial force and effect to require the attendance of petitioners as witnesses outside of the county in which they resided, the distance being less than 50 miles from the place of their respective residences to the place where they were required to attend." *Pollak v. Superior Court*, 197 Cal. 389, 391, 240 P. 1006, 1007.

Petitioner argues, however, that the court in the *Pollak* case was concerned with the limit of the jurisdiction of a court to serve a subpoena, rather than the problem of which court had power to issue the process; that in cases where the witnesses' residence is within the range (100 miles) of the subpoena power of the court in the county where the action is pending that court has the issuance power under subdivision one, and the provision in subdivision three comes into play only when the residence of the witness is outside that range; that such construction recognizes the sound policy of having,

whenever possible, the court where the action is pending, and which will try the case, as the one to determine what questions are proper, etc. in event of a refusal to answer questions.

We agree that the primary question involved in the *Pollak* case was the permissive territorial range of a subpoena. While factually a situation similar to that in the instant case was presented, the court made no reference to the specific question here involved, namely, the apparent conflict between subdivisions one and three of section 1986. In *Scott v. Shields*, 8 Cal.App. 12, 96 P. 385, referred to in the *Pollak* case, the question was whether the notary, before whom the deposition was to be taken, or the clerk of the court was authorized to issue a subpoena, 8 Cal.App. 12, 14, 96 P. 385, and there was no discussion of the above mentioned conflict in section 1986. *Merrill v. Superior Court*, 33 Cal.App. 55, 164 P. 340, referred to in the *Pollak* case, is subject to the same comment. There is nothing helpful in *Burns v. Superior Court*, 140 Cal. 1, 73 P. 597. The case must, therefore, be determined by proper statutory construction.

[2,3] Where possible, all parts of a statute should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency. Code of Civ.Proc., § 1858; *In re Estate of Stevens*, 27 Cal.2d 108, 162 P.2d 918; *County of Los Angeles v. Craig*, 52 Cal.App.2d 450, 126 P.2d 448; 23 Cal. Jur. 792-3. If section 1986 is construed to mean that, by reason of subdivision three, in all cases a subpoena for a deposition is to be issued by the clerk of the court in the county where attendance is required, then the italicized part of subdivision one is rendered nugatory. Both subdivisions may be given effect, however, by construing subdivision one to authorize the clerk of the court in the county where the action is pending to issue the subpoena for a deposition in cases where the witness resides in that county or within 100 miles of the court, the reach of the subpoena, and his attendance is required within the county

or the 100 mile radius. In cases where the witness resides beyond the reach of the subpoena of that court it is issued by the clerk of the court of the county in which his attendance is required, with the limitation, of course, that the witness resides in that county or within 100 miles of that court. There is other wording in section 1986 which supports that interpretation. It will be recalled that the first part of subdivision three refers to requiring attendance in cases "not provided for in subdivision one" which may mean in cases beyond the territorial reach of the court in the county where the action is pending, as provided by section 1989 of the Code of Civil Procedure. This construction also harmonizes with and makes effective the latter section which reads: "A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than one hundred miles from his place of residence to the place of trial." It is, at least partly, in accord with the code commissioner's note, *supra*, in that in all cases permitted by section 1989, the subpoena is issued by the clerk of the court in the county in which the action is pending. Moreover, there are valid reasons, as urged by petitioner, and above mentioned, why the court where the action is pending should in all cases possible issue the subpoena and entertain the proceedings under section 1991 of the Code of Civil Procedure when the witness disobeys the subpoena.

[4] We hold, therefore, that the clerk of the Superior Court of Alameda County had no jurisdiction to issue the subpoena and that court, respondent here, should quash it.

Let a peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that the Superior Court of Alameda County had no jurisdiction to issue the subpoena. However, in my opinion, there is no basis for distinguishing Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006, and it should be overruled.

In the Pollak case, the court failed to mention the conflict between subdivisions (1) and (3) of section 1986, Code of Civil Procedure, and appears to have been misled by the importance of the territorial issue. But the decisive question was stated as follows: "In the case at bar the witnesses whose testimony is sought to be taken in Napa county reside in San Francisco, at the very place of trial, and are available therein as witnesses at any time. In view of that situation the question arises as to whether or not a party to an action, in any event, may require the attendance of a witness outside of the county in which he resides and wherein the action is pending, for the purpose of giving a deposition, even though the place where such witness is required to attend be less than 50 miles from his place of residence." 197 Cal. at pages 392-393, 240 P. at page 1008. This is exactly the situation which is presented by the petition of Wemyss.

Pollak was obliged to obey the subpoena issued by the Superior Court of Napa County because, "in view of the broad language of said section 2021 of said Code, it would seem that authority is granted to take depositions in any county, irrespective of the place where the witness resides or the place wherein the action is pending, provided only the distance between the place of residence of said witness and the place where his deposition shall be taken be less than 50 miles." 197 Cal. at pages 393-394, 240 P. at page 1009. This is directly contrary to the determination of the same question in the present case.



38 Cal.2d 599

**AETNA LIFE INS. CO. v. INDUSTRIAL  
ACC. COMMISSION et al.****L. A. 22103.****Supreme Court of California, in Bank.****March 18, 1952.****Rehearing Denied April 14, 1952.**

Petition for writ of review by Aetna Life Insurance Company, a corporation, against Industrial Accident Commission of the State of California, and others for review of an order of the Commission denying petitioner's claim of lien against amount of workmen's compensation benefits payable to employee of corporation of which petitioner was the insurer for payment of unemployment compensation disability benefits, under compromise agreement between employee and employer's workmen's compensation insurer. The Supreme Court, Schauer, J., held that petitioner was entitled to a lien against amount of lump sum award made to insured's employee by its workmen's compensation insurer as result of a compromise.

Order annulled and cause remanded to Industrial Accident Commission.

Carter, J., dissented.

**1. Workmen's Compensation ⇨1130**

Amount of compromise award made to employee by employer's workmen's compensation insurer was "compensation" within general definition of that term in Workmen's Compensation Law and definition thereof in chapter of that law concerning compromise and release. Labor Code, §§ 3207, 5001.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

**2. Workmen's Compensation ⇨1004**

Unemployment compensation disability insurer of employer was entitled to lien for amount of its payments to employee against amount of compromise award paid by employer's workmen's compensation insurer to injured employee. Labor Code, §§ 3202, 3207, 4903(f), 5001; Gen.Laws, Act 8780d, § 450 et seq.

---

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Herlihy & Herlihy and M. A. Cornell, Jr., all of Los Angeles, for petitioner.

Sidney L. Weinstock, San Francisco, as Amicus Curiae on behalf of petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, and Thomas L. Higbee, San Diego, for respondents.

SCHAUER, Justice.

Aetna Life Insurance Company seeks review of an order of the Industrial Accident Commission which denies Aetna's claim of lien against \$2,400 payable to Leo V. Nowak, an employee of Consolidated Vultee Aircraft Corporation, under a compromise agreement between the employee and American Motorists Insurance Company, the workmen's compensation insurance carrier of Vultee.

Petitioner contends, in effect, that the Industrial Accident Commission has failed in this case to give effect to the legislative intention, declared in the Workmen's Compensation Act (Lab.Code, § 4903, par. (f)) and the Unemployment Insurance Act (3 Deering's Gen.Laws, Act 8780d, § 207) and emphasized by this court in Bryant v. Industrial Accident Commission (1951), 37 Cal.2d 215, 231 P.2d 32, that a disabled workman is not entitled to unemployment compensation disability benefits for a period of unemployment caused by a disability for which he is entitled to workmen's compensation. The record sustains this contention and the order of the commission must be annulled.

It was held in the Bryant case that, to make the declared intent effective, the Industrial Accident Commission, pursuant to paragraph (f) of section 4903 of the Labor Code, must allow a lien "against any amount to be paid as [workmen's] compensation" for the "amount of unemployment compensation disability benefits which have been paid under or pursuant to the Unemployment Insurance Act in those cases where, pending a determination under [the workmen's compensation law] \* \* \*, there was uncertainty whether such benefits were payable under that act or payable [under the workmen's compensation law]."

In the present case the Industrial Accident Commission contends that the lien cannot or should not attach to the amount

payable under the compromise because that sum is not an "amount to be paid as [workmen's] compensation." This contention is untenable. The compromise payment comes within the definitions of "compensation" as enunciated in sections 3207 and 5001 of the Labor Code. (See footnotes 2 and 3, *infra*). To sustain the contention would not only derogate the statute but would permit the Industrial Accident Commission to adopt and effectuate a policy sharply contrary to that which has been clearly declared by the Legislature and which has been expressly upheld by this court. (*Bryant v. Industrial Accident Commission* (1951), *supra*, 37 Cal.2d 215, 231 P.2d 32.)

The history of this proceeding is as follows: Nowak, the employe, was unable to work for several months because of a disabled back. He claimed that his disability was the result of an industrial injury and filed his application for adjustment of claim with the Industrial Accident Commission. American Motorists Insurance Company, the workmen's compensation insurance carrier, denied liability.

Aetna, during the period in question, was the insurer of Vultee, the employer, under a voluntary plan for the payment of unemployment compensation disability benefits and other benefits, including medical expenses, where an employe became unable to work because of a non-industrial injury. This plan was adopted pursuant to the Unemployment Insurance Act (3 Deering's Gen.Laws, Act 8780d, art. 10, pt. 6). Aetna paid \$1,256.05 unemployment disability benefits, other benefits which were used for living expenses, and medical expenses. It filed its claim of lien for the amount of these payments with the Industrial Accident Commission in the proceeding brought by Nowak against American Motorists Insurance Company. On this claim Nowak endorsed the following: "I consent to the requested allowance of a lien against my compensation."

Nowak and American Motorists negotiated a compromise of their controversy as to whether Nowak was entitled to workmen's compensation. Their agreement recites, as the reason for compro-

mise, that "grave dispute exists as to whether there was an injury arising out of and in course of the employment, and if so, whether said injury resulted in the condition of which applicant complains. There is also dispute as to whether there is resultant permanent disability. The parties seek to avoid the hazards of further litigation." They "agree to settle any and all claims on account of said injury by the payment of \* \* \* \$2,400.00 \* \* \* in one lump sum, less attorney's fees as set by the Commission." The compromise agreement does not mention Aetna's claim of lien.

Shortly after the compromise was presented to the Industrial Accident Commission for approval, the employe's attorney wrote to the Industrial Accident Commission stating that the employe and the workmen's compensation insurance carrier "contemplated that the lien of Aetna Life Ins. Co. would not be observed. For that reason, the reason for the Compromise and Release was specifically framed so that it went only to resolvment of the issue of injury and to the issue of permanent disability"; that "Aetna has merely paid what is its true share considering the fact that applicant's condition may have been wholly or partially non-industrial." A copy of this letter was sent to Aetna. Aetna then wrote to the Industrial Accident Commission stating, "We believe that the only reason for the proposed compromise is an effort on the part of the applicant to retain the \$1,200 admittedly paid to him by the Aetna Life Insurance Company and an effort on the defendant's part to help him retain it, thereby saving them the payment of an equal amount in order to effect compromise. The issue of the Aetna Life Insurance Company's lien is before the Commission and we do not believe the applicant and the defendant have a legal right to in effect destroy our statutory lien by agreement simply by stating that the compromise does not intend to dispose of certain issues." Aetna's letter requested a further hearing. Such hearing was had. Aetna established that it had paid \$1,256.05 in medical expenses and weekly pay-

ments which the employe used for living expenses and that its policy did not cover industrial injuries.

At that hearing (and in its petition for rehearing) Aetna directed the referee's attention to the opinion of the District Court of Appeal in *Bryant v. Industrial Accident Commission* (1950), reported at 224 P.2d 444. This is the *Bryant* case in which we granted a hearing and the final opinion in which is reported at 37 Cal. 2d 215, 231 P.2d 32. While the *Bryant* case was pending in this court the Industrial Accident Commission made the order here attacked; it approved the compromise and ordered that Aetna's claimed lien be denied and that Aetna be dismissed from the proceeding.

The Industrial Accident Commission takes the position that an essential basis for application of paragraph (f) of section 4903 of the Labor Code and the principles enunciated in the *Bryant* case is the determination by that commission that the disabling injury was sustained in circumstances which entitle the disabled employe to workmen's compensation during a period for which he has received unemployment compensation disability benefits, and that, for the benefit of the injured workman, it can leave open the question whether his injury was industrial, and that a person in the position of Aetna, who has advanced disability payments prior to determination of the issue, has no right to have the issue determined. The commission says that under general Industrial Accident Commission policy and specific rule<sup>1</sup> it would not leave open the question of the industrial character of the injury and would not approve a compromise such as the one here unless there was doubt that the workman could establish that he was entitled to workmen's compensation. In support of this argument the Industrial Accident Commission refers to evidence, received at an intermediate hearing before it, which

tends to show that the workman's disability had no connection with his employment. If the question had been litigated, it says, the workman might well have been awarded nothing and Aetna would then have received nothing because there would have been neither a right to reimbursement nor a fund upon which to claim a lien. However, in that event, the issue in which Aetna is interested would have been both heard and determined.

Aetna urges that the Industrial Accident Commission should be required to decide whether the injury was industrial, because the procedure adopted here—refusal to determine the issue and dismissal of Aetna—is tantamount to refusal to hear and could result in the perpetration of a fraud on it as a result of collusion between the employe and the workmen's compensation insurance carrier, the perpetration of which would be aided by such procedure of the Industrial Accident Commission. Furthermore, Aetna asserts, if the procedure here followed by the commission is upheld, carriers such as Aetna inevitably will refuse to pay claimed unemployment compensation disability benefits promptly and, necessarily for the proper handling of their business under those circumstances, will await final decision by the Industrial Accident Commission as to whether the injury is industrial. There is merit in both contentions. Without even considering the basic legal implications of the first, the latter contention is impelling.

Obviously it is to the benefit of disabled workmen and in full accord with the salutary public policy of the relevant statutes that such workmen receive prompt payment pending determination of the cause of their disability. The Workmen's Compensation Law and the Unemployment Insurance Act should not be construed together in a manner which not only would defeat directly one legislative intent (to avoid overlapping or duplicating payments) but which also

1. Section 10890, Title 8, of the California Administrative Code reads, "Agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all

future liability, will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval would be for the best interest of the parties."



would tend to defeat a substantial purpose by discouraging the prompt payment of benefits under the Unemployment Insurance Act where there is a question whether benefits are payable under the compensation law. To the contrary see section 3202 of the Labor Code: The provisions of the Workmen's Compensation Law "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." And, as this court pointed out in *California Employment Commission v. Los Angeles, etc., News Corp.* (1944), 24 Cal.2d 421, 427, 150 P.2d 186, the Unemployment Insurance Act "is a remedial statute and as such must be liberally construed for the purpose of accomplishing its objects."

[1] As stated above, there is no merit to the contention of the Industrial Accident Commission that the amount to be paid under the compromise agreement is not "compensation." The payment clearly comes within the general definition of "compensation" in the Workmen's Compensation Law<sup>2</sup> and the definition thereof in the chapter of that law which concerns compromise and release.<sup>3</sup>

Both parties have cited *Hawthorn v. Industrial Accident Commission* (1951), 101 Cal.App.2d 568, 572, 225 P.2d 966. That case, however, is not determinative of the issue in the present case. *Hawthorn*, a city fireman and a member of the State Employees' Retirement System, was injured in line of duty. Under special provisions of the Labor Code which apply to firemen so injured (div. IV, pt. 2, ch. 2, art. 7) *Hawthorn* was entitled to leave of absence without loss of salary in lieu of temporary disability workmen's compensation (Lab.Code, § 4850), and the Industrial Accident Commission was required,

at the request of the city or the retirement system, to determine whether the disability was incurred in line of duty (Lab.Code, § 4851). The only holding of the *Hawthorn* case is that the commission had neither duty nor power to award leave of absence and salary. Its closest approach to relevancy here lies in the suggestion that the commission's "only responsibility is to determine upon request whether the disability claimed arose out of and in the course of the employment." In that case, however, the city and the retirement system, which could require the commission to determine whether the fireman's disability arose out of and in the course of employment, were not parties in interest claiming a lien as is *Aetna*, the one who is entitled to require the commission to make a similar determination as to the employee here.

[2] We conclude that if the parties, including *Aetna*, cannot work out an agreement which effects a settlement of *Aetna's* claim, then the Industrial Accident Commission should determine the period of disability for which the employee is entitled to compensation and allow the claimed lien for the amounts of unemployment disability benefits paid during that period.

For the reasons above stated, the order is annulled and the cause is remanded to the Industrial Accident Commission for further proceedings in accord with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I reaffirm the views expressed in my dissent in *Bryant v. Industrial Accident Commission*, 37 Cal.2d 215, 223 231 P.2d 32.

2. Section 3207 of the Labor Code provides, "'Compensation' means compensation under Division IV [the Workmen's Compensation Law] and includes every benefit or payment conferred by Division IV upon an injured employee, or in the event of his death, upon his dependents, without regard to negligence."

3. Section 5001 of the Labor Code provides, "Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. No release of liability or compromise agreement is valid unless it is approved by the commission."

There are features about this case, however, which necessitate additional discussion.

The majority holds that a lien for unemployment disability payments made to an applicant for workmen's compensation must be allowed against a lump sum award made as the result of a compromise.

The Unemployment Insurance Act, Stats. 1935, p. 1226, as amended, § 207, provides that a person shall be entitled to disability payments thereunder unless he has received or is *entitled* to receive compensation under the workmen's compensation laws. In the instant case there has never been a showing that Nowak, the employee, was entitled to compensation. He received a lump sum by way of a compromise agreement between him and his employer's insurance carrier. To reach the result that such sum is compensation, and thus subject to a lien for disability payments, the majority reasons that if the lien is not allowed, the insurer covering the liability for disability payments will not make them promptly but will withhold them to see if workmen's compensation is awarded, and, therefore, the liberal application of the workmen's compensation laws would thus be thwarted. There can be no doubt that petitioner was required by law to make the disability payments whether or not an award of workmen's compensation was made in the applicant's favor. It is strange reasoning indeed which supposes a "probable" failure to comply with the law as a reason for interpreting a statute favorable to the prospective law violator. The presumption is to the contrary. A person is presumed to be innocent of wrong and that the law has been and will be obeyed. Code Civ.Proc. § 1963, subs. 1, 33. Hence, we will not suppose that the requirement that disability payments be made will be wilfully disobeyed.

This is the first case which has come to my attention in which the author of the majority opinion has relied upon section 3202 of the Labor Code as a basis for the interpretation of the provisions of that code or the workmen's compensation law, and then such reliance is for the purpose of

denying the benefits of the law to persons injured in the course of their employment. This is indeed using the mandate of liberal construction for its own destruction. A definition of liberal construction may be found in my dissenting opinion in *California Shipbuilding Corp. v. Industrial Accident Commission*, 31 Cal.2d 270, 288, 289, 188 P.2d 27.

There is another factor of compelling importance. The effect of the majority's interpretation is that there must be a determination of whether compensation is payable in every case, and, therefore, the provision for compromising compensation claims becomes ineffective, and might just as well be stricken from the statute. There can be no compromise, because, if it must be decided whether the injury is compensable in all cases, and hence a lien attaches, there is nothing to compromise. The statute says that nothing therein (and that includes the allowance of a lien for disability payments) shall prevent a compromise. It reads: "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division, but nothing in this *division* shall: (a) \* \* \* *Impair the right of the parties interested to compromise*, subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death." (Emphasis added.) Labor Code, § 5000. "Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. No release of liability or compromise agreement is valid unless it provides for the payment of full compensation in accordance with this division or unless approved by the commission." Labor Code, § 5001. If when a lien is filed against a compromise award the commission must decide whether the injury is compensable, the extent of the disability and the amount of compensation, the compromise is nullified because it is based on a dispute as to those factors. It is clear, therefore, that the right to compromise is not only impaired in direct violation by section 5000, it is completely destroyed.

Even conceding the soundness of the majority holding in the Bryant case, which I do not, it should not be extended to a case such as this where the only award made in favor of the injured employee is by way of a compromise on the issue of liability. This should be apparent when we consider the desirability from the standpoint of the injured employee of compromising cases of doubtful liability. Such cases, if not compromised, are generally taken into court which results in delay and expense to both parties, and often the defeat of applicant's claim. The Legislature, therefore, wisely provided for a compromise, believing it to be to the best interests of the applicant in doubtful cases of liability. In fact a compromise is often reached where the agreement expressly provides that it does not constitute an admission of liability by the defendant-employer. Generally, in such cases the applicant agrees to accept much less than the amount of his claim. Such being the case it is apparent that if a lien is permitted for unemployment disability payments against the amount agreed upon by way of compromise, the incentive to compromise will be greatly minimized and many injured employees will be deprived of the benefits of this remedial statute enacted for their protection. If, as the majority says, that the Unemployment Insurance Act and the Workmen's Compensation Act should be construed together as remedial statutes, and as such, must be liberally construed for the purpose of accomplishing their objects, it seems clear that such a construction of the two acts would lead to a holding that the lien provision of the former act would not apply to an award based upon a compromise of liability for the injury for which disability payments were made. Considerations of public policy should dictate that it is of far greater importance, particularly in advancing the social and economic welfare of injured workingmen, to compromise and settle disputed claims for workmen's compensation, than to permit a few carriers of unemployment disability insurance to recoup their unemployment disability payments from the amount of an award based upon a com-

promise and thus destroy the incentive to compromise such claims.

Finally, it should be pointed out that even if the majority's interpretation is correct, the claimant of the lien for disability payments had the burden of establishing the validity of its lien which necessarily required it to establish that Nowak's injury was compensable, the extent of the disability and the amount of compensation payable. That is true because it is not entitled to the lien unless the award was payable under the workmen's compensation laws. It has failed to meet this burden, as it offered no evidence on the subject.

I would, therefore, affirm the order of the commission denying petitioner's lien.

Rehearing denied; CARTER, J., dissenting.



38 Cal.2d 633

**CONNER et al. v. SOUTHERN PAC.**

CO. et al.

Sac. 6232.

Supreme Court of California, in Bank.

March 21, 1952.

Rehearing Denied April 17, 1952.

W. F. Conner and Ludie E. Conner brought an action against Southern Pacific Company, a foreign corporation, and others, for death of plaintiffs' son which resulted when the named defendant's train struck automobile which was being steered by plaintiffs' decedent while in tow of a pickup truck which was being driven across defendant's railroad tracks by driver who did not see train until it was too late for driver to accelerate and pull the automobile off of the tracks. The Superior Court, Tehama County, Arthur Coats, J., set aside verdict for defendants and granted plaintiffs' motion for a new trial and defendants appealed. The Supreme Court, Schauer, J., held that whether plaintiffs' son was guilty of negligence was for jury under evidence, and that jury were correctly instructed.

Order reversed.

Carter, J., dissented.

Prior opinion, 233 P.2d 41.



**1. Railroads** ⇨350(13, 16, 32)

In action for death of plaintiffs' son which resulted when defendant's train struck automobile which was being steered by plaintiffs' son while in tow of a pickup truck which was being driven across defendant's railroad tracks by driver who did not see train until it was too late for driver to accelerate and pull automobile off tracks, whether plaintiffs' son was guilty of negligence which proximately contributed to accident in failing to keep a lookout for his own safety and in failing to reasonably apply his brakes after he was in position to see oncoming train was for jury under evidence.

**2. Trial** ⇨255(11)

In action for death of plaintiffs' son which resulted when defendant's train struck automobile which was being steered by plaintiffs' son while in tow of a pickup truck which was being driven across defendant's railroad tracks by driver who did not see train until it was too late for driver to accelerate and pull automobile off tracks, trial court was not required to give instruction that one guiding a towed vehicle has less control over its progress than does driver of towing vehicle, where no such instruction was requested.

**3. Railroads** ⇨324(1)

Where automobile steered by plaintiffs' son was being towed by pickup truck which was being driven across defendant's railroad tracks by driver who did not see train until it was too late for driver to accelerate and pull automobile off tracks before automobile was struck by train, plaintiffs' son was bound to exercise reasonable care for his own safety in steering or operating automobile.

**4. Railroads** ⇨351(12)

Where automobile steered by plaintiffs' son was being towed by pickup truck which was being driven across defendant's railroad tracks by driver who did not see train until it was too late for driver to accelerate and pull automobile off tracks, instructions correctly informed jury that plaintiffs' son should have exercised reasonable care in circumstances, and properly left it to jury to decide whether plaintiffs' son

could and should have done anything more than let himself be pulled slowly into path of approaching train, as against contention that instructions did not sufficiently emphasize that plaintiffs' son had less opportunity to control vehicles than did driver of truck and that instructions misled jury.

**5. New Trial** ⇨39**Trial** ⇨296(1)

Whether erroneous instructions are cured by other correct instructions or are prejudicial is question for discretion of trial court, but where instructions are correct there is no basis for exercise of discretion and no legal ground, in that respect, on which a new trial may be granted.

**6. Appeal and Error** ⇨1169(9)

Where it appears on appeal that a trial court in granting a new trial based its order exclusively upon erroneous concept of legal principles applicable to cause, order will be reversed.

---

Glenn D. Newton, Redding, for appellants.

Alfred E. Frazier, Red Bluff, and Duard F. Geis, Willows, for respondents.

SCHAUER, Justice.

Defendants appeal from an order granting plaintiffs' motion for new trial in an action for wrongful death. The motion was granted for asserted error in instructions. We have concluded that the jury were correctly instructed. It necessarily follows that the trial court's order setting aside the verdict and granting a new trial cannot be sustained.

Bill Conner, plaintiff's son, was killed when defendants' train struck an automobile which was being steered by Conner while in tow of a pickup truck driven by Richard Benson. Benson drove upgrade at a speed of about five miles an hour across defendants' tracks and did not see the train until it was too late for him to accelerate and pull Conner's car off the tracks. Visibility was good and both drivers were familiar with the crossing. There is evidence from which the jury could, and its verdict implies that it did,

find that, had Conner kept a lookout for his own safety, he would have seen the train<sup>1</sup> and could have signaled to Benson and thereby caused the latter to avoid the accident or he could have escaped from the towed car before it was struck; also, the evidence would support a finding that Conner by seasonably applying his brakes after he was in a position to see the oncoming train could have stopped both vehicles before even the towing car went upon the crossing.

[1] The trial court instructed the jury that Benson was guilty of negligence as a matter of law.<sup>2</sup> The questions whether the railroad was negligent in the circumstances, whether any such negligence was a proximate cause of the accident, and whether Conner (the deceased) was guilty of negligence which proximately contributed to cause the accident, were left to the jury. This (at least as against plaintiff) was proper, and the instructions upon which such issues were submitted were not erroneous.

The jury were told that "A traveler approaching a railway crossing with the intent of crossing thereover on a public highway is required, if he does not stop, to approach the tracks with his vehicle under control so as not to render ineffective other precautions required of him, such as looking and listening for the approach of a train, and so that he may be able to stop or turn aside while still in a position of safety upon ascertaining that a train is approaching which might endanger his passage over said track"; and that he must yield the right of way to an approaching train.

[2,3] The principal argument of the plaintiffs is to the effect that no instruction expressly directed the attention of the jury to the fact—or instructed them that as a matter of law it is a fact—that one guid-

ing a towed vehicle has less control over its progress than does the driver of the towing vehicle. Whether, under the circumstances here, such an instruction on that proposition of fact would have been proper is beside the point; no such instruction was requested and the court was not bound to so instruct of its own motion. Moreover, the fact is obvious without an instruction declaring it. As to the applicable law the jury were properly informed that they must determine whether deceased "exercised the care and vigilance for his own safety which the circumstances required"; that negligence is "always a relative question—relative to the circumstances of the time, of the place, and of the person or persons"; that "The person in charge of the towed vehicle is bound to exercise reasonable care for his own safety in steering or operating it. Whether proper care has been exercised is a matter to be determined according to the facts of the particular case." The above quoted instructions correctly and adequately informed the jury as to the duty of care of one in the position of deceased. The record discloses no basis for a determination that the jury did not follow such instructions in arriving at their verdict.

[4-6] The court appears to have granted the new trial because it decided that the jury were misled by its instructions, which, it concluded, did not sufficiently emphasize the factual proposition that Conner had less opportunity to control the vehicles than did Benson. But the instructions are not erroneous in law or misleading in fact. They correctly informed the jury that Conner should have exercised reasonable care in the circumstances in which he was, and left it to the jury to decide whether he could and should have done anything more than let himself be

1. The track to the north, from which direction the train approached, was straight and the view unobstructed for at least a mile from the point, approximately 60 feet from the tracks, where Benson slowed to a speed of about five miles per hour preparatory to crossing the tracks.

2. Because of our conclusion that there is no error adverse to plaintiffs in the instructions we do not need to consider whether upon undisputed evidence deceased, like Benson, was as a matter of law guilty of negligence which proximately contributed to his death.

pulled slowly into the path of the approaching train. Whether instructions which are actually erroneous are cured by other, correct instructions or are prejudicial is a question for the discretion of the trial court (*Fennessey v. Pacific Gas & Elec. Co.* (1938), 10 Cal.2d 538, 544, 76 P.2d 104) but where, as here, the instructions are correct, there is no basis for the exercise of discretion, and no legal ground, in that respect, on which a new trial may be granted (*Parker v. Womack* (1951), 37 Cal.2d 116, 230 P.2d 823). The inquiry as to whether instructions are erroneous presents purely a question of law (*Dodds v. Gifford* (1932), 127 Cal.App. 629, 634, 16 P.2d 279; *Markham v. Hancock Oil Co.* (1934), 2 Cal.App.2d 392, 395, 37 P.2d 1087) and if it appears on appeal that a trial court in granting a new trial based its order exclusively upon an erroneous concept of legal principles applicable to the cause, its order will be reversed (*Estate of Baird* (1926), 198 Cal. 490, 507, 246 P. 324).

Plaintiffs rely on the statement, quoted with approval from 3 Cal.Jur. 854, in *Marchetti v. Southern Pac. Co.* (1928), 204 Cal. 679, 683, 269 P. 529, that "a passenger in a machine operated by another cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision." The statement has no application here. Conner was not a passenger and the question of his contributory negligence was one of fact. In *Fairman v. Mors* (1942), 55 Cal.App.2d 216, 219-220, 130 P.2d 448 it was said that "One sitting behind a steering wheel of a towed car is utterly helpless so far as directing the course or conduct of such car." This statement, in its application to the facts of this case, obviously is incorrect. The record here shows that Conner's car was equipped with steering gear, brakes and horn. There is evidence that before the towing and towed vehicles went upon

the tracks they were going so slowly and up such a grade that Conner, by applying his brakes, could have stopped both of them in safety.<sup>3</sup> Furthermore, he was not as a matter of law "utterly helpless" to alter the course of the vehicles. (See *Farrar v. Whipple* (1924), 65 Cal.App. 123, 126, 223 P. 80, affirming judgment against one whose negligent steering of a towed vehicle resulted in injury to others.) The limited ability of one at the wheel of a towed vehicle to control its travel would not justify his depending entirely, as might (under some circumstances) a mere passenger, on the vigilance of the driver of the towing car. Certainly he would have the duty of exercising ordinary care in watching for traffic, railway trains, etc., in the control of his own car to a reasonable extent, in sounding his horn to warn the driver of the towing vehicle if such action appeared reasonably necessary, and, under the slow speed conditions shown here, in leaving the towed car if reasonably necessary.

Since the jury, correctly instructed, impliedly found upon sufficient evidence that Conner failed to exercise the reasonable care required of one in his position and that his negligence proximately contributed to cause his death, the granting of a new trial upon the ground designated was error.

For the reasons above stated, the order is reversed.

**SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.**

**CARTER, Justice.**

I dissent.

In a whole series of instructions the jury was told that the pilot of a car being towed must do all that an operator of a car must do and more to escape the charge of contributory negligence when he is being towed across a grade railroad crossing. The jury was told that more care was required than

3. "The Court [to witness Benson]:  
\* \* \* The question, of course, is you towing his car and you not putting your brakes on, and he putting it on, I presume, what distance could he have stopped his car, which also means stopping yours, too? A. I guess he could have stopped in six or seven feet.

"Mr. Newton [defendants' counsel]:  
And he didn't give you any signal to stop as you were going up the grade, did he?  
A. No. \* \* \*

"Q. There is a gradual rise as you leave the highway to approach the railroad tracks? A. About a four foot rise from the highway."



of the operator of the towing car, because, as will later be shown, he was expected to exercise the highest degree of care. Nevertheless the majority holds that the instructions were not erroneous and therefore the trial court was wrong in granting a new trial after verdict for defendant railroad company. It must be remembered that in this case there are three persons involved. The railroad employees operating the train, Benson, who was driving the car which was doing the towing, and the deceased, who was in the towed car. Benson is *not* a party defendant or plaintiff and any negligence of his is *not* imputed to the deceased. Hence, the only instructions pertinent would be those dealing with the situation as between the railroad crew and the deceased, the occupant of the towed car.

The trial court gave the following instruction (quoted in the majority opinion): "A traveler approaching a railway crossing with the intent of crossing thereover on a public highway is required, *if he does not stop*, to approach the tracks with his vehicle *under control* so as not to render ineffective other precautions required of him, such as *looking and listening* for the approach of a train, and *so that he may be able to stop or turn aside* while still in a position of safety upon ascertaining that a train is approaching which might endanger his passage over said track." (Emphasis added.) (Instruction No. 24.) In addition, the jury was advised: "The railway train has the right of way and in their operation of a train toward and over a crossing, the trainmen have the right to assume that every person will approach the crossing exercising ordinary care to avoid collision, and will look and listen for an approaching train and stop, if necessary, before he or she crosses to let the train go by." (Instruction No. 17.) "It is the rule in respect of the right-of-way at a railroad crossing that a vehicle or person approaching a steam railroad crossing, with the intention of going over the tracks, is under the duty to *yield the right-of-way* at that crossing to any railroad train which may be approaching the crossing." (Emphasis added.) (Instruction No. 18.) "You are instructed that in approaching a railroad

crossing, a continuous duty is imposed upon the driver of an automobile to maintain a lookout in the directions from which danger is anticipated." (Instruction No. 19.) "The tracks of a railroad, such as that involved in this case, are in themselves a warning of danger. The view of the tracks and intersection in this case was unobstructed and under these conditions before one drives a vehicle into the space which would be occupied by a train if it were to pass over such tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of train, engine or car on the tracks. What is included in the term 'every reasonable opportunity' depends on all the surrounding circumstances, as they would be met and viewed by a person of ordinary prudence, if he occupied the same position as the one whose conduct is in question." (Instruction No. 23.) Summarized, those instructions informed the jury that plaintiff was in *exactly* the same position as the driver of a car, in full control thereof, approaching a railroad crossing and must do all the things such a person could do; that the train crew may assume he will look, listen, and if necessary stop; that he must yield the right of way to the train, and maintain a continuous lookout; that by implication he must stop, approach the crossing with the vehicle *under control* and be able to stop or turn aside.

The jury was told in effect that the mere fact alone that the car is being towed constitutes contributory negligence, because the things the deceased was required to do could be done only by some one who was operating the towing car.

It should be obvious that when a person is in control of a car being towed he is practically helpless. He cannot stop or swerve and thus cannot yield the right of way. To expect him to look and listen is also unreasonable. All his attention must be focused on the towing operation if he is to avoid running into the towing car, fouling the tow line, or having his car upset. Certainly, he is in a more helpless position than a passenger in a car. While a passenger may not have a brake at his foot or a steering wheel in his hand,

he can communicate with the driver and inform him of approaching danger. In the instant case to require the deceased to put on the brake (assuming that would be safe) would demand making the choice between his life and that of the driver of the towing car, for otherwise he would stop the towing car in the path of the train. If he attempted to brake his car the result might well be to stall the towing car. It is asserted that deceased could have blown his horn, but there is no showing that the horn was operating. In any event the driver of the towing car would not have known of the reason for blowing the horn.

For the foregoing reasons, judges taking a common sense view with regard to the operation of a towed car have commented: "One sitting behind a steering wheel of a towed car is utterly helpless so far as directing the course or conduct of such car. He is not the driver either in the statutory sense or in any sense. No amount of turning of the steering wheel by him will alter its course." (Fairman v. Mors, 55 Cal. App.2d 216, 219-220, 130 P.2d 448.

The effect of the foregoing clearly erroneous instructions was magnified by another faulty instruction which in effect told the jury that even slight negligence on decedent's part would bar recovery; that is to say it was advised that he was required to use extraordinary care. The instruction reads: "Contributory negligence is such an act or omission of a person killed or injured, amounting to want of ordinary care in the circumstances of the case, as concurring or co-operation with a negligent act of a defendant, was a proximate cause of the death complained of. If, in this case, there was any conduct on the part of the person who was killed, amounting to negligence, *no matter how slight*, and if such negligence in any degree proximately contributed to the injury, *no recovery can be had*, and it will be your duty to return a verdict in favor of the defendants." (Emphasis added.) (Instruction No. 7.) It is settled that such an instruction is faulty because it tells the jury that only slight contributory negligence will bar recovery when it is the degree of contribution that may be slight. It is error to instruct the jury that

contributory negligence, *no matter how slight*, will bar recovery by plaintiff, because it is in effect saying that contributory negligence is not ordinary negligence, which is the doing of something or the failure to do something which a reasonably prudent person would or would not have done under like circumstances. (Clark v. State of California, 99 Cal.App.2d 616, 222 P.2d 300; Strong v. Sacramento & P. R. R. Co., 61 Cal. 326; Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931; Robinson v. Western Pac. R. R. Co., 48 Cal. 409; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Morgan v. Los Angeles R. & G. Corp., 105 Cal.App. 224, 287 P. 152.) In Clark v. State of California, supra, the court said: "But appellant more justly complains of a group of instructions given by the court at defendants' request which as to the point now under consideration may be summarized as follows: The court told the jury that if the decedent was guilty of contributory negligence, *no matter how slight*, which proximately contributed to the accident their verdict must be for the defendants. Again the court said that in determining whether or not decedent was guilty of contributory negligence 'if you believe from the evidence that she was guilty of the slightest degree of negligence \* \* \* and that such negligence proximately contributed to the accident and her death' the verdict must be for the defendants. As said by the Supreme Court of California in Strong v. Sacramento & P. R. R. Co., 61 Cal. 326, 328: 'The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover.' \* \* \*

"While the lawyer and also the layman recognize that there are differing degrees of negligence, here ordinary negligence was the only degree of negligence involved, and to permit the jury to continue in their mistaken belief that they were concerned with the degree of negligence as distinguished from the degree of proximate contribution of that negligence to the happening of the

accident and the infliction of the injury, was detrimental to plaintiff's interests, to say the least."

It is conceded by the majority that where instructions are erroneous the question of prejudice and whether bad instructions are cured by others is for the discretion of the trial court on motion for a new trial. (*Fennessey v. Pacific Gas & Elec. Co.*, 10 Cal.2d 538, 76 P.2d 104; *Mathers v. County of Riverside*, 22 Cal.2d 781, 141 P.2d 419; *Brignoli v. Seaboard Trans. Co.*, 29 Cal.2d 782, 178 P.2d 445.)

That the jury was misled in the instant case is clear. I would, therefore, affirm the order granting a new trial.

Rehearing denied; GIBSON, C. J., and CARTER, J., dissenting.



38 Cal.2d 593

**FREDRICKSON v. SUPERIOR COURT IN  
AND FOR CITY AND COUNTY OF  
SAN FRANCISCO et al.**

S. F. 18431.

Supreme Court of California, in Bank.

March 14, 1952.

Rehearing Denied April 3, 1952.

Marie Margaret Maschio Fredrickson, petitioner, filed a petition for writ of certiorari to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, and the Honorable T. I. Fitzpatrick, Judge of the Superior Court, respondents, vacating a decree settling the final account of the petitioner as administratrix in the estate of Robert E. Maschio, deceased, wherein Carew & English, Inc., was the real party in interest. The Supreme Court, Carter, J., held that Superior Court did not act in excess of its jurisdiction in vacating the decree under statute authorizing relief from judgment or orders taken through mistake, inadvertence, surprise, or excusable neglect.

Order affirmed.

Prior opinion, 236 P.2d 405.

**1. Executors and Administrators**

§ 509(4), 513(11)

Generally, an order settling a final account of an administratrix is conclusive on

unpaid creditors, and there must be some legally recognized basis for vacating such a final order, and, if there is none, court acts in excess of its power in so acting.

**2. Executors and Administrators** § 510(1)

Remedy of administratrix to review an order vacating a final order settling final account of administratrix, was by certiorari, since no appeal lies from such order. Probate Code, § 1240.

**3. Executors and Administrators** § 510(8)

In certiorari proceeding by administratrix to annul an order vacating a decree settling final account of administratrix, only such defects as amounted to jurisdictional error could be considered by Supreme Court.

**4. Executors and Administrators** § 509(2)

Where administratrix was advised at hearing on motion of creditor of estate to vacate a decree settling final account of administratrix, that motion was made under statute authorizing relief from judgments or orders taken through mistake, inadvertence, surprise, or excusable neglect, and administratrix made no objection to the hearing of the motion on such grounds, court did not act in excess of its jurisdiction, though notice of motion was allegedly insufficient because it did not set forth grounds of motion. Code Civ.Proc. §§ 473, 1010.

**5. Executors and Administrators** § 510(4)

Where creditor of estate made a motion to vacate decree settling final account of administratrix under statute authorizing relief from judgments or orders taken through mistake, inadvertence, surprise, or excusable neglect, and administratrix was advised at the hearing that the motion was made under such statute, and no objection was made by administratrix that notice of motion was insufficient because it did not set forth the grounds in the notice of motion, administratrix would be deemed to have waived any such objection, and could not raise such objection in certiorari proceedings. Code Civ.Proc. §§ 473, 1010.



**6. Executors and Administrators**  $\S$  510(8)

Even if it be assumed that affidavits must accompany a motion under statute authorizing relief from judgments or orders taken through mistake, inadvertence, surprise, or excusable neglect, failure of creditor of estate to file them with notice of motion to vacate decree settling final account of administratrix was not a jurisdictional defect vulnerable in a certiorari proceeding by administratrix. Code Civ. Proc.  $\S$  473.

---

Sefton & Anderson and Seibert L. Sefton, all of San Francisco, for petitioner.

Heller, Ehrman, White & McAuliffe, and Caspar Willard Weinberger, all of San Francisco, for respondents and real party in interest.

CARTER, Justice.

This is a proceeding in certiorari to annul an order of the Superior Court sitting in probate vacating a decree settling the final account of the administratrix, ordering distribution and discharging the administratrix in the estate of Robert E. Maschio, deceased.

Maschio having died intestate, Marie Fredrickson, as guardian of the estate of Esther Maschio, a minor daughter of the deceased, was issued letters of administration. Notice to creditors was duly given. Carew & English, a corporation, in due time and form presented to counsel for the administratrix its verified claim in the sum of \$1,071, for the funeral expenses of the deceased. Apparently, the administratrix' name appears on the claim, but it is agreed that she did not approve it. The probate judge did approve it. It also appears that it was filed with the clerk. No notice of rejection of the claim was given. Counsel for the administratrix testified at the hearing on the motion later discussed herein that his office had sent the claim to decedent's sisters and he thought they had paid it. The claim has not been paid.

In proper time the administratrix filed her final account and petition for its set-

tlement and distribution of the estate. It was not verified as required by section 922 of the Probate Code, nor did it contain a list of claims filed or presented as required by that section and section 921. In the account it was stated that all the claims had been paid and testimony to the same effect was given at the hearing on the account. On November 29, 1950, the court made its orders settling the account, distributing the estate and discharging the administratrix. On May 28, 1951, and within six months of the order of settlement (see Code Civ. Proc.  $\S$  473), Carew & English made a motion to vacate those orders, stating as grounds in its notice of motion:

"1. That the \* \* \* account filed herein \* \* \* was not verified, as required by Section 922 of the Probate Code;

"2. That said account does not show all the claims filed or presented against said estate, as required by said Section 922 of the Probate Code;

"3. That Carew & English, Inc., \* \* \* duly presented a claim in the sum of \$1,071.00 against the estate of said decedent within the time prescribed by law, and at the place designated in the Notice to Creditors; said claim is on file herein and purports to have been approved by said administratrix, and was allowed by the Court;

"4. That said claim was not paid or otherwise acted upon, and that no notice of rejection of said claim was served on claimant;

"5. On all the files, pleadings and papers herein;

"6. On oral testimony to be adduced at the hearing of the motion;

"7. That said Decree of Distribution and said Decree of Discharge are and each of them is void, for the reasons set forth in the grounds for this motion above stated."

At the hearing on the motion counsel for the administratrix testified as above mentioned. Counsel for Carew & English as-

serted that there had been a fraud on the court and stressed the lack of verification of the account and petition for distribution. The facts above mentioned were made to appear. The court expressed the view that that was "enough" for it and agreed there was a fraud on the court and stated: "It would be a fraud on the Court, and the person would be guilty of perjury." The court also said: "Well, even the six months would not bar you here—this is a fraud on the Court—it can be brought up at any time."

A minute order was made granting the motion and the administratrix seeks to have it annulled on certiorari, asserting that the court had no power to vacate the settlement as it is binding and conclusive on Carew & English.

[1,2] With exceptions not here pertinent an order settling a final account is conclusive on unpaid creditors. *Federal Farm Mortgage Corp. v. Sandberg*, 35 Cal.2d 1, 215 P.2d 721; *In re Estate of Mailhebau*, 218 Cal. 202, 22 P.2d 514; *In re Estate of Fernandez*, 119 Cal. 579, 51 P. 851. There must be some legally recognized basis for vacating such a final order, and if there is none, the court acts in excess of its power in so acting. With reference to the remedy by certiorari, it is settled that no appeal lies from the order of vacation as it is not listed as an appealable order in section 1240 of the Probate Code. *Kramer v. Superior Court*, 36 Cal.2d 159, 222 P.2d 874; *Howard v. Superior Court*, 25 Cal.2d 784, 787, 154 P.2d 849. Hence, the question of availability of appeal is not presented.

There is considerable discussion in the briefs as to whether the motion was made or granted under section 473 of the Code of Civil Procedure, a legally recognized method of vacating a final judgment on the grounds of inadvertence or excusable neglect, because of the failure of Carew & English to contest the settlement of the account and Carew & English here base their argument in support of the order of vacation on that section. It is true that the section was not mentioned in the notice of mo-

tion, but it does point at inadvertence and excusable neglect inasmuch as it details what happened, that the claim was filed, was on its face approved by the administratrix and judge but was not paid and no notice of rejection was given. At the hearing the facts were developed as heretofore set forth. There may have been more as the record on the hearing of the motion recites that "argument and discussion" followed, but does not state of what it consisted. While proper notice of the hearing on the settlement of the account was given, we cannot say on this certiorari proceeding that the court lacked jurisdiction to give relief under section 473 insofar as the evidence of excusable neglect, etc., is concerned, because such relief (certiorari) "could be granted only if it be shown that the probate court in denying [or granting] the motion to set aside the decree exceeded its jurisdiction. (Code Civ.Proc., § 1068; and cases hereinafter cited.) Under the authorities herein cited the probate court has jurisdiction to entertain the motion and to grant or deny the application in the exercise of its discretionary power. (Prob. Code, § 1233; Code Civ.Proc., § 473.)

"\* \* \* that orders granting relief [under § 473] have rarely been reversed and then only for an abuse of discretion. \* \* \* In addition it is well-settled that certiorari will not lie where the only excess of jurisdiction alleged relates to insufficiency of the evidence. *In re Estate of Kay*, 30 Cal.2d 215, 218, 181 P.2d 1". *Kramer v. Superior Court*, 36 Cal.2d 159, 162, 222 P.2d 874, 876. Also, "It need hardly be added that on certiorari we do not review matters within the discretion of the lower court." *In re Estate of Kay*, 30 Cal. 2d 215, 226, 181 P.2d 1, 7.

[3-5] The court had no power to and did not base its order of vacation on section 473, argues petitioner, because the inadvertence, excusable neglect, etc., were not set forth as grounds in the notice of motion, as required by section 1010 of the Code of Civil Procedure, no affidavits on that subject accompanied it and they were not invoked at the hearing. We have here-

tofore pointed out that the notice indicated that relief should be given on those grounds, and this should be sufficient, when we consider that this review is of jurisdictional error and only such defects may be considered. It is stated in the affidavit of counsel for Carew & English, filed here in opposition to the petition for the writ, that at the hearing on the motion petitioner was advised that the motion was made under section 473. That is not denied by petitioner. And at the hearing, discussions transpired which were not recorded. They may have shown that the motion was based on section 473. As far as appears, petitioner made no objection to the hearing of the motion on the grounds of mistake, excusable neglect, etc. Under these circumstances we cannot say that the court acted in excess of its jurisdiction. Moreover, the grounds under section 473 having been raised at the hearing, and no objection having been made by petitioner to the sufficiency of the notice of motion in that respect, the petitioner waived any such objection. *Lohman v. Lohman*, 29 Cal.2d 144, 173 P.2d 657; *Mann v. Pacific Greyhound Lines*, 92 Cal.App.2d 439, 207 P.2d 105; *Hecq v. Conner*, 203 Cal. 504, 265 P. 180; *Simonini v. Jay Dee Leather Products Co.*, 85 Cal.App.2d 265, 193 P.2d 53.

Petitioner relies upon *Nason v. Superior Court*, 39 Cal.App. 448, 179 P. 454, and *Westphal v. Westphal*, 61 Cal.App.2d 544, 143 P.2d 405, for the proposition that the notice of motion limited the jurisdiction of the trial court to grounds other than section 473. In the *Nason* case the motion was made two years after the decree of distribution was entered and section 473 could not be applied. In the *Westphal* case the grounds urged on appeal were not urged in the trial court. Here, accepting petitioner's claim that the notice of motion was insufficient, the grounds were raised without objection in the trial court at the hearing on the motion.

[6] Insofar as the lack of affidavits is concerned, assuming they must accompany a motion under section 473, the failure to

file them with the notice of motion is not a jurisdictional defect vulnerable in a certiorari review. *Imperial Beverage Co. v. Superior Court*, 24 Cal.2d 627, 150 P.2d 881.

The order vacating the decree is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



38 Cal.2d 643

**BECK v. WEST COAST LIFE INS.  
CO. et al.  
S. F. 18117.**

Supreme Court of California, in Bank.  
March 21, 1952.

Rehearing Denied April 17, 1952.

Herbert Beck, administrator of the estate of Lila Loly Downey, deceased, brought an action against the West Coast Life Insurance Company, and others, to recover proceeds of life policy. Jettie Knoll, alternative beneficiary under the policy, intervened. The Superior Court, San Francisco County, Daniel R. Shoemaker, J., entered judgment that Beck had no interest in policy, and he appealed. The Supreme Court, Traynor, J., held that under the policy, alternative beneficiary was entitled to proceeds where primary beneficiary was precluded from obtaining same because he had murdered the insured.

Judgment affirmed.

Edmonds and Spence, JJ., dissented.

Prior opinion 228 P.2d 832.

#### I. Insurance — 448

Though under terms of life policy, primary beneficiary who murdered insured was entitled to proceeds, beneficiary could neither receive nor retain proceeds, since it would be unconscionable to allow him to profit from his own wrong. Civ. Code, §§ 2224, 3517.



**2. Insurance** Ⓒ448

Unless policy so provides, insurer is not relieved of liability thereon because of disqualification of principal beneficiary.

**3. Insurance** Ⓒ587

Beneficiary clause of life policy in which insured has reserved right to change beneficiary is donative and testamentary in character and hence intent of insured as expressed by language that she used should be given effect so far as possible.

**4. Insurance** Ⓒ585(1)

Where life policy stated that proceeds should be paid to alternative beneficiary if primary beneficiary predeceased insured, insured clearly indicated intent that any interest her estate might have in proceeds should be subordinate to interest of alternative beneficiary, and hence where primary beneficiary was precluded from receiving proceeds because he murdered insured, alternative beneficiary was entitled to proceeds as against insured's estate. Civ. Code, §§ 2224, 3517.

**5. Insurance** Ⓒ448

Rule that primary beneficiary of life policy, who murdered insured, cannot recover proceeds of policy should not be invoked in such a way as to prejudice rights of alternative beneficiary. Civ. Code, §§ 2224, 3517.

**6. Insurance** Ⓒ448

Public policy expressed in probate code provision preventing convicted murderer from succeeding to any part of estate of his victim prevents passage of either equitable or legal title to insurance proceeds to principal beneficiary who murdered insured. Probate Code, § 258.

Chas. I. Rosin, Los Angeles, for appellant.

Paul Friedman, San Francisco, for intervenor and respondent.

TRAYNOR, Justice.

On May 23, 1946, the West Coast Life Insurance Company issued a life insurance policy to Mrs. D. A. Downey. The bene-

ficiary clause provided that the proceeds be paid to "David Albert Downey—Husband, if living, otherwise to Jettie Knoll—Friend of the Insured." The insured reserved the right to change beneficiaries. On July 18, 1947, the primary beneficiary murdered the insured in Colorado. He has been convicted of the crime and sentenced to life imprisonment. *Downey v. People*, 121 Colo. 307, 215 P.2d 892. Herbert Beck, administrator of Mrs. Downey's estate, brought this action against the insurer to recover the proceeds of the policy. In its answer the insurer alleged that the cause of death was not within the coverage of the policy and asked that the policy be cancelled for fraud. Leave was then granted to Jettie Knoll, the alternative beneficiary, to intervene in the action. Beck and Knoll each moved for judgment on the pleadings against each other, and the trial court granted Knoll's motion and ordered that the action proceed with Knoll as sole plaintiff against the insurer. Beck has appealed from the judgment that he has no interest in the policy.

[1,2] Under the terms of the policy the murderer is entitled to the proceeds, but since it would be unconscionable to allow him to profit from his own wrong, he may neither receive nor retain them. *Drown v. New Amsterdam Casualty Co.*, 175 Cal. 21, 23, 165 P. 5; *West Coast Life Ins. Co. v. Crawford*, 58 Cal.App.2d 771, 773, 138 P.2d 384; see also cases collected in 91 A.L.R. 1486. Unless the policy so provides, however, the insurer is not relieved of liability because of the disqualification of the principal beneficiary. *Meyer v. Johnson*, 115 Cal.App. 646, 650, 2 P.2d 456; *West Coast Life Ins. Co. v. Crawford*, 58 Cal.App.2d 771, 786, 138 P.2d 384; see, *Vance on Insurance* [2nd ed.] p. 599. It is therefore necessary to determine whether the proceeds should be paid to the named alternative beneficiary or to the estate of the insured.

The general principle that precludes a wrongdoer from unjustly enriching himself has been codified in sections 2224<sup>1</sup> and

1. "One who gains a thing by fraud, accident, mistake, undue influence, the vio-

lation of a trust, or other wrongful act, is, unless he has some other and better

3517<sup>2</sup> of the Civil Code and applied in a variety of situations. "[W]here the defendant has by his own wrong obtained the legal title to property, a trust as to such property will be imposed upon him in favor of the party injured. This principle is a familiar one, and is based upon the maxim, which has been carried into our Code (Civ. Code, section 3517), that no one may profit by his own wrong. The instances of its application are as various nearly as the ways in which property can be wrongfully acquired." *Brazil v. Silva*, 181 Cal. 490, 494, 185 P. 174, 176; see also, *Sears v. Rule*, 27 Cal.2d 131, 139, 163 P.2d 443; *Weinstein v. Moers*, 207 Cal. 534, 541-542, 279 P. 444; *Smith v. Lombard*, 201 Cal. 518, 527-528, 258 P. 55; *Brison v. Brison*, 75 Cal. 525, 526-527, 17 P. 689; 11 A.L.R. 2d 808; 159 A.L.R. 997; 102 A.L.R. 589. Once it is determined that the wrongdoer may not receive or retain the property, the question arises as to who is the injured party or "the person who would otherwise have had it." (Civ.Code, § 2224.) Frequently the answer is obvious. Thus in the *Silva* case, where the sole beneficiary under the will fraudulently prevented the testator from revoking it, it was clear that the heirs were the injured parties. Again, when one person conveys his property to another in reliance on a fraudulent promise to hold it in trust for the transferor, the latter is the one who would have had it but for the fraud. *Brison v. Brison*, 75 Cal. 525, 17 P. 689. The problem is more difficult, however, when the primary beneficiary of an insurance policy murders the insured. It will ordinarily be impossible to determine who would have received the proceeds but for the murder. The murderer himself might have received them through the natural death of the insured. The insured might have outlived the murderer but not the alternative beneficiary, or the insured might have changed the beneficiaries altogether. If the alternative beneficiary were older than both the primary beneficiary and the insured, the

probabilities would favor the heirs or legatees of the insured as those most likely to take but for the murder. In any event all doubts must be resolved against the murderer. Whatever the probability that he would have received the proceeds had he not murdered the insured, he cannot be allowed to insure that result by his own wrongful conduct. *Cleaver v. Mutual Reserve Fund Life Ass'n*, 1892, 1 Q.B. 147, 160; see, 3 Scott on Trusts, § 494.1, p. 2407.

As between the estate of the insured and the alternative beneficiary there are three possible solutions. It has been held that the absence of any express provision in the policy permitting the alternative beneficiary to take, when the primary beneficiary is still alive, requires that the proceeds be paid to the estate of the insured. *Beck v. Downey*, 9 Cir., 191 F.2d 150, 152. The choice might also be made on the basis of mortality tables and the proceeds paid to the person or persons who would be most likely to take had the murder not been committed. The third solution is to allow the alternative beneficiary to recover the proceeds. *Metropolitan Life Ins. Co. v. McDavid*, D.C., 39 F.Supp. 228; *Neff v. Massachusetts Mutual Life Ins. Co.*, Ohio Com.Pl., 96 N.E.2d 53, 54-55; *United States v. Kwasniewski*, D.C., 91 F.Supp. 847, 854; *Sharpless v. Grand Lodge, Ancient Order of United Workmen*, 135 Minn. 35, 37, 159 N.W. 1086, L.R.A. 1917B, 670; see, 3 Scott on Trusts, § 494.1, p. 2407; *Costigan*, Note, 9 Ill.L.Rev. 505, 509; *Wade*, Acquisition of Property by Wilfully Killing Another—A Statutory Solution, 49 Harv.L.Rev. 715, 742.

[3-5] We have concluded that the third solution should be adopted. Because the beneficiary clause of a life insurance policy in which the insured has reserved the right to change beneficiaries is donative and testamentary in character, *Grimm v. Grimm*, 26 Cal.2d 173, 175-176, 157 P.2d 841; *Landrum v. Landrum's Admx.*, 186 Ky. 775, 779, 218 S.W. 274; *Continental*

right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

2. "No one can take advantage of his own wrong."

Life Insurance Co. v. Palmer, 42 Conn. 60, 65, the intent of the insured as expressed by the language that she used should be given effect so far as possible. Estate of Lefranc, 38 Cal.2d 289, 239 P.2d 617, and cases cited; see also Probate Code § 101. Although her expressed intent that her husband receive the proceeds cannot be given effect, the policy names the one she wished to take if her husband could not. It stated that the proceeds should be paid to the alternative beneficiary, if the primary beneficiary predeceased the insured. Thus, in the type of disability that would naturally be anticipated by the insured, the alternative beneficiary was preferred over the estate of the insured. In this case there occurred the only other possible contingency in which the primary beneficiary would be under a disability equivalent to actual death. The insured has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds. A holding that the estate of the insured is entitled to the proceeds would not only defeat this intent, but would also enable the murderer to deprive the alternative beneficiary of her opportunity to take in preference to the estate by foreclosing the possibility that the murderer might predecease the insured. The rule that prevents his profiting by his own wrong should not be invoked in such a way as to prejudice the rights of the alternative beneficiary. "In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights." Fry, L. J. in *Cleaver v. Mutual Reserve Fund Life Ass'n*, 1892, 1 Q.B. 147, 160.

[6] It is contended, however, that the court may not award the proceeds to the alternative beneficiary on the theory of enforcing a constructive trust against the

murderer on the ground that the doctrine of constructive trusts does not apply to this situation in this state. In the case of intestate succession there is a specific statutory provision preventing a convicted murderer from succeeding to any part of the estate of his victim and providing how the murderer's share should be distributed. (Probate Code § 258.) Although there is no such specific provision governing the disposition of the proceeds of life insurance, it may be contended that the public policy expressed in the Probate Code prevents the passage of either equitable or legal title to the murderer. Since we are not here concerned with any possible interest of a bona fide purchaser for value from the murderer, it is unnecessary to decide whether or not legal title passed to him. Even if it is assumed that the legal title did not pass, an appropriate rule of law must be applied to determine upon whom it devolved. A refusal to allow the legal title to go to the murderer under the terms of the policy would present the same problem as that created by prohibiting him from taking the equitable title, and accordingly, the same considerations that lead the chancellor to select the alternative beneficiary as the beneficiary of a constructive trust, would lead to a rule of law that the legal title devolves upon her.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

The parties agree that there is no ambiguity in the beneficiary clause of the policy which would justify the admission of extrinsic evidence to explain the meaning of the words used in it. The decisive question, therefore, is the very narrow one of textual interpretation. In my opinion, only by ignoring the clear and unequivocal language of the policy of insurance may the conclusion be reached that the alternative beneficiary is entitled to the proceeds despite the fact that the contingency conditioning her right has never occurred.



The decision is placed upon the ground that "the policy names the one \* \* \* [the insured] wished to take if her husband could not." In effect, the clause "if living" is enlarged to mean "if living and not otherwise disqualified to take". But the provisions of the policy do not express any intent that Jettie Knoll should be the beneficiary if David Downey is disqualified for some reason other than his death. The contract specifically states, as the only contingency upon which Jettie Knoll could become entitled to its proceeds, that David Downey be not living.

"In the construction of a[n] \* \* \* instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, *not to insert what has been omitted* \* \* \*." Code Civ.Proc., § 1858. Emphasis added. In violation of this salutary rule, on the basis of conjecture, an omission is supplied which may have been either accidental or intentional.

Most of the reasoning to support the decision in favor of the alternative beneficiary is based upon the doctrine of constructive trusts. The question as to whether the doctrine is here applicable is not decided, but upon a theory which the court refuses to expressly apply, it is determined that Jettie Knoll is "the person who would otherwise have had" the property. This, says the opinion, is one of three possible solutions to the problem. It is chosen in preference to a construction that the alternative beneficiary shall take only when the express condition of her right to do so has been met.

To determine "the person who would otherwise have had" the property without giving effect to the unambiguous language of the contract is an impossible task. The insured reserved the right to change the beneficiary. Who can say what disposition Lila Downey might have made of the proceeds had she lived? She had the unqualified right to name the payee of the policy by designating the beneficiary. Under these circumstances, even if the doctrine of constructive trusts is applicable, the ultimate question is: Who is entitled to the pro-

ceeds under the express terms of the contract?

Sound public policy dictates that a murderer should not be permitted to profit from his own wrong. *Drown v. New Amsterdam Casualty Co.*, 175 Cal. 21, 165 P. 5; see cases collected in 91 A.L.R. 1486; 70 A.L.R. 1539. However, because that rule bars David Downey from receiving the insurance money, this court is not thereby at liberty to disregard the otherwise valid provisions of the policy.

To reinforce its conclusion, the majority opinion relies upon a number of cases from other jurisdictions. With one exception, each of them is distinguishable upon its facts.

In *Metropolitan Life Ins. Co. v. McDavid*, D.C., 39 F.Supp. 228, 229, the administrator of the estate of the deceased insured made no claim upon the proceeds of the policy in which a contingent beneficiary was named. The court was not faced with, and did not consider, adverse claims as between the insured's estate and the contingent beneficiary. The only question there decided was "whether Beatrice McDavid took the life of her husband, Israel McDavid, under such circumstances that she cannot receive the proceeds of these policies as she otherwise would have done." 39 F.Supp. at Page 229.

In *United States v. Kwasniewski*, D.C., 91 F.Supp. 847, the murderer was a contingent beneficiary, and the victim the principal beneficiary, of a matured policy of insurance. Of necessity the court construed a governing federal statute. 38 U.S.C.A. § 802(h). To determine the rights of the parties, it looked to the legislative purpose to provide assistance to persons dependent upon the insured. There was no contest between the estate of either the insured or the principal beneficiary and any contingent beneficiary because the statute expressly provided that no installments of insurance should be paid to the heirs or legal representatives of the insured or of any beneficiary. 38 U.S.C.A. § 802(j). *Sharpless v. Grand Lodge Ancient Order of United Workmen*, 135 Minn. 35, 159 N.W. 1086, L.R.A.1917B, 670, did not involve a

dispute between the insured's estate and a contingent beneficiary.

Only *Neff v. Massachusetts Mutual Life Ins. Co.*, Ohio Com.Pl., 96 N.E.2d 53, offers support for the present decision. The reasoning of that decision, as in the present one, entirely ignores the unambiguous language of the contract. Certainly the decision of a *nisi prius* court is not here controlling.

The majority opinion also cites, but refuses to follow, the decision of the United States Court of Appeals for the Ninth Circuit in *Beck v. Downey*, 191 F.2d 150. Petition for certiorari to the United States Supreme Court now pending. This is another case which concerns the right to the proceeds of insurance upon the life of Mrs. Downey. The district court awarded judgment to the alternative beneficiary in policies which read: "to David A. Downey, husband, as beneficiary, if living; otherwise to Jennie B. Downey, mother-in-law, as contingent beneficiary." The judgment was reversed with directions to enter one in favor of the administrator of the estate of the insured.

The majority opinion of this court inaccurately states the rule of *Beck v. Downey* to be "that the absence of any express provision in the policy permitting the alternative beneficiary to take, when the primary beneficiary is still alive, requires that the proceeds be paid to the estate of the insured." More correctly, the holding is that the contract must be given effect according to its plain terms which provide that the contingent beneficiary can take only if the principal beneficiary is not alive. The court analyzed the rights of the parties as follows: "The contingency, which was a condition precedent to Jennie B. Downey's right to the proceeds, was that David A. Downey be not 'living' at the time of the death of the insured. In the ordinary meaning of the word 'living,' the contingency conditioning Jennie B. Downey's right to the fund never occurred. For when Lila L. Downey died \* \* \*, David A. Downey was 'living.' The public policy

that prevented David A. Downey from receiving the proceeds does not produce the result of vesting the fund in the contingent beneficiary. \* \* \*

"The words 'if living' must be interpreted in their ordinary common sense meaning, namely, that the insured intended the proceeds to go to her mother-in-law, if the beneficiary was not alive but was 'dead and buried.' Had there been an intent to have the proceeds go to the contingent beneficiary in the event of any *incapacity* of the beneficiary, while alive, to take the proceeds, plain language to that effect could and certainly would have been used. We think the language of the policies was clear and unequivocal." 191 F.2d at Page 152.

The language construed in *Beck v. Downey*, *supra*, is substantially the same as that here under consideration. The two cases are identical in all material respects. They concern the same deceased and the same provision of policies upon her life. The reasoning of the federal court is equally applicable to the rights of Beck and Jettie Knoll. Although that court was not applying California law and its decision is not here controlling, it is anomalous for the two highest courts in this jurisdiction to reach opposite conclusions upon the same facts by applying the same general principles of common law.

For these reasons, I would reverse the judgment with directions to the trial court to enter a judgment ordering that Herbert Beck, administrator, is, as against Jettie Knoll, the owner of and entitled to the possession of the proceeds of the life insurance policy; that Jettie Knoll take nothing by her complaint in intervention; and that the other issues presented by the answer and cross-complaint of West Coast Life Insurance Company to the complaint of Beck, as administrator, be tried solely between them.

SPENCE, J., concurs.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

**CRAMER v. LEE WA CORP. et al.**  
**Civ. 18708.**

District Court of Appeal, Second District,  
Division 2, California.

March 12, 1952.

Rehearing Denied March 31, 1952.

Hearing Denied May 8, 1952.

William Cramer sued the Lee Wa Corporation and others to recover a real estate broker's commission. The Superior Court, Los Angeles County, Otto J. Emme, J., gave judgment for plaintiff and defendants appealed. The District Court of Appeal, Second District, McComb, J., held that agreement to pay plaintiff commission for selling house, which agreement provided for further negotiation on commission if house sold at less than specified amount, entitled plaintiff to commission in the reasonable value of his services after house was sold by another at less than the specified amount.

Affirmed.

**1. Brokers** ⇨43(3)

A written contract to employ a real estate broker need not express all the terms of employment, or state the amount of compensation to be paid, and is sufficient if fact of employment is certain.

**2. Brokers** ⇨71

Where real estate broker's contract of employment does not show the amount of commission to be paid it will be construed as an agreement to pay a reasonable sum.

**3. Brokers** ⇨71

If real estate broker's contract leaves determination of amount of commission to later negotiations and parties are unable to agree, broker is entitled to a commission in amount equal to reasonable value of services rendered.

**4. Brokers** ⇨55(2)

Where vendor agreed to pay broker specified commission for sale at more than \$50,000 net to vendor and to negotiate with broker on new commission basis if it were necessary to sell at less than \$50,000 net, sale of property by another at \$47,000 entitled broker to commission.

**5. Brokers** ⇨85(10)

In action to recover broker's commission, under vendor's agreement to pay

specified commission for sale at more than \$50,000 net to him and to negotiate on new commission basis if it were necessary to sell at less than \$50,000 net, on sale made by another at \$47,000, evidence as to reasonable value of broker's services was properly received.

**6. Brokers** ⇨86(8)

In action to recover broker's commission under contract specifying parties would negotiate as to amount of commission, broker's testimony that his services were reasonably worth \$15,000 sustained finding that his services were of the reasonable value of \$14,044.50.

**7. Brokers** ⇨49(1)

Real estate broker's contract in which vendor agreed that if it became necessary to sell at less than \$50,000 net to him, he would negotiate with broker on new commission basis, did not limit broker's right to commission to situation where sale of property netted vendor at least \$50,000.

**8. Evidence** ⇨213(1)

In action to recover real estate broker's commission, evidence that broker, during course of negotiations in effort to compromise, had offered to take \$6000 in settlement, was received for limited purpose of showing attempts at negotiating a settlement and did not limit broker's recovery to \$6000. Code Civ.Proc. § 2078.

**9. Appeal and Error** ⇨843(1)

Where one count of a complaint was supported by evidence and sustained the judgment, errors alleged with reference to other count in complaint were not considered since a reversal of judgment would not result.

---

Shepherd & Shepherd, Los Angeles, for appellants.

Frye & Yudelson, North Hollywood, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a real estate broker's commission, defendants appeal.



*Facts:* Defendant corporations owned certain apartment buildings which became the subject of negotiations leading to a preliminary agreement dated October 25, 1949, whereby the companies transferred three apartment buildings to Rodney M. Benson in exchange for a piece of property located at 6601 Langdon Avenue, Van Nuys. This agreement provided that the commission to be paid plaintiff was "to be mutually agreed upon."

Thereafter defendant corporations delivered to plaintiff a listing agreement containing this provision: "If a sale or exchange is effected by him during their agency for the above described property, I agree to pay them Five (5%) percent of the selling price, as commission for their services, \* \* \*."

On October 26, 1949, plaintiff and defendants entered into a further agreement reading as follows:

"Regarding Standard Exchange Agreement, dated October 26th, between Lee Wa Corp., Dickens St. Company, Jenner Corp. of which I am President and Mr. Rodney G. Benson, Jr., wherein I am exchanging 3 apartment buildings, legally described as Lots 503, 443 and 508 of Tract 5822, M.B. 66 P. 64-65, in City and County of Los Angeles State of California, for a home located at 6601 Langdon Ave., Van Nuys, legally described as Lots 17 & 18 and South-erly 4.80 ft. of Lot 19 of Tract 11449 M.B. 255 P. 14-15, City and County of Los Angeles, State of California; I hereby agreed to pay William Cramer, a licensed realtor commission after completion of this exchange on the following basis as remuneration for his work in negotiating said exchange:

"It is understood that the home at 6601 Langdon Avenue, is to be sold, at which time I will pay William Cramer, his commission on following basis:

"Asking price for home & furnishings \$85,000.00.

"At above price I will pay William Cramer \$20,000 commission, for his entire services in entire deal.

"If the home and furnishings is sold at less than \$85,000 I will pay William Cramer a minimum of \$15,000 commission, providing I at least receive \$50,000 net to me less escrow & title charges.

"If it becomes necessary to sell the house at a lesser price than that which nets me \$50,000, I will negotiate with William Cramer on a new commission basis."

About June 14, 1950, the property was sold for \$47,000 through another broker, and after defendants denied a demand for his commission, plaintiff instituted the present action.

[1-3] *Questions:* First: *Did the evidence disclose that plaintiff was entitled to judgment for the reasonable value of the services rendered by him to defendants?*

Yes. The following rules are here applicable:

(1) All the terms of employment of a real estate broker need not be expressed in writing. It is sufficient if the fact of employment is certain. The contract need not state the amount of compensation to be paid. (*Caminetti v. National Guaranty Life Co.*, 56 Cal.App.2d 92, 95[1], 132 P.2d 318.)

(2) Where a broker's contract of employment does not show the amount of commission to be paid it will be construed as an agreement to pay a reasonable sum. (*Caminetti v. National Guaranty Life Co.*, supra.)

(3) If a real estate broker's contract leaves the determination of the amount of commission to later negotiations and the parties are unable to agree, then in an action instituted to recover the commission, the court will allow the broker a commission in an amount equal to the reasonable value of the services rendered. (*Caminetti v. National Guaranty Life Co.*, supra; *Muncy v. Thompson*, 26 Cal.App. 634, 636, 147 P. 1178.)

[4,5] Applying the foregoing rules to the facts of the instant case, under rule (1), supra, plaintiff was entitled to a commission after the written agreement employing him had been signed, the properties

exchanged and the Langdon Avenue property sold. Under rules (2) and (3), the parties not having been able to agree upon a commission, the trial court properly received evidence as to the reasonable value of plaintiff's services and gave judgment accordingly.

[6] Second: *Was there substantial evidence to sustain the trial court's finding that plaintiff's services were of the reasonable value of \$14,044.50?*

Yes. Plaintiff testified that his services were reasonably worth \$15,000. This evidence sustains the trial court's finding as to the reasonable value of plaintiff's services, in fact, the trial court might have accepted plaintiff's testimony and awarded a larger amount.

[7] Third: *Did the provision in the contract of October 26, 1949, reading, "If it becomes necessary to sell the house at a lesser price than that which nets me \$50,000, I will negotiate with William Cramer on a new commission basis" limit plaintiff's right to a commission to a situation where the sale of the property netted defendants at least \$50,000?*

No. The quoted language simply provided that if the sale of the property did not net defendants at least \$50,000, then defendants would negotiate with plaintiff for the amount of his commission.

Where the parties are unable to agree on the commission, as in the present case, under rules (2) and (3) set forth above in answering the first question, the amount of commission is the reasonable value of the services as found by the trier of fact supported by substantial evidence.

[8] Fourth: *Was plaintiff's recovery limited to \$6,000 because, during the course of negotiations in an effort to compromise, plaintiff had offered to take \$6,000 in settlement of his claim?*

No. Such evidence was received for the limited purpose of showing attempts at negotiating a settlement. In view of the circumstance that it was made by way of compromise, it was not binding upon plaintiff. (Cf. Code of Civ.Proc. section 2078.)

[9] Since one count of the complaint seeking to recover the reasonable value of services rendered was supported by evidence, which count in turn sustained the judgment, errors alleged by counsel with reference to the other count in the complaint will not be considered since, regardless of the determination of the questions raised by counsel with reference to the other counts a reversal of the judgment would not result. (Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 349 [11], 103 P.2d 188.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



109 Cal.App.2d 823

GRIFFIN et al. v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 1-13 et al.

Civ. 18385.

District Court of Appeal, Second District,  
Division 2, California.

March 19, 1952.

Ralph Griffin and others brought mandamus proceedings against the International Longshoremen's and Warehousemen's Union, Local 1-13, (an unincorporated association and labor union) and another to compel defendants to reinstate plaintiffs in union. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that plaintiffs' fourth amended petition was demurrable because it showed on its face that plaintiffs were guilty of laches.

Affirmed.

#### I. Pleading 193(4)

The defense of laches can be raised by demurrer where the laches is apparent on face of petition or complaint.

**2. Equity** ⇨84

The application of the doctrine of laches depends on the facts and circumstances in each case.

**3. Mandamus** ⇨143(2)

Where in mandamus proceedings to compel defendants to reinstate plaintiffs in union it was apparent on face of fourth amended petition that more than four years had elapsed since time of alleged acts of defendants, and there was nothing in fourth amended petition to show any excuse or reason for the long delay, and plaintiffs were seeking large sums of money by way of damages, and damages would be very much greater if proceedings should then be tried than if proceedings had been promptly instituted and tried, fourth amended petition was demurrable on ground of laches.

**4. Equity** ⇨88

Failure of defendants to oppose the filing of fourth amended petition by plaintiffs was not a waiver by defendants of their rights to rely on doctrine of laches.

**5. Pleading** ⇨253

When an amended complaint or petition is filed, a defendant has a right to plead de novo.

**6. Limitation of Actions** ⇨39(1)

Cause of action for violation of the public policy of the state by expelling Negro plaintiffs from union was barred by four-year limitation statute. Code Civ.Proc. § 343.

Edward S. Cooper, Los Angeles, for appellants.

George E. Shibley, Long Beach, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of a demurrer without leave to amend to plaintiffs' fourth amended petition for a writ of mandate to compel defendants to reinstate plaintiffs in the union, plaintiffs appeal.

*Chronology:*

i. November 15, 1948, the original petition herein was filed in which plaintiff

Griffin alleged that on April 16, 1946, he and other unidentified members were wrongfully expelled from defendant union;

ii. January 4, 1949, an amended petition was filed containing a claim for damages;

iii. March 30, 1949, a demurrer to the first amended petition was sustained with leave to amend;

iv. April 11, 1949, a second amended petition was filed;

v. May 9, 1949, a demurrer was sustained to this petition with leave to amend;

vi. May 19, 1949, a third amended petition was filed wherein some of the present plaintiffs were joined as parties; defendants filed an answer to this petition;

vii. May 8, 1950, plaintiffs' motion for leave to file a fourth amended petition was granted; and

viii. July 27, 1950, demurrer to the fourth amended petition was sustained without leave to amend, resulting in the present appeal.

*Questions:* First: *Does the fourth amended petition show upon its face that the alleged causes of action are barred by laches?* Yes. The following rules are applicable:

[1] (1) The defense of laches can be raised by demurrer where the laches is apparent upon the face of the petition or complaint. (King v. Los Angeles Co. Fair Ass'n, 70 Cal.App.2d 592, 596[4], 161 P.2d 468.)

[2] (2) The application of the doctrine of laches depends upon the facts and circumstances in each case. (King v. Los Angeles Co. Fair Ass'n, supra.)

[3] In the present action it is apparent upon the face of the record plaintiffs are guilty of laches. The original petition was not filed until two years and seven months had passed after the alleged wrongful acts of defendants, and it was more than four years after such alleged acts that plaintiffs filed the fourth amended petition.

Nothing is alleged in the pleading to show any excuse or reason for such long delay.



It is evident that this was prejudicial to defendants' rights because plaintiffs are seeking large sums of money by way of damages, which amount would be very much greater if the action were tried at this late date than if it had been promptly instituted and tried. The foregoing conclusion is in accord with the adjudicated cases.

In *Newbury v. Civil Service Commission*, 42 Cal.App.2d 258, 108 P.2d 745 (hearing denied by the Supreme Court) it was held that a petition for a writ of mandate seeking appointment to a municipal position was barred by laches. It appeared that petitioner waited for more than a year and a half after he knew that another had been appointed to the position before he sought relief.

In *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, 62 P.2d 1047, (hearing denied by the Supreme Court) petitioner waited for more than nine months before taking action to obtain a position as motor truck driver in a municipal department. The court held that his claim was barred by laches; Mr. Justice Shinn, speaking for the court saying at page 680 of 17 Cal.App. 2d, 62 P.2d 1047, 1050, "The law is well settled that one who seeks the remedy of *mandamus* to compel his reinstatement to a civil service position from which he has been dismissed must act promptly."

In *Jenkins v. Superior Court*, 98 Cal.App. 729, 277 P. 757, the court held an application for a writ of mandate predicated upon facts which had occurred a year and a half before was properly denied on the ground the relief had not been diligently and reasonably sought.

A like result was reached in *King v. Los Angeles County Fair Ass'n*, *supra*, wherein relief was not sought until more than two

years after the facts and circumstances alleged to have given rise to the cause of action had taken place. It was held that the alleged cause of action was barred by laches.

[4, 5] Plaintiffs' contention that defendants have waived their right to rely upon the doctrine of laches because they did not oppose the filing of the fourth amended petition is devoid of merit. When an amended complaint or petition is filed a defendant has a right to plead *de novo*. (*Wilson v. First National Trust & Savings Bank*, 73 Cal.App.2d 446, 449[1, 2], 166 P.2d 593; *Scott v. McPherson*, 168 Cal. 783, 786, 145 P. 529.)

[6] Second: *If the fourth amended petition is considered as alleging a cause of action predicated upon a claim of violating the public policy of the State of California, were plaintiffs' causes of action barred by the statute of limitations? Yes.* It is alleged for the first time in the fourth amended petition filed more than four years after the alleged acts of discrimination took place that defendants expelled plaintiffs from the union because of the fact that they were Negroes. If such were the fact it would be contrary to public policy of the nation and this state. (*James v. Marinship Corp.*, 25 Cal.2d 721, 739, 155 P.2d 329, 160 A.L.R. 900.)

However such a cause of action must be instituted within four years after it arises, otherwise it is barred by the statute of limitations. (Sec. 343, Code of Civ. Proc.\*)

In the present case plaintiffs' claim predicated upon such cause of action is barred.

Affirmed.

MOORE, P. J., and FOX, J., concur.

\* Section 343, Code of Civil Procedure reads: "An action for relief not hereinbefore provided for must be commenced

within four years after the cause of action shall have accrued." (The relief here sought is not otherwise provided for.)

109 Cal.App.2d 709

**In re KIRKPATRICK'S ESTATE.****KIRKPATRICK v. KIRKPATRICK.**

Civ. 1866.

District Court of Appeal, Second District,  
Division 2, California.

March 13, 1952.

Julia C. Kirkpatrick, administratrix of estate of Russell C. Kirkpatrick, deceased, filed her first and final account and petitioned for distribution and John R. Kirkpatrick, son of decedent by former marriage, filed objections to said account whereupon the administratrix filed amended second and final account and petitioned for distribution. The Superior Court, Los Angeles County, Otto J. Emme, J., ordered the amended second and final account settled and John Kirkpatrick appealed. The District Court of Appeal, Second District, Moore, P. J., held that act done to preserve the estate, though without prior court approval and although irregular, did not necessitate court's rejection of account.

Order affirmed.

**1. Executors and Administrators ⇨504(1)**

Where administratrix used her own funds to refinance and make payments on estate's automobile under honest belief that she thereby prevented total loss to the estate of its equity in the vehicle, such procedure, though without prior court approval and although irregular, did not necessitate court's rejection of administratrix' final account, since it was primary duty of administratrix to preserve the estate.

**2. Executors and Administrators ⇨82**

When administrator has done an act for purpose of saving estate from loss without first having procured an order of court to do so, the act will be approved if circumstances were such that a reasonably prudent man would have done likewise.

**3. Executors and Administrators ⇨281**

Where a just obligation against an estate has been paid in good faith even in absence of a verified claim, it is not improper for the court subsequently to approve the payment of such sums. Probate Code, § 929.

**4. Executors and Administrators ⇨481**

Where administratrix used own funds to refinance and pay for intestate's automobile, transferred title of vehicle to her name, and used vehicle during probate, and trial court, in settling account, deemed her innocent of bad faith and impliedly found that by protecting estate she rendered valuable service which counterbalanced her casual use of vehicle, administratrix was entitled to credit for difference between amount due on automobile loan at death and balance due at accounting.

**5. Executors and Administrators ⇨506(1)**

In proceeding to settle administratrix' final account, contestant who proposed surcharges had burden of proof.

**6. Executors and Administrators ⇨504(4)**

In proceeding to settle administratrix' final account, it was incumbent upon contestant to specifically allege objections and failure to do so operated as a waiver of any further opposition.

**7. Executors and Administrators ⇨510(8)**

In proceeding to settle administratrix' final account where contestant emphasized errors, omissions and discrepancies in probate documents but administratrix impressed trial court with her honesty and good faith, and where estate was limited and no loss resulted because of administratrix' conduct, contestant was not prejudiced by approval of final account.

**8. Executors and Administrators ⇨115**

Technical errors are not uncommon where personal representatives have an interest in estate and in such event the court's primary duty is to avoid loss to estate rather than to punish or embarrass administrator.

Vernon Bettin and Roscoe R. Hess, Los Angeles, for appellant.

Shelby Lee Chambers and John R. Barta, Los Angeles, for respondent.

MOORE, Presiding Justice.

Russell C. Kirkpatrick departed this life intestate in April, 1948. He left a widow, Julia, and a son by a former marriage. In

qualifying as administratrix of the modest estate, the widow did not list the son as an heir although she knew of his existence. Having concluded that the estate was community property and that all of it passed to her, she considered the son was not an heir. June 15, 1948, she filed an inventory consisting of three items which were duly appraised as follows:

|                                   |        |
|-----------------------------------|--------|
| Buick sedanet, subject to loan of |        |
| \$1593.40 .....                   | \$2150 |
| Note and mortgage .....           | 2100   |
| Note and mortgage .....           | 1000.  |

Six months later she filed her first and final account and petition for distribution. She was therein debited with the amount of the inventory and credited with expenses of administration in the sum of \$279.85<sup>1</sup>. Al-

so, she had out of her own funds paid the only claim filed in the sum of \$284.17 and she waived the statutory fee due her as administratrix. In January, 1949, the son, John Kirkpatrick, filed his objections to the last above mentioned account, recited family history and demanded that one half of the estate be distributed to him.

In June, 1950, Julia filed her "amended second and final account and petition for distribution" in which she charged herself with two additional items of interest collected on the two notes in addition to the same items as charged in the prior final account, making the total \$5,528.25 and credited to herself the costs of administration and other necessary outlays for the benefit of the estate aggregating \$2,136.09<sup>2</sup>.

1. Petitioner is entitled to the following credits:

"Credits

"Expenses of Administration

|                                               |                 |
|-----------------------------------------------|-----------------|
| "Filing fee                                   | \$ 10.00        |
| Certified Copies of Letters of Administration | 1.10            |
| Premium on Bond                               | 15.00           |
| Publishing Notice to Creditors                | 7.50            |
| Appraiser's fee                               | 6.25            |
| Attorney's Statutory Fee                      | 240.00          |
| "Total Credits                                | <u>\$279.85</u> |

"Estate in Hands of Administratrix

|                                                                                                                                                                                   |                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| "1946 Buick Sedanet, subject to loan of \$1593.40                                                                                                                                 | \$2,150.00         |
| "Note and mortgage in sum of \$2,100<br>executed November 3, 1947, by<br>George W. Mirich and Ruth V.<br>Mirich, 6% interest, covering<br>real property in Polk County,<br>Oregon | \$2,100.00         |
| "Note and mortgage in sum of \$1,000<br>executed November 24, 1947, by<br>John and Caroline Walter, 6%<br>interest, covering real property<br>in Marion County, Oregon            | \$1,000.00         |
|                                                                                                                                                                                   | <u>\$5,250.00"</u> |

2. "Credit allowed by Order of Court on hearing of  
March 17, 1949

|                                                                               |           |
|-------------------------------------------------------------------------------|-----------|
| Premium on Bond                                                               | \$ 324.02 |
| Utter-McKinley, funeral expense advanced by<br>Administratrix from her funds  | 15.00     |
| Inglewood Park Cemetery, burial, advanced by<br>Administratrix from her funds | 180.71    |
| Reduction of automobile loan, advanced by<br>Administratrix from her funds    | 144.50    |
| Statutory Attorney's fees (On \$5,528.25)                                     | 802.45    |
| Statutory Administratrix fees (on \$5,528.25)                                 | 251.13    |
| Difference of Value of Item B                                                 | 251.13    |
| Difference of Value of Item C                                                 | 73.23     |
|                                                                               | 75.52     |

"Total Credits \$2,136.09"



This account was by order settled leaving in the administratrix' hands for distribution the assets of the estate "after the payment of the credit due said Administratrix," one half to Julia and one half to John.

Although numerous grounds<sup>3</sup> are asserted as reasons for reversal, only a few require discussion. Of concern primarily are alleged errors made by the court below in (1) failing to surcharge the administratrix with the value of the use of an automobile left by decedent, (2) to surcharge herself with the equity of decedent in the car at the time of his death, and (3) in allowing her a credit with regard to payments made on a subsisting encumbrance against the vehicle.

The automobile, valued at \$2,150 at decedent's death, was subject to a loan of \$1,347.15. Respondent paid this obligation and refinanced the vehicle. At the time of her final accounting there was still a \$544.30 balance outstanding. Also, she maintained and used the vehicle during the period of administration and caused it to be registered in her individual name. Under cross-examination by appellant's counsel, Julia admitted having used the automobile; also, she refinanced it.

[1-3] However, her testimony satisfied the court that she honestly believed that by obtaining the new loan she was enabled to prevent the total loss of the vehicle to the estate and that by her act she did protect the estate to the extent of the value of the estate's equity in the vehicle. Such procedure, though without prior court ap-

proval and although irregular, did not necessitate the court's rejection of the account for the reason that it is the primary duty of the administratrix to preserve the estate. 11 B Cal.Jur., p. 253. When an administrator has done an act for the purpose of saving the estate from loss without first having procured an order of court to do so, the act will be approved if the circumstances were such that a reasonably prudent man would have done likewise. See Estate of Armstrong, 125 Cal. 603, 606, 58 P. 183. Where a just obligation has been paid in good faith even in the absence of a verified claim, it is not improper for the court subsequently to approve the payment of such sums. Probate Code, sec. 929.

[4] The payment of \$802.85 by Julia to protect the estate against loss of the sedanette was no slight adventure in administering an estate of a modest inventory. She thereby rendered a valuable service to the estate which the court impliedly found to counter-balance the widow's casual use of the vehicle. The transfer of registry of the machine was not without its advantages. Julia sincerely believed that by registering the car in her name she could more readily refinance the existing mortgage. By reason of the facts that in advancing her separate funds to reduce the loan on the inventoried automobile and caring for it during administration, neither her use of nor her transfer of its registry to "Julia Kirkpatrick" nor the collective vice of both acts could have fairly justified the court in surcharging the administratrix with the

### 3. "Assignments of Error

"1. Failure to surcharge administratrix with equity in automobile as of date of death.

"2. Failure to surcharge administratrix with compound interest upon equity in automobile, the value of wrist watch, not listed in the inventory.

"3. Allowance of attorney's fees and commissions based upon unpaid principal of two notes, estate's interest being only a half interest therein.

"4. Allowance to administratrix of credit of the difference between original loan on automobile and the reduced loan, such credit having the effect of allowing her sole, free use of the car for over two years.

"5. Failure to make specific finding upon the issues of bad faith, negligence and improper conduct of administratrix raised by the objections to the account.

"6. Approval of account without requiring administratrix to establish affirmatively the propriety of the charges and credits.

"7. Failure to find on specific issue of her failure to sell automobile, there being no sufficient evidence for implied finding that it would have been lost if she had not paid the loan and refinanced it.

"8. Failure to rule clearly on motion to strike evidence."

car's value at the date of death. Clearly, the court deemed her innocent of bad faith and of such official improprieties as would warrant the imposition of penalties. Accordingly, the credit of \$802.85, the difference between the debt at death and balance now due on the sedanette, was the proper and correct sum by which she reduced the obligation of her husband's estate.

Appellant asserts also that the court erred in approving the administratrix' account without affirmative proof by her of all charges and credits set forth therein. Appellant's objections as filed, however, did not question any of the debits alleged. His only attack upon the credits referred to attorney's and administratrix' fees and the credit of \$802.85 she had paid on the automobile. As to such fees, the court found in accordance with appellant's objections. As to the credit on the amount due on the vehicle, ample testimony was heard. It disclosed that at her husband's death, Julia had to borrow money from her mother to liquidate the mortgage on the automobile. Thereafter she borrowed other moneys in order to repay her mother. After that transaction she made the payments and kept the car insured.

[5, 6] Other matters raised by appellant were affirmative allegations or attempted surcharges upon which he had the burden of proof. They constituted new and affirmative matter in opposition to the account. Estate of Vance, 141 Cal. 624, 626, 75 P. 323. If there were further objections to the final account, it was incumbent upon appellant specifically to allege them. Failure to do so operates as a waiver of any opposition thereto. Estate of More, 121 Cal. 635, 639, 54 P. 148.

[7, 8] Appellant has with prolixity set forth in his briefs the proceedings to date in this matter and has attempted to emphasize many errors, omissions and discrepancies in the various documents filed by respondent in connection with official duties. Such argument is apparently made for the purpose of demonstrating bad faith and improper conduct. It is true that the record herein reveals a degree of carelessness and perhaps a failure to adhere to the precise

letter of the probate law. However, respondent made such explanations of her actions as to impress the trial court with her honesty and good faith. In view of the rather limited estate left by decedent and no loss having resulted by reason of the conduct of the administratrix, it cannot be said that appellant was prejudiced by the court's approval of the final account. Such technical errors as allegedly occurred are not uncommon where personal representatives have an interest in the estate. In such event the court's primary duty is to avoid loss to the estate rather than to punish or embarrass the administrator. Many of the criticisms urged by appellant under the doctrine of *de minimis* relate to nonessentials and do not warrant intervention by the reviewing court.

Order affirmed.

McCOMB and FOX, JJ., concur.



# PEOPLE v. SOUTHACK.\*

Cr. 4717.

District Court of Appeal, Second District,  
Division 1, California.

March 13, 1952.

Rehearing Denied March 24, 1952.

Hearing Granted April 10, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Otto J. Emme, J., of manslaughter, and he appealed from the judgment and order denying motion for new trial. The District Court of Appeals, Drapeau, J., held that it was error for judge to allow private conference before bench among counsel for people, and for defendant and judge, upon admission of evidence.

Judgment and order reversed.

White, P. J., dissented.

## I. Criminal Law 635

Criminal trials require that defendant and whole court, and others there present, shall hear what is said and see what is done by everyone.

\* Subsequent opinion 248 P.2d 12.

**2. Criminal Law** ⇨635

In homicide prosecution, allowing conference to be held at judge's bench upon admissibility of evidence among counsel for people and for defendant and judge, so that no one else in the court room could hear and of which no record was made, was error.

**3. Witnesses** ⇨388(8)

In homicide prosecution, allowing prosecutor to put the impeaching question to defendant and his witness after reading prior statements at preliminary investigation which did not fairly impeach witnesses' testimony and then ask argumentative questions as to whether statements were contradictory, was error.

**4. Witnesses** ⇨388(1)

Impeaching evidence to lay foundation for impeachment must be plainly inconsistent with testimony sought to be impeached.

**5. Witnesses** ⇨388(1)

Where party seeking to impeach witness's testimony reads the impeaching evidence and asks the question, "Did you so testify?", no argumentative questions should follow.

**6. Witnesses** ⇨388(1)

In attempting to impeach a witness's testimony, interrogating witness in terms of conclusions as to whether former testimony is contradictory is not permissible.

**7. Witnesses** ⇨388(6)

It is unfair to defendant in criminal case for prosecutor to assume to prove prior statements said to be impeaching by merely producing witness to testify from memory as to exact language of questions asked and answers given on prior examination, without using memoranda.

**8. Criminal Law** ⇨761(16)

Trial court should not assume in an instruction that defendant has confessed to crime when he has not.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

On the afternoon of a hectic day in April, 1951, defendant was standing in the doorway of his home, with a loaded shotgun in his hand. He was facing his former son-in-law, who was standing on the front porch. The gun fired. Its charge struck the son-in-law in the face, killing him instantly. Defendant was tried for murder, convicted by a jury of manslaughter, and appeals from the court's judgment sentencing him to state's prison, and from an order denying him a new trial.

The son-in-law was divorced from defendant's daughter, and the decree had become final. There was a little girl of this marriage. The daughter and her little girl were living in the home of her father and mother.

On at least two occasions before the shooting, the son-in-law had appeared at defendant's home, under the influence of liquor, had threatened to kill defendant and his family, and had cursed everyone in sight.

On the second of these occasions he forcibly entered defendant's house, yanked the telephone off the wall, pulled a knife on defendant, kicked in the doors and broke up the furniture, including defendant's television set. For this offense he was haled into court, pleaded guilty, and was put on probation. On this occasion sheriff's officers who investigated the breach of the peace told defendant he had a right to kill the man if necessary to protect his home and family. And one of the conditions of his probation was that he was to remain away from his former wife.

On the afternoon of the homicide the son-in-law came to defendant's home three times. The first time he was met by his former wife outside the house. He demanded permission to take the little girl for a ride. The mother refused because he was obviously considerably under the

Bertram H. Ross, Los Angeles, for appellants.



influence of liquor. Then he cursed her and her father, and threatened to kill the whole family, and kicked over the garbage can. He went away before sheriff's officers could be summoned.

The second time he came on that day he kicked the front door so hard that it jarred the whole house. He did not get inside, because the door was secured with a safety chain. Again he left before peace officers could be summoned.

On the third and last time he came, he again cursed everybody, and threatened to kill the defendant and the whole family. This time he remained until officers from the sheriff's substation at Norwalk arrived. Defendant told the officers that the son-in-law could not come into his house, but that the others could. The officers advised everyone to keep the peace, but unfortunately got back into their patrol car without requiring the son-in-law to leave.

Defendant's daughter walked toward the front door of the house. Her former husband intercepted her at the front porch. His talk was loud, profane and threatening. Defendant came to his door, holding his loaded shotgun in his right hand. The girl sensed that her father was in the door. She started back into the house, bumped into her father, and the gun discharged, with the fatal result.

There is grave question whether the evidence supports even a verdict of manslaughter, when one gives to defendant the benefit of a reasonable doubt, and the presumption of innocence to which under our law he is entitled.

In any event, the judgment must be reversed for a number of errors, any one of which alone would require the same holding. These errors are as follows:

[1,2] On three different occasions, called upon to rule upon the admission of evidence, a conference was held at the judge's bench among counsel for the people and for defendant and the judge. The record does not disclose what was said by any of the parties, and this court is unable to determine why the rulings were made. Criminal trials require that the defendant and the whole court, including the defend-

ant, and others there present, shall hear what is said and see what is done by everyone. The practice of holding private conversations at the bench which no one else in the court room hears, and of which no record is made, is contrary to the standards of trial practice which it is the function of this court to maintain.

[3] On a number of different occasions, on cross examination of defendant's witnesses, there was particularly gross misconduct by counsel for the people. Time and again he read from what he said was a transcript of questions and answers of these witnesses, at what he said was an investigation by sheriff's officers on the day of the homicide. The questions and answers as he read them did not fairly impeach the witnesses' testimony. Then when witnesses answered the question, "Did you so testify?" counsel went further and argued with them, saying, "Now which time were you telling the truth?" Objections to this form of question were repeatedly overruled, and motions to strike denied.

Particularly obnoxious was the cross examination of defendant's daughter. For a sample of it, consider the following:

"Now, I ask you were you asked those questions and did you give those answers? A. I gave those answers, yes, but it is entirely wrong, of what happened, I was half out of my mind when all this happened; I was in a nervous state, to be frank with you. I don't really remember too much of what I said in that transcript that you have there.

"Q. And you are telling us, are you, that when Mr. Haight asked those questions and you gave these answers, you were not telling the truth; is that right?"

(Objection made and overruled.)

"The witness: What was that?"

"Q. At the time you gave these answers to Sgt. Haight's questions, you were not telling the truth, is that right?"

\* \* \* \* \*

"Q. All right, now, when you gave that answer, was that answer true?"

(Objection made and overruled.)

"Q. Was that answer that you gave true? A. True to the extent of what I had said there, yes.

\* \* \* \* \*

"Q. And that was not true?"

[4-6] It would seem that any tyro at the bar should know the time-honored rules in respect of impeaching questions of this sort: First, the impeaching evidence must be plainly inconsistent with the testimony sought to be impeached. *People v. Radovich*, 122 Cal.App. 176, 9 P. 2d 542; *People v. Peter*, 125 Cal.App. 657, 14 P.2d 166; *People v. Smith*, 25 Cal.App. 2d 241, 77 P.2d 277. Secondly, when the question, "Did you so testify?" is answered, no argumentative questions should follow. Interrogating a witness in terms of conclusions as to whether the former testimony is contradictory is not permissible. *People v. Larrios*, 220 Cal. 236, 30 P.2d 404.

No record of success in obtaining convictions in criminal cases is worth the injustice and injury inflicted upon the defendant in this case. As Mr. Justice McFarland said long ago in the case of *People v. Wells*, 100 Cal. 459, 465, 34 P. 1078, 1080:

"It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent."

The people called as a witness on rebuttal a sheriff's officer, who testified from memory as to the exact language of questions asked and answers given on the examination at the sheriff's office, none of which was in fact impeaching. The witness made no memoranda for himself. No shorthand reporter was called to testify as to what had been said. And there was no evidence that this witness had even refreshed his memory.

[7] No man has that good a memory. It is unfair to a defendant in a criminal

case to assume to prove in that way statements supposed to have been made, said to be impeaching. So far as the record before this court goes, defendant freely answered questions put to him by the sheriff's officers. His statements there and his testimony in court were to all intents and purposes the same. He stood in the doorway of his home to protect it and his family; the man who was killed had threatened them all, and on one occasion had inflicted great damage in defendant's home; and while the gun was in defendant's hand it was accidentally discharged.

[8] The court read to the jury long and detailed stock instructions on confessions. Defendant made no confession; such portions of his statements at the sheriff's office as were read were not a confession, and no instructions on confessions should have been given. The trial court should not assume in an instruction that a defendant has confessed a crime, when he has not. *People v. Strong*, 30 Cal. 151; *People v. Andrade*, 29 Cal.App. 1, 154 P. 283.

The judgment and the order denying a new trial are, and each of them is, reversed.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent.

Since appellant in his opening brief states that he "does not question the sufficiency of the evidence to justify the verdict", I am not concerning myself with the factual background surrounding this prosecution, but will confine myself to the claimed legal errors which allegedly occurred during the trial.

Regarding the alleged error in the cross-examination of appellant's witnesses and in particular, during the cross-examination of his daughter, it appears in the record that at the trial this witness gave testimony at variance with statements made by her to the officers immediately following the homicide. In the instant case, the attempted impeachment of the witnesses, including appellant, was in ac-

cordance with section 2052 of the Code of Civil Procedure. Appellant's daughter was permitted to explain the apparent inconsistency in her testimony, which she did by saying that at the time she made her statement to the officers she "was in a nervous state, to be frank with you, I don't really remember too much of what I said in that transcript that you have there". Proof of prior statements made by a witness, inconsistent with his or her testimony, is a recognized and proper means of impeachment, and goes to the credibility of such witness. A reading of the record convinces me that the impeaching questions were not directed to a collateral matter but had a direct bearing on the circumstances and transactions which resulted in the homicide. Since no claim is made that the evidence was insufficient to sustain the judgment of conviction, I fail to see wherein prejudicial error may be predicated upon the rulings of the court concerning the questions asked in an attempt to impeach appellant and his witness during cross-examination.

Concerning appellant's complaint that the court erroneously instructed the jury on the subject of confessions and admissions, the record reveals that the court instructed the jury that evidence was received tending to show that on an occasion other than the trial appellant made statements tending to prove his guilt of the crime charged. That such a statement may be either a confession or an admission. That a confession is a statement acknowledging a certain conduct constituting the crime for which he was on trial, disclosing his guilt of said crime and excluding the possibility of a reasonable inference to the contrary. The jury were further told that if they found that a confession was made, they were to decide whether it was true. Further, they were told that an admission is something less than a confession, which does not concede guilt, but which proves a fact of some element of the crime.

The jury were then instructed that the law forbade them to consider a confession unless it was voluntary; that they were to determine whether it was voluntary;

that this rule is not applied to an admission not amounting to a confession. The court then admonished them to view with caution the testimony of any witness purporting to relate an oral admission or confession. A further instruction was given defining for the jury when a confession is involuntary.

Appellant earnestly contends that no confession is to be found in the record of this case and thus the instructions unduly stressed the definition of a confession to his prejudice in that a jury might believe from such instructions that appellant had confessed to the crime. Appellant places great reliance upon the case of *People v. Strong*, 30 Cal. 151, in which it was held that the giving of an instruction on confessions was erroneous where no confession was contained in the record. However, it is to be noted that in the cited case all the evidence was circumstantial. The decision indicates that no statements were made which could be construed either as a confession or admission. Without quoting verbatim the instruction in question which appears in the decision of the court, suffice it to say that the Supreme Court held that this instruction as given would have been erroneous even if there had been any degree of admission to participation in the crime because the instruction failed to advise the jury that it was for them to determine whether such evidence amounted to proof of the fact.

In the case at bar, we are not confronted with a record such as that contained in the *Strong* case because, in my judgment, the appellant herein did make certain statements tending to show guilt. Also, the instructions given are admittedly correct statements of the law. In the case at bar the jury were told that they were the judges of whether the statement made was a confession or an admission; that testimony indicating such statements should be viewed with caution.

Although not appearing in the majority opinion, we do find in the record evidence of extra-judicial statements made by appellant as follows: inside the house before the shooting appellant stated he would shoot the deceased if the latter came in



the house. He was warned by a deputy sheriff that he might be charged with murder if he did so. When the door to the house opened later, and appellant pointed the gun in the deceased's direction, he said, "You can not come into this house, but the doctor can. If you do, I will shoot you." When the deceased requested appellant to step outside, appellant replied, "Why, you yellow-bellied bastard, I could shoot you without batting an eye." After the gun was fired, and Elsworth fell dead, appellant ran down the steps with the gun in his right hand, exclaiming, "Oh, my God, I did it. I did it." When interrogated by the officers appellant stated that it was his gun. In testifying he admitted that he had fired the gun previously that same day and had reloaded the chamber before going to the door.

Where, as here, the facts are that the defendant was in possession of a deadly weapon which he pointed at the victim, and the fatal instrumentality is that weapon, and where immediately after the shot is fired defendant declares, "I did it", has he confessed to manslaughter? If the jury believed that it was voluntary manslaughter and that he pulled the trigger, or if they believed that he did not pull the trigger, but that the death arose out of the unlawful assault with a deadly weapon, then such a declaration could, in my opinion, under the circumstances of this case, be construed as a confession of the crime of manslaughter.

In any event, the question seems to me to be close enough to warrant the trial court in submitting the matter to the jury for determination. And, the instructions being proper, it must be deemed that the jury decided the question correctly. If appellant desired to clarify or amplify the instructions on admissions and confessions because of any inadequacy therein by reason of their generality, indefiniteness or incompleteness, he should have requested the same. Having failed so to do, error cannot be predicated upon the failure to give such additional instructions, *People v. Reed*, 38 Cal.2d 423, 240 P.2d 590; *People v. Ahsbahs*, 77 Cal.App.2d 244, 249, 175

P.2d 33; *People v. Chavez*, 100 Cal.App.2d 214, 218, 223 P.2d 44.

In the case now engaging our attention, I am persuaded that the jury could not have been misled by the giving of the general instructions on the definitions of confessions and admissions particularly where it was left to the jury to determine whether such definitions were applicable to the facts presented and where the jury might reasonably infer from the statements made that appellant did in fact confess the crime of manslaughter, of which he was convicted.

Assuming it may be difficult from the statement made by appellant whether it amounted to a confession or an admission, he was not prejudiced by the instructions given. If the statement, "I did it" be regarded as only an admission, the jury, without proper instructions might well have regarded it as a confession. The correct instructions given on the distinction between confessions and admissions served rather to aid than confuse the jury.

In my opinion, appellant's contention that error was committed in the giving of instructions on admissions and confessions because the statements of appellant upon which such instructions were predicated were introduced for purposes of impeachment only cannot be sustained. Although counsel in offering evidence may state it is for a limited purpose only, the specification of such purpose is but a reason addressed to the court, why the particular evidence should be admitted. As stated in *Island v. Fireman's Fund Indemnity Co.*, 30 Cal.2d 541, 546, 184 P.2d 153, 156, 173 A.L.R. 896, "The court is not bound by the declarations of counsel that evidence is admitted for a limited purpose so as to preclude the drawing of deductions from it other than those suggested by the terms of the offer, unless injustice would follow to the opposite party by permitting such inferences. (Citations.)" See also *Isenberg v. Sherman*, 214 Cal. 722, 731, 732, 7 P.2d 1006. Impeaching evidence is only to be limited where it is incompetent for any other purpose. 27 Cal.Jur., 169-170, sec. 143; *People v. Barr*,

134 Cal.App. 383, 387, 25 P.2d 503; *People v. Holman*, 72 Cal.App.2d 75, 96-97, 164 P.2d 297, and cases therein cited.

In view of appellant's concession that the evidence is sufficient to support the verdict arrived at in this case, I am persuaded that no prejudicial error is to be found in the record. I would therefore affirm the judgment.



109 Cal.App.2d 798

**GREINER v. KIRKPATRICK et al.**

Civ. 14909.

District Court of Appeal, First District,  
Division 1, California.

March 19, 1952.

Action by Jeannette Condry Greiner, formerly Jeannette B. Condry, against Russell Kirkpatrick and Lois A. Kirkpatrick, to enjoin defendants from interfering with plaintiff's use of right of way. The defendant Russell Kirkpatrick filed disclaimer and action proceeded against Lois alone. The Superior Court in and for the County of Alameda, A. J. Woolsey, J., entered decree for plaintiff and defendant appealed. The District Court of Appeal, Bray, J., held that evidence supported court's conclusion that at time of transaction between defendant and her grantor who had granted easement to plaintiff which had been recorded, defendant had been put on notice of plaintiff's rights both by recording of plaintiff's easement and by observation of plaintiff's use of portion of it.

Judgment affirmed.

**1. Easements** ⇨36(3)

In suit to enjoin adjacent property owner from interfering with plaintiff's use of right of way, wherein it appeared that escrow arrangement under which defendant had purchased property adjacent to that of plaintiff had been entered into prior to time plaintiff had received grant of easement from defendant's predecessor in title, but that transaction by which defendant took

title had not become final until after plaintiff had recorded grant of easement, evidence sustained court's conclusion that at time transaction between defendant and her grantor was completed defendant had been put on notice of plaintiff's rights, both by recording of plaintiff's easement, and by observation of plaintiff's use of portion of such easement. Civ.Code, § 1214.

**2. Estoppel** ⇨70(2)

Where defendant who owned land adjoining that of plaintiff was aware, prior to time she purchased her property, that plaintiff had on record an easement over portion of defendant's property, defendant could not thereafter assert that plaintiff was estopped, by reason of fact that plaintiff's grant of easement from defendant's predecessor in title had been given subsequent to time defendant had entered into escrow agreement for purchase of land, from asserting easement, since element of ignorance of true situation by defendant was missing.

**3. Estoppel** ⇨116

The burden of proving facts necessary to constitute estoppel is on party asserting it.

**4. Appeal and Error** ⇨173(9)

**Estoppel** ⇨107, 110

Estoppel must be pleaded, and it may not be raised for first time in appellate court.

**5. Easements** ⇨61(9)

In action by landowner against adjoining landowner to restrain interference with landowner's use of right of way for ingress and egress to her garage, evidence supported court's finding that area fixed by it which was less than area defined in grant of easement from adjacent landowner's predecessor in title, was reasonable and necessary to ingress and egress by landowner.

**6. Easements** ⇨61(2)

Where it was established that plaintiff had right of easement over portion of defendant's land as means of egress and ingress to garage, injunction which required defendant to remove portion of certain obstructing wall and from interfering with use in easement by plaintiff and from con-

structing any obstruction thereon, or abrupt grade which would interfere with plaintiff's use of right of way, was not unjustified, since all defendant was required to do was to restore area to its original condition and thereafter refrain from interfering therewith.

Arch MacDonald, Clayton W. Brunsell, Oakland, for appellant.

Stanley C. Smallwood, Charles W. Fisher, Oakland, for respondent.

BRAY, Justice.

Defendant Lois A. Kirkpatrick<sup>1</sup> appeals from a judgment in favor of plaintiff enjoining defendant from interfering with plaintiff's use of a right of way.

#### Questions Presented

1. Is plaintiff estopped to assert any easement? 2. Did the court include in the easement more land than reasonably necessary to accomplish its purpose? 3. The effect of the injunction in requiring defendant to remove a portion of a certain wall.

#### Facts

The controversy arises over the use by plaintiff of a certain area required to enable her to get in and out of her garage, over which area she originally received a grant of an easement.

On June 21, 1943, the major portion of lot 1022 in a certain tract in Oakland was conveyed to plaintiff by Mr. and Mrs. E. W. Fehr. Plaintiff thought she had purchased all of lot 1022. However, a considerable portion of lot 1022 was excluded from the purchase. This portion was owned by Oscar O. and Annie I. Uhle, who also owned lot 1021. This fact was discovered when plaintiff talked to Mrs. Uhle concerning a certain low wall which partially blocked plaintiff's driveway. The portion excluded from plaintiff's deed is on a slope, and most of it is used as the driveway from lot 1021 to the street. The house on

lot 1021 was then occupied by the Uhles. Plaintiff immediately started to negotiate with the Uhles for the removal of a portion of the wall and the grant to her of an easement over the excluded portion of lot 1022. She then took down the portion of the wall which interfered with her getting in and out of her garage. On September 11th the Uhles signed the grant to plaintiff of a nonexclusive easement, or right of way, over that portion of lot 1022 which had been excluded from the original deed. The grant particularly described by metes and bounds the area over which the easement was granted. It was the same description which was used in excluding the area from the original deed. This grant was recorded September 29th.

On September 19th defendants made a deposit in escrow for the purchase of the Uhle home. The deed from the Uhles to defendant is dated September 25th. It was not recorded until October 7th. The deed covered lot 1021 and the portion of lot 1022 described in the easement from the Uhles to plaintiff. No mention, however, was made of that easement. Within two weeks of September 19th defendant's husband saw plaintiff's husband taking down the wall. It is claimed for defendant that she did not know of plaintiff's easement until March or April, 1944. Plaintiff testified that after the rock wall was removed and for over two years, the easement was used without any protest by defendant.

In the preliminary report from the abstract company obtained by defendant there is no mention of the easement, but it is mentioned in the final report. Defendant claims her escrow was closed at 10 o'clock September 29th. The easement to plaintiff was recorded at 11 o'clock that same day. July 19, 1946, defendant constructed a 14 foot extension to the wall.

#### Record

When defendant, on protest, refused to remove the wall, plaintiff brought this action asking that defendant be enjoined

1. Russell Kirkpatrick was joined as a defendant. However, he filed a disclaimer,

and the action proceeded against Lois alone.



from maintaining the wall or obstructing her use of the easement. Defendant answered and cross-complained, claiming ownership of the strip in question, and alleging that plaintiff had no easement, that plaintiff had full ingress and egress to her property without going over the strip, that the wall is necessary to keep the ground from sliding and does not interfere with plaintiff's ingress and egress; and that in any event it was the intention of the Uhles and plaintiff that plaintiff was to have an easement only over such portion of the strip as was actually needed for ingress and egress. Defendant asked that plaintiff be denied relief, or, at best, that the easement be reformed.

While the deed from the Uhles to plaintiff granted an easement over the entire strip, without any limitation, both parties and the court tried the case on the theory that if plaintiff was entitled to an easement it should be only over such portion of the strip as was reasonably necessary for egress and ingress. The court found that plaintiff was entitled to an easement and found the area which it believed necessary for that purpose (considerably less than that described in the easement), ordered defendant to remove that portion of the wall which was within that area, and permanently enjoined defendant from obstructing plaintiff's use of that area for ingress and egress.

#### 1. The Easement and Estoppel

[1] Defendant contends that as her deed was dated September 25th and the escrow for the purchase of the property "closed" September 29th at 10 o'clock, and plaintiff's easement deed, although dated September 11th, was not acknowledged by Oscar Uhle until September 27th, and was not recorded until 11 o'clock September 29th, defendant must be held to have taken without notice and gets the land free of the burden of the easement. Defendant of course cannot claim to be a purchaser "whose conveyance is first duly recorded". See Civ.Code, § 1214. Again, just what

is meant by the term, the escrow was "closed," does not appear.<sup>2</sup> The purchase and the escrow were subject to the Uhle title being clear. Thus, the transaction was not complete or final at the time of the "closing" of the escrow. It only became final when the title company recorded the Uhle deed to defendant (and was ready to issue its title insurance policy), which was not until October 7th. At that time, at least, the title company knew of the recorded easement. Its knowledge was that of defendant, as it obviously was defendant's agent as well as that of the seller. Defendant's husband testified that when "we" were at the property he saw plaintiff's husband taking down the wall within two weeks of September 19th. The court under this evidence could very well have concluded that defendant's husband would have communicated that fact to his wife and that defendant did have knowledge that plaintiff was asserting rights to the strip, even though the husband testified that when he asked Mrs. Uhle about it she said the man was doing some repair work. Defendant did not testify, so there is no evidence that defendant, at the time she purchased the Uhle property, did not know of plaintiff's easement. The evidence supports the court's conclusion that at the time the transaction between the Uhles and defendant was completed defendant had been put on notice of plaintiff's rights both by the recording of plaintiff's easement and by observation of plaintiff's use of a portion of it.

[2-4] The very first, and perhaps most important, element of estoppel is missing in this case, namely, ignorance of the true situation by the person now attempting to assert the estoppel. The burden of proving the facts necessary to constitute an estoppel is on the party asserting it—here, the defendant. *General Motors Acceptance Corp. v. Gandy*, 200 Cal. 284, 253 P. 137. Moreover, it should be pleaded. *Producers' Holding Co. v. Hill*, 201 Cal. 204, 256 P. 207. It was not pleaded here. Defendant is attempting to raise it for the first time

2. See *Security-First Nat. Bk. v. Clark*, 8 Cal.App.2d 709, 48 P.2d 167, and *Hol-*

*land v. McCarthy*, 173 Cal. 597, 160 P. 1069, as to effect of "escrow."

in this court. That cannot be done. See *Patterson v. Spring Valley Water Co.*, 207 Cal. 739, 279 P. 1001; *Eucalyptus Growers Ass'n v. Orange C. N. & L. Co.*, 174 Cal. 330, 163 P. 45.

## 2. Extent of the Easement

[5] As pointed out, in spite of the fact that the written easement covered a described area, the case was tried on the theory that the court should fix the area reasonably necessary for plaintiff to get in and out of her garage. While there was evidence to the contrary, there is ample evidence to support the court's finding that the area fixed by it is reasonable and necessary for this purpose. In order to get out it appears necessary to back a car over that area which was blocked by the portion of the wall which plaintiff tore down and which defendant thereafter restored. Defendant's land is higher than plaintiff's. The evidence shows that the area fixed by the court and in which defendant may not maintain a wall is limited to the amount of ground necessary for plaintiff's egress and ingress, and that the portion of the wall which is outside this area (and most of which was on the land included in the written easement) and which does not have to be removed, is amply sufficient to keep defendant's ground from sliding.

Defendant seems to contend that the court should have restricted the easement to practically the width of an automobile's wheel tracks and should have required plaintiff to maneuver around the end of the wall. In the first place, the evidence supports the conclusion that more space is required than the mere width of the car's tracks and that it is impracticable to maneuver around the end. Moreover, it must be considered that this action was not to obtain an easement by adverse user, in which case the area is greatly restricted. Here was an easement by grant of a definitely defined area, over the whole of which plaintiff had the right to pass.

## 3. The Extent of the Injunction

[6] The judgment in addition to requiring the removal of a portion of the wall restrains defendant from interfering with the use by plaintiff of the described area (called a "right of way"), as a vehicular right of way for ingress or egress to or from plaintiff's property to the adjacent public highway and from constructing or maintaining any wall or obstruction thereon, or abrupt grade of any kind or nature which might interfere with the use by plaintiff of said right of way. Defendant seems concerned that by ordering the removal of the portion of the wall on the area designated by the court and by enjoining defendant from maintaining such a wall or an abrupt grade, the court is requiring defendant to construct and maintain a driveway for plaintiff. This concern is unjustified. Except for the removal of the wall and any regrading necessary to restore the ground to its original natural condition, all of which, of course, will be at defendant's sole expense, defendant is not required to take any affirmative steps towards the maintenance of the driveway, unless, of course, she has done something to interfere with the natural slope of the ground and has thereby obstructed plaintiff's use. Plaintiff's easement merely gives her the right to use the area for ingress and egress. Defendant is not required to make any changes from the natural condition of the ground, or any grading thereof necessary to permit its reasonable use. Those matters will have to be done, if necessary, by plaintiff, and, as the easement is nonexclusive, in such manner as not to obstruct or prevent the reasonable use thereof by defendant. Defendant has the right to use the land defined by the court for any use not inconsistent with plaintiff's easement. *Parks v. Gates*, 186 Cal. 151, 199 P. 40.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

109 Cal.App.2d 730

**LEVY et al. v. MARTIN.**

Civ. 18830.

District Court of Appeal, Second District,  
Division 2, California.

March 14, 1952.

Action by Marilyn Levy, an infant, by Albert A. Levy, her guardian ad litem, and others, against George Martin for damages sustained by plaintiffs when defendant's automobile collided with that of plaintiff's which had stopped just beyond crest of hill and bend of curve during hours of dusk. The Superior Court of Los Angeles County, Arthur Coats, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeals, Fox, J., held that under circumstances disclosed, whether defendant had been guilty of negligence in not bringing his automobile to more prompt stop was question for jury.

Judgment affirmed.

**1. Appeal and Error**  $\hookrightarrow$ 930(1)

Evidence on appeal must be viewed in light most favorable to party successful in trial court.

**2. Negligence**  $\hookrightarrow$ 136(9)

The general rule is that negligence is question of fact for jury, and it is only when inference of negligence is irresistible that it becomes duty of court to decide upon it as matter of law, and when facts or inferences are in any degree doubtful, only proper rule is to submit entire rule to jury under proper instructions.

**3. Automobiles**  $\hookrightarrow$ 245(17)

In action for damages when defendant's automobile collided with rear of plaintiff's automobile which had stopped on highway, wherein it appeared that defendant was precluded from entering next lane by bus which was passing defendant's automobile, and that defendant had observed tail-lights of plaintiff's automobile while same was 250 feet away, but had not realized that car was standing motionless, whether defendant had been guilty of negligence in not coming to quicker stop was question for jury.

**4. Appeal and Error**  $\hookrightarrow$ 206(2)

In action for damages when defendant's automobile collided with rear of plaintiff's

automobile which had stopped on highway just beyond crest of hill and bend of curve, wherein defendant had testified that he was alone in automobile at time of collision, question to defendant whether his wife, back there in wheelchair, had been in automobile with defendant, in absence of objection thereto, was not prejudicial error.

**5. Appeal and Error**  $\hookrightarrow$ 207

As general rule, failure to object to questions asserted as prejudicial misconduct of counsel forecloses raising any question regarding such alleged misconduct on appeal.

**6. Appeal and Error**  $\hookrightarrow$ 978(2)

Determination of trial judge whether verdict in case is due wholly or in part to alleged misconduct of counsel, will not be disturbed on appeal unless, under all circumstances appearing, such determination is plainly wrong.

Hindin, Girard, Lewis & Green, Los Angeles, for appellants.

C. F. Jorz, Los Angeles, for respondent.

FOX, Justice.

This is an appeal by the plaintiffs from a judgment in favor of defendant after a jury trial.

[1] Viewing the evidence as we must on appeal in the light most favorable to the successful party in the trial court, the facts and circumstances surrounding this automobile collision are as follows: The plaintiffs, husband and wife and two adult children, were traveling north in the family car. The defendant, who was alone, was also driving northward. His car collided with the rear of plaintiffs' vehicle causing injury to the plaintiffs. Their car was in the traffic lane nearest the right-hand side of the highway and was stopped at the time of impact. The accident occurred on the Bay Shore Highway at a point approximately 9 miles south of the city limits of San Francisco and about one half mile north of the intersection of said highway and the South San Francisco cut-off. It was getting dusk and both machines had their lights on. The weather was fair.



Between the cut-off and the place where the accident happened there is a "compound" curve, i. e., first a gradual curve to the right and then a reverse turn to the left; also, the highway is up grade, making a ridge over which one cannot see until he reaches approximately the crest. As defendant was traveling around the curve on the inside lane of traffic at about 50 miles an hour with nothing in front of him that he saw—"no lights at all"—a Greyhound bus signalled to pass him. When he completed the curve he pulled over to the outside traffic lane at approximately the top of the grade to permit the bus to pass. Defendant then saw the taillights of plaintiffs' car approximately 250 feet away. He traveled some 50 feet before he realized plaintiffs' car had stopped. He then immediately applied his brakes and left 63 feet of skid marks to the point of impact. The roadway here was down grade. He could not pass to the right of plaintiffs' car because the shoulder was gravel and there was a guard rail and a drop of several feet to a railroad track. He could not pass on the left because he was abreast of the Greyhound bus which was passing him. There was no northbound traffic ahead of plaintiffs that defendant could see but the southbound traffic was heavy. The speed limit over this highway was 55 miles an hour.

Plaintiffs contend defendant was guilty of negligence as a matter of law because (1) he negligently failed to reduce the speed of his car while his vision was restricted either by curves or the crest of a hill, and (2) that he either negligently failed to see that which he should have seen, when he achieved the crest of the hill, or (3) having seen what he should have seen he negligently failed to apply his brakes.

[2] The general rule is that negligence is a question of fact for the jury. *Matsumoto v. Renner*, 90 Cal.App.2d 406, 409, 202 P.2d 1051. "It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as a matter of law; and, where the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions." *Arellano v.*

*City of Burbank*, 13 Cal.2d 248, 257, 89 P.2d 113, 118.

[3] As to defendant's failure to reduce his speed as he rounded the curves to the crest of the hill, the jury could well have concluded he was not negligent since there was no visible traffic in front of him—"no lights at all,"—and since the operator of the Greyhound bus desired to pass him and drive faster, and particularly since the bus driver's seat is somewhat higher than the driver's position in a passenger car thus enabling the bus driver's vision to encompass the roadway farther ahead.

In view of defendant's testimony which the jury evidently accepted they could reasonably conclude that he was not negligent in failing to see plaintiffs' car upon reaching the crest of the hill for he testified he saw the taillights of plaintiffs' vehicle upon reaching that point.

The question of defendant's alleged negligent failure to apply his brakes upon seeing the taillights of plaintiffs' car 250 feet away is also in the debatable field. He says he did not realize plaintiffs' car was standing until he had traveled some 50 feet. The fact that it was nighttime—after 6:00 P.M., in late January—and "getting dusk" and that one does not ordinarily find a car standing in a regular traffic lane on a main highway, would certainly justify a driver in taking a brief second to determine that the vehicle was not moving. Also, some momentary period is necessary for the normal operation of the driver's reflexes and the actual application of force to the brakes and their response thereto. The jury could well have concluded that defendant exercised that degree of care in applying his brakes that is expected of an ordinarily prudent person under such circumstances.

It is clear that the inference of negligence is not irresistible with respect to any of defendant's challenged conduct. It was therefore a question of fact for the jury's determination. *Arellano v. City of Burbank*, supra.

Plaintiffs argue that the facts in the instant case are comparable to those in *Huetter v. Andrews*, 91 Cal.App.2d 142, 204 P.2d

655, where it was held that the conduct of the defendant in driving into the plaintiff's car ahead constituted negligence as a matter of law. The facts actually are very different as the following brief summary will show. In the Huetter case the defendant had a clear view of the highway, with no vehicles intervening, for 850 feet preceding the point of impact with plaintiff's car. He had stopped, backed onto the shoulder, and was executing a left turn into a crossover on a divided, four-lane highway. Defendant drove this 850 feet looking straight ahead but did not see plaintiff's automobile until he was within 75 to 100 feet of it. He still continued a straight course and left no skid marks until he struck plaintiff's car broadside at a speed of 35 to 40 miles an hour. Plaintiffs also rely on *Edlund v. Los Angeles Ry. Co.*, 14 Cal.App.2d 673, 58 P.2d 928, where it was held that a woman who drove her car into the rear of a standing bus was chargeable with negligence as a matter of law. She had been following the bus for some blocks; the bus stopped, backed 10 or 15 feet and again stopped. A man walked out to the bus and with one foot on the step stood talking through the open, front door to the bus driver. At this point the lady's car approaching at about 20 miles an hour crashed into the rear of the bus. She had observed the bus as she approached it but thought it was continuing to move forward. There was nothing to interfere with her vision; she not only had ample opportunity to see the bus, but did see it. The collision was "the obvious result of her failure to look with sufficient care to distinguish between a moving and a stationary bus." Such a situation is clearly distinguishable from the case at bar. Plaintiffs rely also upon *Pate v. Pickwick*, 125 Cal.App. 670, 14 P.2d 174; *Binford v. Purcell*, 2 Cal.App.2d 87, 37 P.2d 732; *Armstrong v. Studer*, 2 Cal.App.2d 166, 37 P.2d 475; *Falasco v. Hulen*, 6 Cal.App.2d 224, 44 P.2d 469; *Flynn v. Kumamoto*, 22 Cal.App.2d 607, 72 P.2d 248, and *Wright v. Ponitz*, 44 Cal. App.2d 215, 112 P.2d 25. None of these cases determine that the particular conduct in question constituted negligence as a matter of law. On the question of negligence each simply holds that the evidence is suffi-

cient to support the trial court's *factual* determination that the respective acts constituted negligence under the circumstances.

[4-6] Plaintiffs claim they were prevented from having a fair trial by reason of the conduct of defendant's counsel. The circumstances upon which this is based are as follows: Defendant's wife who appeared to be crippled attended the trial in a wheel-chair. She was not called as a witness. When defendant was being examined by plaintiffs' counsel under section 2055 of the Code of Civil Procedure he testified he was alone in his car when the collision happened. On re-direct his attorney asked this question: "Was your wife—back there in the wheel-chair—in the car with you?" The answer was in the negative. Plaintiffs contend this reference to defendant's wife evoked the jury's sympathy in his behalf and that the harm was of an incurable nature. No objection, however, was made to the question and the court was not requested to admonish the jury to disregard it. Generally the failure to take these protective steps forecloses raising any question regarding such alleged misconduct on appeal. *Holder v. Key System*, 88 Cal.App.2d 925, 937, 200 P.2d 98; *Collas v. Pasadena City Lines*, 89 Cal.App.2d 93, 97, 200 P.2d 77. It must further be pointed out that the trial court denied a motion for a new trial upon the ground, among others, of this alleged misconduct of defendant's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by plaintiffs by reason of the matters to which we have referred. "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." *Lafargue v. United Railroads*, 183 Cal. 720, 724, 192 P. 538, 540; *Gluckstein v. Lipsett*, 93 Cal.App.2d 391, 406, 209 P.2d 98; *Cope v. Davison*, 30 Cal.2d 193, 203, 180 P.2d 873, 171 A.L.R. 667. This, we think, may not fairly be said here.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

109 Cal.App.2d 863

**ANDERSON v. ANDERSON.**

Civ. 4364.

District Court of Appeal, Fourth District,  
California.

March 21, 1952.

Suit by wife for divorce. The Superior Court, Kern County, W. L. Bradshaw, J., denied order modifying custody provision with reference to custody of the minor child of the parties and ordered that custody remain in the plaintiff, and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence on behalf of the wife, both oral and in form of affidavits, was sufficient to support the finding that wife was a fit and proper person to retain custody of the child.

Order appealed from affirmed.

**I. Trial ⇨45(1)**

In hearing on motion for modification of a custody provision which gave divorced wife custody of the minor child of the parties, refusal of court to admit evidence as to conditions existing at the time of the divorce decree, which evidence was offered for the purpose of showing the grounds upon which the court granted the divorce, was not error, where no offer of proof was made and nothing was said which would indicate that the offered transcript of the evidence heard in divorce action contained any evidence material to the motion before the court.

**2. Divorce ⇨303(3)**

In hearing on motion for modification of custody provision which gave custody of child to divorced wife, evidence on behalf of the wife, both oral and in the form of affidavits, was sufficient to support the finding that wife was a fit and proper person to retain custody and that the interests of the child would be best served thereby, and, therefore order denying the modification was not an abuse of discretion.

---

Waldo R. Bergman, Bakersfield, for appellant.

Dorris, Fleharty & Phillips, Bakersfield, for respondent.

BARNARD, Presiding Justice.

On August 12, 1948, the plaintiff secured an interlocutory decree of divorce on the ground of extreme cruelty. The defendant had defaulted and the decree, among other things, gave the plaintiff the care, custody and control of the couple's daughter, then two years old. A final decree was entered on August 26, 1949, containing the same provision by reference.

On February 28, 1951, the appellant filed an affidavit in support of his motion for a modification of the custody provision, and asked that custody be given to him, alleging unfitness on the part of the plaintiff.

The matter was heard on March 20, 1951. The plaintiff presented the affidavits of six persons, including her own. The court heard oral testimony, the defendant and four witnesses testifying in his behalf and the plaintiff testifying in her behalf. The court then gave the parties time in which to file further affidavits. On March 23, the plaintiff filed affidavits by five other persons. On March 30, the defendant filed six affidavits, including that of one person who had given oral testimony. On April 4, the plaintiff filed an answering affidavit. Thereafter, the court found that the plaintiff is a fit and proper person to retain such custody; that the interests of the child would be best subserved by not modifying the previous order; that no cause exists for such a modification; and that it would be detrimental to the welfare of the child to presently modify the custody provision. An order was made denying the modification requested, discharging the order to show cause, and ordering that the custody remain in the plaintiff. The defendant has appealed from this order.

[1] The appellant first contends that the court erred in refusing to admit evidence as to conditions existing at the time of the divorce decree. In this connection, appellant had offered in evidence "a transcript of the evidence heard in the divorce action," for the purpose of showing "the grounds upon which the court granted the divorce." This offer of evidence was denied. It is argued that "the original agreement for custody was made without advice of coun-



sel"; that the proffered evidence was necessary in order to show a change in circumstances and to enable the court to "evaluate the relative conditions of the parties"; and that the rejection of this evidence deprived the appellant of an important element of his proof. The reason for granting the divorce to the respondent was immaterial except as it may have been adverse to the appellant, no offer of proof was made, and nothing was said which would indicate that the transcript contained any evidence material to the motion before the court. Neither error nor prejudice is disclosed by the record.

The appellant next contends that the court abused its discretion by deciding the matter upon affidavits alone, and that the oral testimony which was presented establishes that the change in custody here sought is in the best interests of the child. It is argued that while affidavits are admissible in such a case they are entitled to but little weight, and may not be taken as controlling over testimony personally given in court; that the oral testimony abundantly shows that the respondent was guilty of misconduct adversely affecting the child, of excessive drinking and entertaining male visitors, of gross neglect in caring for the child, and that she is not a fit or proper person to have such custody; and that the court's decision can be justified only by basing it upon the affidavits and by completely disregarding the oral testimony.

[2] There is nothing in the record to indicate that the court's decision rested solely upon the affidavits filed, nor that the oral testimony was disregarded. After the appellant had put on his five witnesses his counsel stated that he had one more witness, but that he would like to submit this witness' testimony by affidavit. The court said "All right," and then respondent's counsel stated that he had a subpoena for several witnesses, that "they were all here

this morning," and that he would like to file affidavits. Appellant's counsel said "I have no objections to filing affidavits." Respondent's counsel then stated that he would put the appellant on the stand and then submit affidavits, giving appellant's counsel any reasonable time to answer. The respondent then took the stand and testified. At the conclusion of her testimony her counsel stated that he would submit the affidavits, and appellant's counsel asked whether he would be permitted to offer further evidence in open court. The court stated that this was the end of the hearing but that both parties could file additional affidavits if they desired. Appellant's counsel stated he would like to file the affidavit of a rebuttal witness, whereupon the court gave the parties time in which to file affidavits and the matter was submitted on that basis.

Some nineteen affidavits were filed in all, and the oral testimony takes up 66 pages of the transcript. The respondent's oral testimony conflicts with, and constitutes a complete denial of, all material matters contained in the oral testimony of appellant's witnesses. A similar conflict appears in the affidavits submitted by the respective parties. Nothing more than a conflict appears and the evidence on behalf of the respondent, both oral and in the form of affidavits, is ample to support the findings and order made. *Woof v. Woof*, 75 Cal.App.2d 51, 169 P.2d 961. It is suggestive that the appellant made no satisfactory explanation of why he originally agreed that custody be given to the respondent, or why he made no attempt to bring the alleged facts to the court's attention until two and one-half years later, although he stated that he knew, before the divorce, that she had always neglected the child, that she had never shown any interest in it whatever, and that she had been guilty of serious misconduct.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

**LEHMANN et al. v. MITCHELL et al.**

Civ. 14665.

District Court of Appeal, First District,  
Division 2, California.

March 14, 1952.

Rehearing Denied April 12, 1952.

Hearing Denied May 12, 1952.

Action by Franklin Lehmann and others, by their guardian ad litem, Elfriede Lehmann, and Elfriede Lehmann, individually, against Mitchell L. Mitchell, and Dietz Bros. (a corporation) for death of plaintiffs' decedent which resulted when he fell through a painted skylight on roof of defendant's building while working thereon. The Superior Court, in and for the City and County of San Francisco, Herbert C. Kaufman, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, held that whether defendants were negligent in not protecting or warning the workmen whom they knew would be on roof against danger of falling into elevator shaft through painted skylight was a question of fact.

Judgments reversed.

**1. Landlord and Tenant** ⇨167(8)

One who leases a part of premises, retaining control of other portions which tenant is entitled to use, is subject to liability to persons lawfully on land with consent of the tenant for damages caused by dangerous condition existing on part under owner's control, if by reasonable care he could have discovered condition and made it safe.

**2. Death** ⇨58(1)

Where death has ensued as a result of an accident thereby sealing lips of injured party and there is no evidence to disclose what transpired immediately prior to or at time of happening of accident, plaintiffs are entitled to invoke aid of presumption indulged in by law that injured person was at time using requisite degree and amount of care necessary under the circumstances for his own safety, and on motion for nonsuit or for a directed verdict, court may not consider any evidence tending to overcome it and the presumption must stand uncontroverted and fully endowed with weight and credence which law bestows on it as evidence.

**3. Trial** ⇨165, 178

Where rules applicable to nonsuit and directed verdict come into operation, and there is a showing on behalf of plaintiff of facts and circumstances of case and the presumption of due care relied on, on one hand, and evidence offered on behalf of defendant, evidence produced by defendant and favorable to his cause is eliminated from consideration for purpose of ruling of court.

**4. Trial** ⇨156(2), 178

A motion for a directed verdict like a motion for a nonsuit is in nature of a demurrer to evidence and concedes as true evidence on behalf of adverse party with all the fair and reasonable inferences to be deduced therefrom, and court is bound to disregard all evidence in conflict with that produced by plaintiffs and is precluded from weighing evidence of defendants against that of plaintiff and is not permitted to judge credibility of witnesses but for purpose of either motion is bound to accord to testimony of witnesses produced by plaintiffs all of value attaching to testimony of witness who is to be believed.

**5. Landlord and Tenant** ⇨169(11)

In action for death of plaintiffs' decedent which occurred when he fell through painted skylight into elevator shaft while working on roof of building, whether defendant lessor and defendant lessee were negligent in not protecting and warning workmen, whom they knew would be on roof, against danger of falling through skylight was a question of fact.

**6. Pleading** ⇨398

A variance between allegations of a pleading and the proof will not be deemed material unless it has actually misled adverse party to his prejudice in maintaining his action or defense on merits.

**7. Pleading** ⇨398

Where defendants intended that proven facts were different from those alleged in complaint but it was not indicated that either defendant was misled as to real issues of fact involved in case, variance was not material.

Marcel E. Cerf, Robinson & Leland and Herbert Pothier, all of San Francisco, for appellants.

Shapro & Rothschild, Edward D. Keil and George A. Connolly, all of San Francisco, for respondent Mitchell.

Herbert Chamberlin, San Francisco, for respondent Dietz Bros.

#### PER CURIAM.

The owner of a building and his tenant are charged in this action with negligence resulting in the death of one Mathias Lehmann, who fell through a painted skylight of the building and was fatally injured. The trial court granted a nonsuit as to the owner and directed a verdict in favor of the tenant. From the judgments entered upon the granting of the motions the plaintiffs have appealed.

The building in question is located at 747 Market Street, San Francisco, and extends through to Stevenson, the next street to the south. It is a three story structure and is about twenty-five feet in width. Respondent, Mitchell, purchased the building in December, 1945, and in February, 1946, leased the ground floor, basement, and the rear portion of the second floor to respondent Dietz Bros., a corporation, as a location for a general food market. A refrigeration plant was already installed in the basement when Dietz Bros. took possession. This plant was connected with a water cooling tower on the roof. This cooling tower consisted of a superstructure down through which water from the refrigeration plant was spilled for the purpose of cooling to a metal tank at the bottom. After taking possession Dietz Bros. completely overhauled and remodeled that part of the refrigeration system in the basement. The changes made rendered the water cooling system on the roof inadequate and permission was obtained by the tenant from Mitchell, the owner, to go on the roof and remodel the cooling system so that it would function with the refrigeration part of the plant. This reconstruction was undertaken by George Windeler Company employer of decedent.

A square galvanized metal air duct 30 by 30 inches crossed the roof from south

to north at an elevation of 30 inches or thereabouts above the roof. This air conduit terminated approximately half way across the roof from the south end. Two skylights were located northerly of the one through which the decedent fell and both were encased in housings to an elevation of two or three feet above the roof. The cooling structure of the refrigeration plant stood on the west side of the galvanized air duct and close to the west edge of the building. At the Stevenson Street end of the roof there was a brick firewall, and the wall of an adjoining building rose on the east side one or two stories higher than the roof. This wall was built almost against the Mitchell building.

The skylight with which we are concerned housed the elevator shaft in the rear of the building and sloped from an elevation of 19 inches on the east side to 8 inches on the west. From north to south it measured 60 inches, and from east to west 50 inches. Three panes of glass each 20 inches wide were installed in the top of the structure which was built out of wood with metal running up the sides.

The glass had been covered with a heavy coat of black paint in 1941 so that it would not show any glare or light from the interior in order to conform to the blackout, or air raid, ordinance of the City and County of San Francisco. On the day in question the paint was weathered, and there was some dirt and debris scattered over the surface of the skylight which gave it an appearance like that of the roof, the latter being of tar and gravel construction. The putty holding the glass was not painted, but it does not appear whether the putty had been replaced after the glass was painted or whether the painter had refrained from covering it at the time he coated the glass with the blackout paint.

The distance from the housing of the skylight to the wall on the east is 20 inches; and from the housing to the firewall on the south 18 inches. North of the skylight the distance from the galvanized air duct to the wall to the east is 72 inches. No guard rail was built around the skylight, nor was there any screen or other



protective or warning device about or upon it.

On the morning of November 5, 1946, the Windelar Company sent the decedent with a helper named Mack Oller to the roof to dismantle and remove the old cooling system and install a new one. These men took the elevator up to the second floor and from there climbed the fire escape on the Stevenson Street end of the building to the roof westerly of the air duct. They then proceeded to dismantle the water tower. In the meantime Lehmann had gone over to the wall on the east side of the roof and had erected a boom and pulley for lowering the wreckage to the street. After the tower was down Oller passed the old lumber and debris to the top of the galvanized air duct and Lehmann took it from there and piled it near the boom for lowering to Stevenson Street. The record does not disclose how much time was consumed in this sorting and piling process, but at noon both men descended to the street for lunch. At 12:30 Lehmann went back on the roof and Oller remained on the street. Lehmann started lowering the boards and other material from the tower while Oller took them off the pulley and put them on a truck. This procedure continued for something over an hour when Lehmann called down to Oller to send up a heavy rope and tackle as he was going to lower a tank.

About a minute, or a minute and a half, after the rope and tackle was sent up Oller heard a crash and upon walking over to the elevator shaft he found Lehmann's body. When he looked up, as he put it, he could see the hole in the roof through which Lehmann fell. The pane of glass on the north side of the skylight housing had given way and Lehmann had fallen through the opening to the floor of the elevator shaft.

No one witnessed the fall and the record is completely silent as to what took place on the roof between the time Oller sent up the block and tackle and when Lehmann fell. The photographs taken immediately after the accident disclose the heavy block and tackle and rope piled on the unbro-

ken part of the skylight, and Lehmann's tool box resting on the top of the galvanized air duct. These photographs also show the broken pane of glass and the construction and relative elevation of the skylight above the roof. With reference to what went on at the time the accident happened, the record discloses little more than these physical facts.

[1] The use of the roof was reserved to Mitchell, the lessor, in his lease to Dietz Bros. In *Johnston v. De la Guerra Properties, Inc.*, 28 Cal.2d 394, at page 399, 170 P.2d 5, at page 7, it is stated that "One who leases a part of the premises, retaining control of other portions \* \* which the tenant is entitled to use, is subject to liability to persons lawfully on the land with the consent of the tenant for damages caused by a dangerous condition existing on the part under the owner's control, if by reasonable care he could have discovered the condition and made it safe." Respondents have readily conceded that the status of Lehmann was that of a business invitee to whom each owed the duty to exercise reasonable care to see that the roof was in a reasonably safe condition to permit him to carry on the work he was engaged to do or else to give him warning of any hazard or danger which was not readily apparent. The respondents do not contend that the skylight did not constitute a dangerous condition on the roof or that the danger was not known to them. They take the position that the skylight by reason of its form, color and design was easily identifiable as such, and its danger was obvious to the decedent making his knowledge of the existing dangerous condition just as great as their own. It is also argued that nothing but his own negligence could have caused the accident.

[2,3] Where death has ensued as a result of an accident thereby sealing the lips of the injured party and there is no evidence to disclose what transpired immediately prior to or at the time of the happening of the accident plaintiffs are entitled to invoke the aid of the presumption indulged in by law that the injured person was at the time using the requisite

degree and amount of care necessary under the circumstances for his own safety. *Wiswell v. Shinnors*, 47 Cal.App.2d 156, 160, 117 P.2d 677. And upon a motion for a nonsuit, or for a directed verdict, the court may not consider any evidence tending to overcome it. For the purpose of either motion the presumption must stand uncontroverted and fully endowed with the weight and credence which the law bestows upon it as evidence. As is said in *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 552-553, 299 P. 529, 534: "But, when the rules applicable to nonsuit and directed verdict come into operation, and we have a showing on behalf of the plaintiff of the facts and circumstances of the case and the presumption relied upon, on the one hand, and the evidence offered on behalf of the defendant, the evidence produced by the defendant and favorable to his cause is eliminated from consideration for the purpose of the ruling of the court."

[4] A motion for a directed verdict like a motion for a nonsuit is in the nature of a demurrer to the evidence and concedes as true the evidence on behalf of the adverse party with all fair and reasonable inferences to be deduced therefrom. The court is bound to disregard all evidence in conflict with that produced by the plaintiffs. Not only is the court precluded from weighing the evidence of the defendant against that of the plaintiff, but the law does not permit it to judge of the credibility of the witnesses. For the purpose of either motion, the court is bound to accord to the testimony of the witnesses produced by the plaintiffs all of the value attaching to the testimony of a witness who is to be believed. *Hunt v. United Bank & Trust Co. of California*, 210 Cal. 108, 291 P. 184.

The presumption that the decedent was using that degree and amount of care requisite for his own safety at the time of the accident eliminates all consideration of negligence on his part and it leaves for us to decide whether from the physical conditions existing on the roof as established by the evidence and the other substantial facts appearing from the record it may be reasonably inferred that the respondents

were negligent in failing to place protective devices around or over the skylight, or otherwise warn of its dangerous condition when they knew that workmen would be occupied in the area. In the case of *Williamson v. Pacific Greyhound Lines*, 78 Cal.App.2d 482, at page 486, 177 P.2d 977, at page 979, this court said: "Negligence and proximate cause have frequently been inferred from existing circumstances even when no question of nonsuit was involved and where circumstantial evidence was the only means of proof available to the injured party." And in the same case, 78 Cal.App.2d at page 485, 177 P.2d at page 979, it is said that: "Upon a motion for a nonsuit made at the conclusion of the plaintiff's case, the rule is almost axiomatic that the court is bound for the purpose of the motion to accept and treat as true every piece of evidence which tends to establish the plaintiff's case and to reject all which tends to disprove it. Every reasonable inference must be indulged in plaintiff's favor, and if two reasonable inferences may be drawn from the established facts, one of which is favorable to the case of plaintiff and the other unfavorable, that which is favorable must be accepted and that which is unfavorable rejected. If, in the present case, it may be as reasonably inferred from the proven facts that the defendant was negligent \* \* \* as that it was not, the inference in favor of negligence must be drawn. Negligence in all cases is but an inference drawn from the proven facts, unless it is the result of a presumption (*Morton v. Manhattan Lunch Co.*, 41 Cal.App. 2d 70, 106 P.2d 212), and, upon a motion for a nonsuit such as is here made, the law compels it to be inferred if it is reasonably possible to do so from the proven facts." To the same effect is *Knell v. Morris*, Cal.App., 234 P.2d 1025. See also *Smellie v. Southern Pacific Co.*, supra; *In re Estate of Lances*, 216 Cal. 397, 14 P.2d 768; *In re Estate of Flood*, 217 Cal. 763, 21 P.2d 579; *Wiswell v. Shinnors*, supra.

Since the respondents do not contend that the skylight did not present a dangerous condition but contend only that it

should have been obvious to the decedent in the exercise of ordinary care that it was a skylight fraught with the danger of an elevator shaft below, we are brought to a consideration of the effect of the black-out paint upon the structure as a concealment or deception as to its true character. Respondents contend that the paint did not conceal the identity of the glass although it was applied for the purpose of preventing any ray of light from passing through it. Just how the decedent might ascertain that the structure was housing an elevator shaft with a bottom some three stories down without making a detailed examination is not pointed out by respondents.

Appellants contend on the other hand that the heavy blackout paint concealed the glass and hid its true identity. They add that the fact that it was weathered coupled with the fact that there was considerable debris scattered over it gave a deceptive appearance of structural durability and point to the heavy block and tackle lying on the unbroken part of the glass as proof that Lehmann was actually deceived by its appearance.

Either contention calls for the deduction of an inference, and under the well established rule as announced in the Williamson case, *supra*, the inference favorable to the plaintiffs must be accepted.

[5] Furthermore the physical facts as a whole furnish substantial grounds for the inference that both respondents were negligent in not protecting or warning the workmen whom they knew would be on the roof against the danger of falling into the elevator shaft through the skylight.

[6,7] Respondents make the further point that the proven facts are different from those alleged in the complaint and that the variance is fatal. However, they do not point out wherein they have been misled by the claimed variance. As is said in the recent case of *Hayes v. Richfield Oil Corporation*, 38 Cal.2d 375, 240 P.2d 580, 584: "A variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or de-

fense on the merits \* \* \*." It is not indicated that either respondent has been misled as to the real issues of fact involved in the case.

Since the judgment appealed from must be reversed upon the grounds stated, we need not discuss the other points raised by appellants.

Each of the judgments is reversed.

Hearing denied; SCHAUER, J., dissenting.



PEOPLE v. GOULD.

Cr. 4714.

District Court of Appeal, Second District,  
Division 2, California.

March 21, 1952.

Rehearing Granted March 31, 1952.

See 243 P.2d 809.

Defendant was convicted in the Superior Court, Los Angeles County, Otto J. Emme, J., of receiving stolen property, and he appealed. The District Court of Appeal, Fox, J., held that the evidence failed to support the conviction.

Reversed.

1. Receiving Stolen Goods  $\S$  496

The elements of the offense of receiving stolen property are that the property found in possession of defendant was acquired by acts constituting theft or extortion, that defendant received, concealed or withheld the property from the owners, and that defendant knew the property was stolen. Pen.Code,  $\S$  496.

2. Receiving Stolen Goods  $\S$  8(4)

Evidence as to defendant's knowledge that fur coat, of which he had temporary possession and which he helped sell to another, was stolen was insufficient to support conviction for receiving stolen property. Pen.Code,  $\S$  496.

3. Receiving Stolen Goods  $\S$  8(4)

Possession of stolen property is not of itself sufficient evidence to support implied finding that possessor knew it had been stolen.



**4. Receiving Stolen Goods** ⇨4

In order to sustain conviction based on presence of ladies' purses in motel bungalow which defendant was sharing with a woman, it was necessary that evidence disclose that defendant had either actual or constructive possession of the purses. Pen.Code, § 496.

**5. Receiving Stolen Goods** ⇨8(3)

In absence of evidence that defendant knew of presence of stolen purses in luggage found in motel bungalow which he was sharing with a woman, evidence failed to show possession of the purses by defendant, and therefore conviction for receiving stolen property could not be sustained. Pen.Code, § 496.

**6. Receiving Stolen Goods** ⇨8(3)

Evidence of possession of stolen watch was insufficient to support conviction for receiving stolen property. Pen.Code, § 496.

---

Lawrence William Steinberg, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from the judgment convicting him of receiving stolen property in violation of section 496bb of the Penal Code,<sup>1</sup> and from the order denying his motion for a new trial. He challenges the judgment on the ground of the insufficiency of the evidence to support it.

The articles involved in this charge are a lady's handbag which had been stolen from Virginia Haralson, and a mink coat, a lady's handbag, and a watch which had been stolen from the North Hollywood home of Mr. and Mrs. Frost on the evening of November 23, 1950. On the day following the Frost robbery one Mel Furlong, whom appellant had known for some time in a business way, came to his apartment seeking to dispose of a fur coat which turned out to be the one stolen from the Frost home. Furlong had previously taken

this coat to his wife, who was in the hospital, and offered it to her as a present. She had, however, declined it because she wanted a car. In an effort to dispose of the coat appellant contacted Joe Paladino, a bar and cafe owner, about the coat, after which he and Furlong went to the home of Paladino, between 8:00 and 9:00 o'clock in the evening. Appellant had known Paladino about two and a half years. After Mrs. Paladino had inspected and tried on the coat and indicated she would like to have it, her husband bought it for \$1,500 cash. Furlong remained outside in his automobile. He died the next day. Mr. Frost had purchased the coat in August, 1949, for about \$5,000 including taxes.

Appellant was living with a woman by the name of Pressler to whom he was not married. They had bungalow No. 6 at a motel near Arcadia. The officers found some of their luggage there containing wearing apparel. In one of the smaller suitcases which police released to Pressler they found women's clothing and the Haralson and Frost purses. Pressler testified she had bought these purses on the day after Thanksgiving, along with some others, from one Calvert who had occupied bungalow No. 7 in this motel. Appellant is not shown to have had any other connection with the purses.

The area around the Arcadia motel was searched and under some leaves beneath a bush they discovered a plastic bag containing numerous items of jewelry among which was the watch stolen from the Frost house. The bush was located behind a ledge near a wall about 35 to 40 feet from appellant's bungalow. It was about 150 feet from bungalow No. 7, which had been occupied by the Calverts. A search of appellant's luggage brought to light a plastic bag similar to the one found under the bush. Appellant denied any knowledge of the jewelry in this plastic container. Concerning the presence of the plastic bag in his possession he and Pressler gave the explanation that Calvert, who had many, had given them two in which to keep golf balls. In this connection the

1. The section was amended in 1951 and renumbered section 496, Penal Code.

husband of the owner of the motel testified that the man who occupied bungalow No. 7 (Calvert) had offered to sell him a set of earrings and a brooch made of yellow gold and stones which he took out of a bag similar to the one produced in court.

[1] The elements of the offense created by the Code are as follows:

1. That the property found in the possession of the defendant was acquired by acts constituting theft or extortion;

2. That the defendant received, concealed or withheld the property from the owners; and

3. That defendant knew the property was stolen. *People v. Rossi*, 15 Cal.App.2d 180, 181, 59 P.2d 206.

[2,3] As to the fur coat the evidence is insufficient to sustain the conviction. Possession of stolen property is not of itself sufficient evidence to support an implied finding that the possessor knew it had been stolen. *People v. Juehling*, 10 Cal. App.2d 527, 531, 52 P.2d 520. There must be other circumstances that point to guilt. *People v. McClain*, 115 Cal.App. 512, 514, 1 P.2d 1023. We find none in this case. Appellant's temporary possession of the coat was explained. He was not a purchaser but was merely trying to help a business acquaintance dispose of a coat which his own wife had rejected because she preferred an automobile. Furlong is not shown to have been a person of bad reputation. The disposition of the coat to a business man appellant had known for some time is not a suspicious circumstance. Appellant does not appear to have profited by the transaction. It is true that the coat was sold at a substantial discount but it is not shown that appellant had any knowledge of or familiarity with the prices of furs or their quality, and since he was not purchasing the coat there was no reason for him to make inquiry concerning its value. The fact that Furlong remained outside in his car while appellant went in and displayed the coat to Mr. and Mrs. Paladino and made the sale, is not a circumstance necessarily pointing to guilt. It may well be that knowing the Paladinos as he did, appellant thought he alone could

make the sale more readily. It is also pointed out that the transaction took place between 8:00 and 9:00 o'clock at night, according to the testimony of Paladino. This, of course, is not a late hour, particularly for one engaged in the bar and cafe business. In any event a previous appointment appears to have been made by telephone. Presumably it was at such a time as would meet the convenience of the Paladinos.

[4,5] In order to sustain the conviction based on the circumstances involving the two ladies' purses it is necessary that the evidence disclose appellant had either actual or constructive possession of them. *People v. Beck*, 71 Cal.App.2d 637, 640, 163 P.2d 41. This it fails to do. The purses were found in his paramour's luggage. She claims to have purchased them less than a week prior to appellant's arrest. There is no evidence to show that appellant ever saw these purses or knew that she had them. This phase of the case is governed in principle by *People v. Jolley*, 35 Cal.App.2d 159, 94 P.2d 1011. In the Jolley case defendant was in the used tire business, principally regrooving smooth tires. He conducted a shop at a down town location, but he stored old tires in the garage at his home. He also used the garage for storing tools and household goods but did not use it for housing his automobile. Defendant's brother and a former employee took a couple of stolen cars there, removed the tires and replaced them with tires taken from the stock in the garage and left the tires removed from the stolen vehicles. Defendant knew nothing of these escapades and had not been inside his garage while the stolen tires were there. It was held the proof of possession was insufficient to sustain the judgment of receiving stolen property.

[6] The circumstances surrounding the recovery of the stolen watch are also insufficient to show possession in appellant. Neither the watch nor the plastic sack containing it and other jewelry was ever shown to have been in his possession. The sole basis for attempting to connect appellant with the watch is the fact that it had been hidden not far from his apartment

in a plastic sack similar to one he had in his possession when arrested. It must be remembered, however, that a similar plastic bag had been seen by the husband of the motel proprietor in Calvert's possession when he tried to sell him a set of earrings and a brooch, and that the bag containing the jewelry was also only a few feet from Calvert's living quarters. Further, a reasonable explanation was given of appellant's possession of a similar bag.

The judgment and order are reversed.

MOORE, P. J., and McCOMB, J., concur.



109 Cal.App.2d 726

**CLAUDINE v. WEST.**

Civ. 14892.

District Court of Appeal, First District,  
Division 2, California.

March 14, 1952.

Rehearing Denied April 12, 1952.

Hearing Denied May 12, 1952.

W. A. Claudine brought action against John West for declaration that defendant had no interest in certain realty and for money judgment. The Superior Court of the State of California, in and for the County of Alameda, James R. Agee, J., held that plaintiff was estopped to contend that agreement with defendant was void on ground that defendant acted as an unlicensed real estate broker.

Judgment reversed.

#### 1. Evidence ⇐20(1)

It is common knowledge that a real estate broker does not recover compensation from owner of realty in the amount of 40 per cent of the profits.

#### 2. Estoppel ⇐92(2)

Where plaintiff, who owned dwellings, and defendant who procured lease of dwellings to the Federal Government Housing Authority pursuant to agreement with plaintiff, assumed a relation of partnership or joint adventure, plaintiff was estopped to

repudiate agreement with defendant and to refuse to pay defendant agreed compensation while retaining the benefits of the transaction, on ground that defendant acted as an unlicensed real estate broker.

Harold J. Abraham, Oakland, for appellant.

Nathan Goldwater, John L. McVey, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in equity for the cancellation of a written agreement, for a declaration that defendant had no interest in described real property, and for a money judgment for sums which had been paid defendant under the agreement. The appeal is taken from the ensuing judgment for plaintiff.

There is little conflict in the evidence. Plaintiff was owner of two dwellings which were rented for \$25 a month each. He was under some tentative agreement to sell both for \$5,000 or \$6,000. He approached defendant and asked him to get him out of the deal. This was in the year 1942. The parties entered into an oral agreement under which defendant would devote his efforts to procuring a sale or lease of the properties to the Federal Government Housing Authority. Through the efforts of defendant the government reconstructed the premises and leased them. The value of the properties was thereby increased from \$5,000 to \$17,000 and the rentals were increased from \$25 a month to approximately \$165 each. Under the terms of this oral agreement these increased rentals were divided between the parties—60% to plaintiff and 40% to defendant. All rentals were collected by the plaintiff and he consistently paid to defendant 40% of them for a period of about six years. This continued until June 25, 1945, when the oral agreement was reduced to writing. The pertinent provisions of this contract are that it was executed "in consideration of services rendered by John West in the management of the properties \* \* \* and further in consideration of other services \* \* \*." Other



provisions were: "First: That all income, save and except Fifty (50) Dollars per month, derived from the lease on said properties with the Home Owners Loan Corporation shall be divided in the ratio of sixty (60) per cent for W. A. Claudine and forty (40) per cent for John West.

"Second: That following the expiration of the lease with the Home Owners Loan Corporation [sic—omission?] before the date of expiration, the net income derived from rentals of said properties and buildings shall be divided in the ratio of sixty (60) per cent for W. A. Claudine and forty (40) per cent for John West.

"Third: That in the event I, W. A. Claudine, decide to sell said properties, the said John West shall have the privilege and right of first refusal to purchase the same but should the said John West not exercise the right of purchase, then the proceeds from the sale of said property, save and except Six Thousand (6000) Dollars shall be divided in the ratio of sixty (60) per cent for W. A. Claudine and forty (40) per cent for John West." Further light on the relationship of the parties is found in paragraph 5 which reads: "It is understood and agreed that said John West will supervise the management of said properties including the making of necessary repairs, making arrangements for all necessary insurance, and making arrangements with respect to all legal matters growing out of the care and management of said properties both during the period of the said lease and following its cancellation or expiration and until the sale of said properties by W. A. Claudine or his heirs, successors and assigns." The terms of this agreement were strictly followed until 1948 when plaintiff repudiated it and commenced this action.

On the filing of the complaint the plaintiff for the first time took the position that the defendant throughout this period of six years was acting as an unlicensed real estate broker and that the contracts, both oral and written, were void under the statute of frauds. However, when both parties went to the Federal Authority for the execution of the lease with that agency its representative called respondent's at-

tention to section 20 of the lease which read: "The Lessor warrants that he (she) (it) (they) has/have not employed any person to solicit or secure this lease upon any agreement for a commission, percentage, brokerage, or contingent fee." Thereupon respondent assured this representative that he and appellant were partners and that they were acting as such in this transaction.

On this state of facts the trial court held that the contracts, both oral and written, were void because appellant did not hold a broker's license. The action is in equity, but there is no equity in the judgment. There is no evidence of fraud or unjust enrichment on the part of appellant. On the other hand all the evidence discloses that respondent received all he asked for and suffered no harm. It was solely through respondent's representation to the Federal Authority that appellant was not a broker or agent (but a partner or joint adventurer, it does not matter which) that respondent was able to obtain the valuable lease from that authority.

[1,2] There was other evidence to support appellant's plea of a joint adventure. The written contract does not have the tone of a broker's or agent's contract. The division of the profits at 60% and 40% is not the usual compensation for a real estate broker's efforts. This is a matter of common knowledge and fully supports appellant's contention that throughout the operation of both contracts the parties assumed a relation of partnership, or joint adventure, and, such being the case, the respondent is estopped from repudiating the contracts while retaining the benefits of the transaction.

There was no evidence to support the finding that the relation of the parties was that of owner and broker. There was ample evidence to support a finding of a relation of joint adventure or partnership.

Judgment reversed.

GOODELL, J., and JONES, Justice pro tem., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

**EADS et al. v. MARKS et al. \***  
Civ. 18653.

District Court of Appeal, Second District,  
Division 2, California.  
March 19, 1952.

Hearing Granted May 15, 1952.

Rand Edison Eads, a minor, by Harold Madison Eads, his guardian ad litem, and another, brought action against Harry Marks, and others, individually, and doing business under the fictitious firm name and style of Crown City Dairy, for injuries sustained when defendants allegedly negligently left glass milk bottle on porch which was picked up by the minor who fell from porch and was injured when bottle broke. The Superior Court of Los Angeles County, William B. McKesson, J., entered a judgment in favor of defendants predicated upon sustaining of their demurrer without leave to amend, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that proximate cause of injury was falling from porch.

Affirmed.

**1. Negligence** ⇨60

A prior and remote cause cannot be made basis of negligence action if such remote cause did nothing more than furnish condition or give rise to occasion by which injury was made possible, where there intervenes between such prior or remote cause of injury a distinct and related cause.

**2. Negligence** ⇨60

Where dairy allegedly agreed not to leave glass milk containers on back porch, but allegedly negligently left milk bottle there which was picked up by one year old child who fell off porch and was injured when bottle broke, proximate cause of injury was falling from porch and not negligent leaving of milk bottle on porch, and action against dairy could not be maintained.

**3. Appeal and Error** ⇨959(1)

An appellate court will sustain action of trial court in denying application for leave to amend complaint unless it be made to appear that there has been abuse of discretion.

\* Subsequent opinion 249 P.2d 257.

**4. Appeal and Error** ⇨1032(1)

An appellant must make it appear by the record that trial court has committed prejudicial error in its ruling.

**5. Appeal and Error** ⇨1040(3)

Order sustaining demurrer to amended complaint without leave to amend, which amended complaint was substantially the same as original complaint to which general demurrer had been sustained, would be affirmed in absence of showing in record that there was prejudicial error. Code Civ.Proc. § 475.

---

Robert H. Green, Los Angeles, for appellants.

Jennings & Belcher, Los Angeles, George M. Henzie, Los Angeles, of counsel for respondent.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrer without leave to amend to plaintiffs' amended complaint, plaintiffs appeal.

**Facts:** It was alleged in plaintiffs' amended complaint as follows: "That on or about December 1, 1948, at which time the said plaintiff, Rand Edison Eads, was of the approximate age of one year, the defendants and each of them were informed by the plaintiff, Harold Madison Eads, and by Lenore Eads, the wife of said plaintiff, that no dairy products, glass containers, milk or milk bottles were to be left at the said residence of plaintiffs' except in the refrigerator in the house, and that all empty milk bottles and glass containers for the defendants would be left within the house. That at said time plaintiff, Harold Madison Eads, and his said wife informed the defendants that if said dairy products or the containers therefor were left within the reach of the minor child that said minor child might be injured by picking up, dropping or tripping over such dairy products and/or the glass containers therefor, and further informed the defendants and each of them that in the absence of plaintiffs, empty glass containers would be placed upon the back porch of said resi-

dence with a memorandum or note stating that no milk or dairy products were to be left; and the defendants and each of them agreed to said request and informed the plaintiff, Harold Madison Eads, and his said wife that none of said products or glass containers therefor would be left except within said refrigerator, and that empty glass containers would be removed by defendants from the back porch, and not left at said residence upon the regular delivery times; that on or about August 12, 1949, defendants and each of them negligently, carelessly and wrongfully placed, deposited, left, and permitted to remain a glass milk container upon the back porch of said residence, and the said minor plaintiff, picked up said container and fell off the porch, causing the container to break within close proximity to his face; that as a direct and proximate result of the negligent and wrongful acts of the defendants the said Rand Edison Eads was caused to suffer severe and permanent injuries, pain and suffering, all to his damage in the sum of \$25,000.00."

*Questions: First: Did plaintiffs' complaint as amended disclose that defendants' negligent act was the proximate cause of the injuries to the minor plaintiff?*

[1] *No.* A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, where there intervenes between such prior or remote cause of the injury a distinct and related cause. (Royal Insurance Co. v. Mazzei, 50 Cal.App.2d 549, 557[7], 123 P.2d 586.)

[2] The foregoing rule is applicable to the facts pleaded in the amended complaint.

\* Section 475 of the Code of Civil Procedure reads: "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruc-

tion, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

Second: *Did the trial court commit prejudicial error in sustaining the demurrer to the amended complaint without leave to amend?*

*No.* The complaint as amended by plaintiffs was substantially the same as the original complaint to which a general demurrer had been sustained.

[3] An appellate court will sustain the action of the trial court in denying an application for leave to amend a complaint unless it be made to appear that there has been an abuse of discretion. (Rose v. Ames, 53 Cal.App.2d 583, 589[5], 128 P.2d 65.)

[4, 5] It is likewise settled an appellant must make it appear by the record that the trial court has committed prejudicial error in its ruling. In the absence of such a showing the order appealed from will be affirmed. (Sec. 475, Code of Civ.Proc.\*; Hill v. Hill, 82 Cal.App.2d 682, 696 [10], 187 P.2d 28; Private Investors v. Homestake Min. Co., 16 Cal.App.2d 1, 5 [2], 60 P.2d 146.)

Affirmed.

FOX, J., concurs.

MOORE, Presiding Justice.

I concur in the judgment but cannot subscribe to the reason assigned by the

tion, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."



majority as the basis for its decision. The injury to the Eads child was proximately caused by defendants' act. Although it resulted from the independent intervening action of the child such occurrence was readily foreseeable and should have been anticipated. Accordingly, had the action been based upon the contract defendants could properly have been found to have proximately caused the harm and therefore be held to answer for the consequences of their own breach of duty. (*Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 218, 157 P.2d 372; *Gibson v. Garcia*, 96 Cal.App. 2d 681, 685, 216 P.2d 119.) It is clear that a person of ordinary prudence should have anticipated some one might be injured by the driver's failure to comply with the agreement. That is a test of the latter's negligence. (*Ibid.*)

However, plaintiffs' cause of action is predicated upon the breach of defendants' contractual duty and for that reason it cannot be the basis of a tort action. The nature of an action does not depend on the form of the pleading but is determined from the nature of the grievance. (1 Cal. Jur.2d Actions, sec. 29, page 624.) Also, if the gravamen of the complaint is in contract, the nature of the action is not altered by allegations of defendants' tortious conduct. (*Dougherty v. California Kettleman Oil Royalties*, 13 Cal.2d 174, 182, 88 P.2d 690.) Although the breach of a duty may give rise to an action both in tort and contract, as a general rule "if a cause of action arises from the breach of a promise, the action is contractual in nature; if it arises from the breach of a duty growing out of the contract, it is delictual." (1 Cal. Jur.2d, supra, p. 624; *Peterson v. Sherman*, 68 Cal.App.2d 706, 711, 157 P.2d 863.) Where the relation between the parties is purely contractual, no tort liability can be founded upon the breach of duty unless in the absence of the contract the law imposes such a duty merely because of the relationship. (See *Prosser on Torts*, sec. 33, p. 205.) Illustrations of the latter relationship are set forth in *Nathan v. Locke*, 108 Cal.App. 158, 287 P. 550, 291 P. 286, as bailor-bailee, carrier-passenger, master-servant and innkeeper-guest.

The situation at bar does not come within the orbit of such protected relationships. No case has been cited where a general duty imposed by law was found to arise from the mere vendor-vendee relationship of the litigants at bar and appellant admits in his reply brief that there would be no general duty to remove the glass containers or to place the products delivered within the house. The recent Texas decision of *Ross v. Haner*, Tex.Com.App., 258 S.W. 1036, involving a landlord-tenant relationship where the tenant was permitted a tort recovery for the landlord's failure to fulfill his promise to repair a screen and plaintiff-child fell from the window, serves only to demonstrate the opposing views on the problem. (*Cf. Stelz v. VanDusen*, 93 App.Div. 358, 87 N.Y.S. 716.)



**In re LA MONT'S ESTATE.**  
**GUNNESS v. LA MONT et al.**  
 Civ. 18693.

District Court of Appeal, Second District,  
 Division 1, California.

March 19, 1952.

Rehearing Denied April 7, 1952.

Hearing Granted May 15, 1952.

Proceeding in the matter of the estate of Daniel Everett LaMont, deceased, wherein the petition of Bella LaMont, and another, for the probate of an alleged will of the decedent was opposed by William L. Gunness, also known as W. L. Gunness. The Superior Court, Los Angeles County, J. F. Moroney, J., denied admission of the will to probate, and the proponents appealed. The District Court of Appeal, White, P. J., held that finding of the trial court that the alleged will was not executed with the formality required by Probate Code, § 50, providing that a will must be signed by two attesting witnesses at the testator's request and in his presence, was supported by substantial evidence and therefore would not be interfered with on review.

**Affirmed.**

\* Subsequent opinion 248 P.2d 1.

**1. Appeal and Error** Ⓒ1011(1)

Finding of trial court will not be disturbed on appeal if there is substantial evidence in record to support finding, regardless of conflicting or contradictory evidence.

**2. Appeal and Error** Ⓒ994(3), 996, 1012(1)

The credibility of witnesses and the weight to be given their testimony are addressed to and settled by trier of facts, and not by appellate court, and on appeal all reasonable inferences from evidence must be drawn in favor of prevailing party.

**3. Wills** Ⓒ114

Under statute providing that a will must be signed by two attesting witnesses, an "attesting witness" is one who is selected by testator to act as such and requested to sign his name as such. Probate Code, § 50(4).

See publication Words and Phrases, for other judicial constructions and definitions of "Attesting Witness".

**4. Wills** Ⓒ108

The right to make testamentary disposition of property is controlled by legislative mandates and there is no right to make testamentary disposition except upon compliance with those mandates. Probate Code, § 50.

**5. Wills** Ⓒ302(2)

In probate proceeding, finding of trial court that instrument was not executed with formality required by statute providing that a will must be signed by at least two attesting witnesses at testator's request and in his presence, was supported by substantial evidence and District Court of Appeal was therefore without authority to interfere. Probate Code, § 50(4).

**6. Wills** Ⓒ215

Once a will is proved, every effort and exertion of court is directed to give effect to wishes of testator, but in the proving of instrument, the sole consideration before court is whether legislative mandates have been complied with.

Gunness & Graves and Joseph L. Graves, Monterey Park, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment of the superior court denying probate to a document executed by decedent and from an order denying a new trial. The will in question reads as follows:

"June 19, 1950.

"To Whom it May Concern:

"I, Daniel Everett LaMont, do hereby bequeath my estate and its entire residue to my sister, Bella LaMont, of the home address.

"My sister, Bella LaMont, and my nephew Fred C. Smith, 523 Cecil St., Monterey Park, Calif., whose signatures appear below are to jointly administer the estate without bond. My nephew, Fred C. Smith, is to act as Guardian for my brother, Albert LaMont.

"D. E. LaMont

"D. E. LaMont

"Bella LaMont      Witness: Klari Moore

"Bella LaMont

Address 1001 So-1st St.  
Alhambra, Calif.

"Fred C. Smith      Witness: Helen B. Smith

"Fred C. Smith      Address 523 Cecil St.  
Monterey Park, Calif.

"Notary Public."

The trial court found as follows:

"1. That the decedent, Daniel Everett Lamont, etc., on June 19, 1950, published and declared the instrument propounded as his last Will and Testament to be his last Will and Testament, and subscribed the same, all in the presence of Helen B. Smith, Fred C. Smith and Bella Lamont.

"\* \* \* \* \*

"3. That witness, Klari Moore, subscribed said instrument as a witness, at the request of Fred C. Smith, on June 25, 1950, but not in the presence of Helen B. Smith, and not in the presence of the decedent, Daniel Everett Lamont, etc.

"4. That Fred C. Smith and Bella Lamont were not requested by said decedent to affix their signatures to said will as witnesses, but said parties were present at the time the testator executed said will

Willis Sargent and Sidney H. Wyse, Pasadena, for appellants.

and were requested by said testator to sign said will as executor and executrix respectively."

The court concluded that the instrument "was not executed with the formality required by Section 50 of the Probate Code of the State of California and probate of said instrument is therefore denied for the foregoing reasons."

On July 21, 1950, Bella LaMont and Fred C. Smith petitioned the superior court for probate of the foregoing will of decedent and for letters testamentary. On August 2, 1950, and before the hearing on the petition for probate, William L. Gunness filed a contest to the probate of said will, alleging lack of testamentary capacity, undue influence, fraud and absence of legal execution of the testamentary document. An answer to said contest was duly filed by Bella LaMont and Fred C. Smith. No appearance was made on behalf of Albert LaMont.

When the cause was called for trial before the court sitting without a jury, the allegations with regard to lack of testamentary capacity, undue influence and fraud were abandoned by the contestant, the authenticity of decedent's signature to the will was admitted by contestant, and the contest proceeded to trial on the single issue of due execution.

Upon the hearing it was undisputed that the signing by Helen B. Smith as a witness was in conformity with section 50 of the Probate Code. Since Bella LaMont was the sole beneficiary under the will the proponents did not rely upon her signature as that of an attesting witness. It is conceded that the signature of Klari Moore was affixed only at the request of Fred C. Smith and not by request of the testator.

Proponents' contention was that the will was properly and legally witnessed by Fred C. Smith and his wife Helen B. Smith.

The foregoing findings of fact are in all respects favorable to proponents save and except the finding that Fred C. Smith did not sign the testamentary document "as a witness" but signed "as an executor". Based upon this finding the court concluded as a matter of law that pursuant to the

provisions of section 50 of the Probate Code, the will in question was not entitled to be admitted to probate and rendered judgment accordingly.

The sole question presented on this appeal is whether the evidence supports the foregoing finding adverse to proponents insofar as the signature of Fred C. Smith as a claimed witness to the will is concerned.

[1] Appellants recognize and admit the existing rule that a finding of the trial court will not be disturbed on appeal if there is substantial evidence in the record to support it, regardless of conflicting or contradictory evidence.

To determine appellants' contention that there is no *substantial* evidence in the record it becomes necessary to set forth the testimony.

In that regard the record reveals that Bella LaMont, Fred C. Smith and Helen B. Smith, called as witnesses for proponents, each testified that they saw the decedent sign the will, that they saw each of the others sign the will, that they recognized each of the signatures, that each of the signatures was affixed in the presence of all, that at the time of signing, the decedent requested each of them to sign as a witness to the will and declared to them that the document was his last will and testament.

Fred C. Smith further testified on direct examination that after decedent had signed the will he asked Bella LaMont to sign it, and Fred C. Smith stated, "Well, Mrs. Wagner has said that as long as she is a party to the will, she can't sign it," that the Mrs. Wagner referred to was a notary public who had advised the witness, that in reply to this remark by Fred C. Smith, decedent said, "Well, never mind about that. I want her (Bella LaMont) to sign and I want you (Fred C. Smith) to sign, and I want Helen (Smith) to sign." The witness further testified on cross examination that decedent requested him to sign as a witness and that the will was prepared by Helen B. Smith. The witness also testified, in answer to questions propounded by the trial judge, that Klari Moore signed the will at a later date at the witness' re-



quest in the living room, that prior to the execution of the will decedent had suggested that two neighbors be witnesses and had later suggested that the doctor and the nurse would do as well, that he also requested Helen B. Smith, Fred C. Smith and Bella LaMont to sign as witnesses. In answer to the trial judge's question, "Well, then why ask these other people—Mrs. Moore, to be a witness?" The witness testified, "Because he was under the impression that it was necessary to have the additional witnesses. He also was under the impression that the notary public was necessary \* \* \*".

It is at once apparent that had the trial judge believed the foregoing testimony, a finding that the will was duly executed would be imperative. But, that he did not believe such testimony is evidenced by the record wherein he expressed himself as follows: "*I am faced with the question of deciding whether or not these people are telling the truth when they say they were asked to sign as witnesses. Frankly, I don't believe their testimony. I don't think they were told to sign as witnesses at all. That is, the first day. I think probably—that is, in so many words. They have all said they were told to sign as witnesses, but it just doesn't—I mean, it just doesn't—*"

"Mr. Graves: That is our position, your Honor.

"*The Court: It doesn't strike the Court as the natural thing. Now, I have no reason to disbelieve these people, on the other hand, but why the attempt to get another witness? I think they were signing because the decedent was under the impression, due to the misinformation that had been given to him by this notary public, or somebody, that these people who were being designated—let me see that will—who were being designated respectively as executrix, 'Bella LaMont, and my nephew, Fred C. Smith, whose signatures appear below, are to jointly administer the estate without bond.'*"

"Now, he apparently thought that these people had to sign it to accept that particular assignment." (Emphasis added.)

The foregoing comments and conclusions of the trial judge were instigated in part by an examination of the proffered will, and the manner in which the signatures thereto were affixed. In the testamentary document the word "witness" immediately precedes the names of Klari Moore and Helen B. Smith, while no designation appears in connection with the names of Bella LaMont or Fred C. Smith. However, in connection with the signatures of the last two people, as the court observed, the will itself refers to them in the last paragraph thereof wherein appears the following: "My sister, Bella LaMont, and my nephew, Fred C. Smith, 523 Cecil St., Monterey Park, Calif., whose signatures appear below are to jointly administer the estate without bond".

We are impressed that from the foregoing the court could reasonably draw an inference that neither Bella LaMont or Fred C. Smith signed the testamentary document "as a witness, at the end of the will, at the testator's request" as required by subdivision 4, section 50 of the Probate Code.

[2] Insofar as the testimony of the witnesses Bella LaMont, Fred C. Smith and Helen B. Smith is concerned, their credibility is a matter settled before the case reaches the appellate tribunal. If we are correct in our understanding of the rules to the effect that the credibility of witnesses and the weight to be given their testimony are addressed to and settled by the trier of facts, and not on appeal, and that on appeal all reasonable inferences from the evidence must be drawn in favor of the prevailing party, we cannot agree with counsel for appellants that there is no substantial evidence supporting the judgment. And this is true even though we are of the opinion that we would have admitted the will to probate had we been sitting in the trial court.

In Re Walker, 110 Cal. 387, 390, 42 P. 815, 1082, 30 L.R.A. 460, our Supreme Court said: "\* \* \* the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the con-

stitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise."

[3] Under the provisions of subdivision 4, section 50 of our Probate Code an "attesting witness" is one who is selected by the testator or testatrix to act as such and requested to sign his or her name as such.

As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed the foregoing as one of the requirements for the execution and authentication of wills such as the one now before us.

[4] It is not for the courts to say that these requirements are mere formalities which may be waived without impairing the status of the instrument. It is not for the courts, under the guise of interpretation, to hold that a mode of execution or authentication other than that prescribed by law, serves the same purpose and is equally efficient to validate the instrument. The legislative mandates are controlling and there is no right to make testamentary disposition except upon compliance with those mandates.

[5] The trial court having found upon inferences reasonably deducible from facts established by an examination of the will itself that the mandates of section 50 of the Probate Code were not complied with, we are without authority to interfere.

We have examined the cases cited by and relied upon by appellants but find them distinguishable from the instant case and questions here involved.

[6] That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. Once a will is proved every effort and exertion of the court is directed to give effect to the wishes of the testator as therein expressed, but in the proving of the instrument the sole

consideration before the court is whether or not the legislative mandates have been complied with.

The attempted appeal from the order denying a new trial is dismissed. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



109 Cal.App.2d 849

**PEOPLE v. RACKLEY (two cases).**

Cr. 2778, 2779.

District Court of Appeal, First District,  
Division 2, California.

March 21, 1952.

Rehearing Denied April 5, 1952.

Prosecution under separate informations for violation of the statute regarding lewd or lascivious acts, in relation to two girls, both aged six years. The Superior Court, in and for the County of Contra Costa, Harold Jacoby, J., rendered judgments of conviction, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that since defendant had neither objected nor excepted to the remarks of the trial court or his conduct in examining witnesses, such objection could not be urged on appeal.

Affirmed.

#### 1. Criminal Law ⇨1035(1), 1053

In prosecution for lewd or lascivious acts with six year old girls, where defendant neither objected nor excepted to remarks of trial court or his conduct in examining witnesses, such objection could not be urged on appeal. Pen.Code, § 288.

#### 2. Criminal Law ⇨655(4)

In prosecution for commission of lewd or lascivious acts with six year old girls, there was no merit to the point raised by defendant in respect to trial court's explanation to prospective juror, of difference between prejudice against offense and prejudice against defendant, wherein juror was plainly told that jurors were sought who could set aside their prejudice against

defendant and who could give defendant a fair and impartial trial notwithstanding their feeling as to offense charged. Pen. Code, § 288.

Masterson, Bernheim and Sugarman and Calfee, Moses & Calfee, all of Richmond, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Dep. Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was charged in separate informations with a violation of section 288 of the Penal Code in relation to two girls both age six years. By stipulation the two charges were consolidated for trial before the same court and jury. Verdicts of guilty were returned in both causes. The appeals are from both judgments and from the orders denying the motions for a new trial.

Briefly the facts are that defendant operated a small candy store and ice cream parlor in the neighborhood where the two girls lived. The store contained a refrigerator near which the candy was arranged on shelves. The defendant sat on a chair near the refrigerator and permitted the girls to go behind it and select their candy from these shelves. While they were reaching for the candy he placed his hand under their dresses and inserted a finger into their private parts. This had happened on many occasions with both girls. The evidence was sufficient to sustain the verdict in both cases and this the defendant concedes.

[1] Two questions are stated in support of the appeal. The first relates to the so-called character witnesses. One of these testified on direct examination that defendant's reputation was "excellent". On cross-examination she said she had heard reports about him molesting little children. The trial court interrupted the examination to explain what is meant by reputation for morality. She stated that she had never heard it discussed but added that the people in the neighborhood "think he is fine," and that "the people I have talked with feel as though the man is innocent." This testimony was all allowed to stand and the de-

fendant could have asked for nothing more favorable.

The witness was palpably confused in her testimony and the remarks of the court were designed to clear some of the confusion. These remarks were certainly not prejudicial to the defendant because it was through the trial judge's insistence, and that alone, that the defendant was able to get to the jury the fact that the witness had discussed his reputation. Appellant's argument here is not that the trial judge erred in this respect, but that his remarks tended to confuse the jury. We entertain just the opposite view.

Another character witness testified that he did not know what "morality" was. Another, when asked her opinion as to defendant's character, testified that she had "never known anything about him, only that he is a good man." The defendant contends that the "cross-examination" of these witnesses by the trial judge was confusing. It appears that the direct examination of both witnesses was designed to confuse the jury and that the statements of the trial judge were for the purpose of making the matter more clear. However it must be noted that the defendant made no objection to the question or statements of the trial judge at any stage of these proceedings, and made no request that the jury be instructed to disregard them. For that reason he cannot assert error on this appeal. The rule is stated in *People v. Bishop*, 134 Cal. 682, 685, 66 P. 976, 977, where the defendant, for the first time on appeal, complained of the action of the trial court (among other things) "for cross-examining a character witness, whom the prosecution had not cross-examined, in a manner calculated to convey to the jury the impression that the court was not satisfied with the answers of witness \* \* \*." 134 Cal. at page 685, 66 P. at page 977. The Supreme Court noted that no objection and no motion to strike had been made and said, 134 Cal. at page 686, 66 P. at page 977: "It is now too late to raise a question as to the matters complained of. If the court asks an improper question, or otherwise commits some supposed infraction of the defendant's rights, it is the duty of counsel then and



there to make known his objection and reserve his exception. We cannot otherwise notice alleged errors of the court, committed on its own motion, any more than can we notice errors in rulings on the conduct of the case by the people's attorney."

[2] The second point raised by defendant is without merit. During the examination of prospective jurors three asked to be excused because of deep prejudice against the offense charged. During the examination of the next juror called, the court explained the difference between prejudice against the offense and prejudice against the defendant. The juror was plainly told that they were seeking jurors who could set aside their prejudice against the offense and who could give the defendant a fair and impartial trial notwithstanding their feeling as to the offense charged. If the defendant had requested a ruling such as that now criticised he could not have fared better.

The judgments and orders are affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



109 Cal.App.2d 827

**KENTERA v. SUPERIOR COURT, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.**

Civ. 15196.

District Court of Appeal, First District,  
Division 1, California.

March 20, 1952.

A mother of a fourteen year old boy, who had appealed from a judgment denying his petition for appointment of a guardian, petitioned for a writ of prohibition preventing the trial court from disturbing the legal custody of the boy, as it existed in the mother when the judgment appealed from was entered, pending the appeal from such judgment. The District Court of Appeal, Peters, P. J., held that the trial court was without

jurisdiction to enter an order appointing a temporary guardian pending the appeal.

Peremptory writ of prohibition granted.

**1. Infants ☞19**

Pending appeal from custody order, trial court, except, perhaps, in extraordinary circumstances, has no jurisdiction to entertain proceeding aimed at changing legal custody of minor as it existed at time order was entered. Probate Code, §§ 1440, 1442.

**2. Guardian and Ward ☞13(8)  
Prohibition ☞10(2)**

Where appeal was pending from judgment denying fourteen year old boy's petition for appointment of a guardian, court was without jurisdiction to make an order for temporary custody, and therefore peremptory writ of prohibition would issue at instance of boy's mother who had legal custody at time order denying boy's petition was entered. Probate Code, §§ 1440, 1442.

W. L. A. Calder, Lorne M. Stanley, San Francisco, for petitioner.

Marshall E. Leahy, John F. O'Dea, San Francisco, for respondent real party in interest.

PETERS, Presiding Justice.

The trial court denied a petition by a minor, aged fourteen, to have his paternal grandmother appointed his guardian. The child appealed from that judgment. The child then petitioned the Superior Court to appoint his grandmother his temporary guardian pending the appeal. The trial court, over the protests of the child's mother, who has legal custody, indicated that it believed that it had jurisdiction of that petition. Upon the petition of the mother, this court issued its alternative writ of prohibition preventing the lower court from acting.

The facts, more in detail, are as follows:

The petitioner, Virginia Lee Kentera, was divorced from Edward C. Kentera in 1940. As modified in 1943, the divorce decree gave joint legal custody of Richard Steven Kentera, the sole issue of the marriage, to both parents, with physical custody

in the mother, and rights of visitation to the father. Virginia has since married one Boesel, and resides with him in Ukiah. Edward has also remarried and lives with his wife in Palo Alto. The paternal grandmother of Richard is Angelina Kentera, who resides in San Francisco.

On July 13, 1951, Richard, then fourteen years of age, who was then temporarily visiting his grandmother in San Francisco, filed a petition pursuant to section 1440 of the Probate Code<sup>1</sup> requesting that his grandmother be appointed his guardian. The petition, after alleging the jurisdictional facts, avers that Richard "is in need of a guardian," and that Angelina is a fit and proper person to act as such guardian and has consented to serve. While the petition avers that Richard's mother, Virginia, has been awarded his custody, there is no averment that Virginia is not a fit and proper person to act as guardian.

Virginia filed opposition to Richard's application, in which, after setting forth the facts entitling her to Richard's custody, she denied that the child was in need of a guardian, and denied that Angelina was a fit and proper person to act as guardian. In connection with this last denial she averred that Angelina was about sixty, that she lived with her husband who is not related to Richard; that no young people reside in that home; that Angelina and her husband operate a restaurant in San Francisco which consumes most of their time and attention; that for these reasons Angelina will be unable to give Richard proper care and supervision; that Angelina and her husband, in their home, do not use the English language but converse in a foreign language. Virginia further averred that she resides with her present husband in Ukiah, and that in the family are three other children, all boys, ages seventeen, nine and seven; that the four boys normally play

and mingle together; and that it would be in the best interests of the child to remain with his mother.

After a hearing, the trial court on October 9, 1951, entered its judgment denying Richard's petition and ordering the boy returned to his mother in Ukiah. It found that since the divorce, Richard has been in the general physical custody of his mother; that the appointment of a guardian for Richard is not necessary or convenient; that the child has lived practically his entire life with his mother; that his mother is a fit and proper person to have the care, custody and control of Richard; that his mother's home in Ukiah is a suitable home for the minor.

On October 15, 1951, Richard appealed from the judgment denying his petition for a guardian. That appeal is pending in the other division of this court, the respondent's brief has been filed, and no doubt the appeal will shortly be placed on a calendar for oral argument. After the appeal was perfected, the trial court, by a *nunc pro tunc* order, purported to amend the findings by adding a finding that the grandmother is a fit and proper person to have custody of Richard. On October 30, 1951, Richard filed a notice of motion for an order to appoint his grandmother his temporary guardian pending the appeal. The mother immediately objected to the trial court considering the petition, urging that the trial court had no jurisdiction to hear the motion for temporary custody pending the appeal from the judgment denying the petition of Richard for the appointment of a guardian. At the hearing of the motion, the trial judge (the same judge who had tried Richard's original petition) expressed his belief that he had jurisdiction to make an order for temporary custody under section 1442 of the Probate Code<sup>2</sup>, pending the appeal, but agreed not to make such an order until

1. That section provides, in part, that "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled \* \* \* may appoint a guardian for his person \* \* \* or estate. The appointment may be made upon the petition of a relative \* \* \* or on the

petition of the minor, if fourteen years of age. \* \* \*

2. Section 1442 appears in the chapter entitled "Appointment of Guardians for Minors". The section provides, in part: "In such proceeding, when it appears to the court or judge \* \* \* that the wel-

this court could act on a petition for a writ of prohibition. This court then issued an alternative writ.

[1] The law is settled that, pending an appeal from a custody order, the trial court (except, perhaps, in extraordinary circumstances not here involved) has no jurisdiction to entertain a proceeding aimed at changing the legal custody of the minor as it existed at the time the order was entered. *Foster v. Foster*, 5 Cal.2d 669, 55 P.2d 1175; *Foster v. Superior Court*, 4 Cal.2d 125, 47 P.2d 701; *Ritter v. Superior Court*, 99 Cal.App. 121, 278 P. 240; *Browning v. Browning*, 208 Cal. 518, 282 P. 503; *In re Browning*, 108 Cal.App. 503, 291 P. 650; see cases collected and discussed 9 Cal.Jur. p. 799, § 141; 5 Cal.Jur. 10 Yr.Supp. (1944 Rev.) p. 340, § 141. The *Foster* cases, *supra*, are leading cases on the subject. There the South Dakota court divided the custody between the parents of the child. During the period in which the mother was entitled to and had custody, with consent of the South Dakota court, she brought the child to California where she resided. In this state she instituted a proceeding to secure exclusive custody. At the end of a contested hearing the trial court indicated that it intended to deny the mother's petition but, before such order was made, it entered a series of orders designed to get the child into the hands of the father, thus changing the physical custody, so that when the custody order should be entered the father would legally have physical custody. The Supreme Court held that such legal maneuvers were not permissible, and that so disturbing the custody pending an appeal was beyond the jurisdiction of the court. A writ of prohibition issued. This was the case decided in 4 Cal.2d 125, 47 P.2d 701. Thereafter, the court entered its order awarding custody to the father. The mother appealed and applied for a writ of *supersedeas*. The Supreme Court, in 5 Cal.2d 669, 55 P.2d 1175, held that such writ should be denied because the appeal acted as an automatic *supersedeas*. In so

holding, the court stated, 5 Cal.2d at page 672, 55 P.2d at page 1176: "Both in the return of respondent to the alternative writ of *supersedeas* and upon oral argument, respondent argued that no writ should issue for the reason that a perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal. [Citing authorities.] With this argument we agree. The authorities so hold. It necessarily follows, we think, from the fact that at the date of the entry of the judgment, the petitioner was legally entitled to the custody of said minor under the order granting her temporary custody, and the fact that the stay of proceedings pending appeal has the legitimate effect of keeping the subject thereof in the condition in which it was when the stay of proceedings was granted, that petitioner is entitled to retain the custody of the said minor until the final determination of the appeal from the judgment. [Citing a case.]"

[2] If the rule of the *Foster* cases be applied to the instant case there can be no doubt that the trial court has no jurisdiction to disturb the legal custody of Richard as it existed when the order appealed from was entered, pending the appeal from that order. At that time, custody was legally in the mother. She has been found to be a fit and proper person to have custody. The trial court has no power to disturb that *status quo* pending the appeal.

There is nothing in section 1442 of the Probate Code that is contrary to this conclusion. The section, by its clear and unambiguous language, permits the trial court to make an order fixing temporary custody pending a custody hearing. The section has no application to the power of a court pending an appeal.

Richard cites such cases as *Foy v. Foy*, 23 Cal.App.2d 543, 73 P.2d 618; *Barrett v. Barrett*, 210 Cal. 559, 292 P.622; *Titcomb v. Superior Court*, 220 Cal. 34, 29 P.2d 206, relating to the power of the trial court to

fare of the minor will be imperiled if he is allowed to remain in the custody of the person then having his care, an order

may be made providing for his temporary custody until a hearing can be had on the petition. \* \* \*



act in custody matters independent of statute. The rule of those cases is admittedly sound, but those cases do not discuss, because they do not involve, the power of the court to make orders affecting custody pending an appeal from a custody order. In *re Pinnell*, 184 Cal. 270, 193 P. 574, also cited by Richard, does not involve action of the court after an appeal, that question being expressly left open.

Let the peremptory writ issue as prayed.

BRAY and FRED B. WOOD, JJ., concur.



**SERVE YOURSELF GASOLINE STATIONS ASS'N, Inc. et al. v. BROCK, Director of Department of Agriculture, et al.\***  
Civ. 18559.

District Court of Appeal, Second District,  
Division 1, California.

March 21, 1952.

Rehearing Denied April 8, 1952.

Hearing Granted May 16, 1952.

Action by Serve Yourself Gasoline Stations Association, against A. A. Brock, as Director of the Department of Agriculture wherein Ulrich's Serve Yourself Stations, intervened, for declaratory relief as to constitutionality of statute purporting to prohibit certain types of advertising signs on or near filling station. The Superior Court of Los Angeles County, Julius V. Patrosse, J., held statute constitutional and plaintiffs appealed. The District Court of Appeal, Hanson, J. pro tem., held that statute restricting use of all price signs at or near filling stations bore no reasonable relation to public safety, health, morals or welfare and was not constitutional exercise of police power.

Judgment reversed.

#### 1. Trade-Marks and Trade-Names and Unfair Competition §63(2.13)

Under statute restricting use of all price signs at or near filling stations to statutory required price sign on each pump, unless such added price sign or signs set forth in detail and in lettering as large as any lettering thereon total price per gallon, including taxes, of any brand or grade of

gasoline offered for sale, and expressly including price sign whereon word "save" appears, signs on serve-yourself filling station which included word "save", but which did not contain material required by statute, were in violation of statute despite fact that all operators involved sold gasoline at price less than that of conventional filling stations. Business and Professions Code, §§ 20880, 20881, 20883.

#### 2. Trade-Marks and Trade-Names and Unfair Competition §68(2.13)

Purpose of statute restricting use of price signs at or near station to statutory required price sign on each pump, unless such added price sign or signs set forth in detail and in lettering as large as any other lettering thereon total price per gallon for gasoline offered for sale on premises, was to eradicate misleading advertisement. Business and Professions Code, §§ 20880, 20881, 20883.

#### 3. Constitutional Law §38

The constitutionality of statute may not be measured by fact that it is salutary from standpoint of consumer or general public in that it tends or may tend to eradicate evil of misleading advertisements. Business and Professions Code, §§ 20880, 20881, 20883.

#### 4. Constitutional Law §81

A state Legislature may not regulate or control private business unless it is affected with public interest, or unless it is necessary for public safety, public health or public morals, or some phase of public welfare, within contemplation of police power.

#### 5. Constitutional Law §81

The Legislature may not regulate prices under the public welfare concept.

#### 6. Trade-Marks and Trade-Names and Unfair Competition §42

Statute restricting use of all price signs at or near filling stations to statutory required price signs on each pump unless such added price sign or signs set forth in detail and in lettering as large as any other lettering thereon total prices per gallon, including taxes, of any brand or grade of gasoline offered for sale on premises, bore no reasonable relation to public safety, health, morals or welfare, and was not con-

stitutional exercise of police power of state. Business and Professions Code, § 20880, 20881, 20883; Const. art. 4, § 25, subd. 33.

**7. Trade-Marks and Trade-Names and Unfair Competition** ⇨68(2.13)

A sign bearing only the word "save" or "serve yourself and save" is not per se misleading or fraudulent, but it is only when commodity is sold at price at which there is no saving that sign may be said to attain status of being misleading or fraudulent.

**8. Constitutional Law** ⇨240(1)

**Trade-Marks and Trade-Names and Unfair Competition** ⇨42

Fact that statute restricting use of all price signs at or near gasoline filling stations to statutory required price sign on each pump, unless added price sign or signs set forth in detail and in lettering as large as any other lettering thereon total price per gallon, including taxes, of any brand or grade of gasoline offered for sale on premises, applied to dealers of petroleum products only and not to dealers of other commodities, was not sufficient classification to save statute from charge that it was discriminatory and violative of equal protection clause of Constitution. Business and Professions Code, §§ 20880, 20881, 20883; Const. art. 4, § 25, subd. 33.

**9. Statutes** ⇨76(1)

Statute restricting use of price signs at or near gasoline filling stations to statutory required price sign on each pump, unless such added price sign or signs set forth in detail in lettering as large as any other lettering thereon total price per gallon, including taxes, on any brand or grade of gas-

oline offered for sale on premises, interferred arbitrarily with private business and imposed unreasonable and unnecessary restrictions thereon and was special law which was unnecessary because applicable general law existed. Const. art. 4, § 25, subd. 33; Business and Professions Code, §§ 17500, 20880, 20881, 20883.

Guthrie, Darling & Shattuck, Milo V. Olson, Salisbury & Knudson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., for respondents.

HANSON, Justice pro tem.

This is a representative suit for declaratory relief instituted by several operators of serve-yourself type of gasoline stations who sought an adjudication that a statute, purporting to prohibit certain types of advertising signs on or near filling stations, is not applicable to the signs erected by them; and, if the statute is applicable that it is unconstitutional.

The various signs involved in this case differ somewhat in that some state thereon merely the word "Save"; others, "Serve Yourself and Save"; and still others, "Save 5" in large letters followed in small letters by either the word "cents," or "ways" or "minutes," or minor variations of the same general tenor.

The statute here involved,<sup>1</sup> enacted in 1949, is but a continuation or enlargement of a series of statutes initially enacted since 1931 seeking on the one hand to require,

**1. Business & Professions Code, § 20880:**

"(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor

vehicle fuel product advertised for sale by such advertising medium.

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium \* \* \* using the words 'save,' \* \* \*, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at

and on the other hand, to restrict the manner and method of posting prices of gasoline and oils at filling stations.

The initial statute enacted in 1931 required filling stations to post on all gasoline pumps the brand, trade-mark or trade name (or if none then "no brand") and the price per gallon of all gasoline dispensed therefrom. The validity or applicability of this statute as it has since been amended is not involved in the instant case. The statute before us, first partially enacted in 1941, and later amended after the advent of the so-called "serve yourself" filling stations, restricts the use of all price signs at or near the stations to the statutory required price sign on each pump, unless such added price sign or signs set forth in detail and in lettering as large as any other lettering thereon, the total price per gallon including taxes of any brand or grade (naming it) of gasoline offered for sale on the premises. A price sign by the express words of the statute includes any sign whereon appears the word "Save."

[1] As each and every one of the signs involved in this appeal contains the word "Save," it follows that all the signs are within the purview of the statute and that they all violate the statute because they fail to set forth the details required by the statute, i. e., the total price including taxes along with the trade name or brand of the gasoline advertised for sale. The fact that all the operators, here involved, regardless of the language used on their signs sold gasoline at a price less than that of the conventional stations is under the language

of the statute immaterial and hence a false quantity.

That being the case we come to the sole remaining question, which is whether the statute is unconstitutional insofar as it requires the statutory details above mentioned to be set forth upon the signs here involved. On that point we are of the opinion that the statute is clearly unconstitutional.

[2, 3] In so ruling we wish to say at the outset that we perceive that the purpose of the legislature in enacting the statute may not only be regarded as salutary but that it is a well-intentioned endeavor to eradicate a present-day evil, i. e., misleading advertisements. When a motorist driving along a street or highway is faced with a sign stating in large letters "Save 5," readable by him at a distance, we think he may well expect upon turning into the station to save 5 cents on the price of either regular or ethyl gasoline below that of the price of the conventional service stations. If in turning into the station and stopping at a pump he learns upon a closer inspection of the sign or from the price posted on the pump that he will not save anything in the way of price or at least less than 5¢ per gallon he unquestionably has been misled by the sign and quite naturally may be irked. Conceivably he may be misled once, but we think it quite possible, if not probable, that he will not again thereafter stop at a filling station displaying in large letters the word "Save" unless his gasoline tank is too near empty to proceed further. If that be his attitude, as we believe it

which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter." (i. e., referring to price signs on pumps.)

Sec. 20881: "If gasoline or other mo-

tor vehicle fuel is offered for sale or advertised for sale from the premises of any place of business in this State, but not under any trade name or brand name, then the words 'no brand' shall be used and designated on the advertising medium."

Sec. 20883: "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.'"



may well be, then the operators of filling stations who use the words "Save 5" on their signs and actually sell their gasoline at 5¢ less than the conventional price will thereafter be harmed to a greater or less extent. The laws of compensation, as enunciated by Emerson, still hold full sway. But, be that as it may, the constitutionality of a statute may not be measured by the fact it is salutary from the standpoint of a consumer or the general public in that it tends or may tend to eradicate an evil such as misleading advertisements.

[4-6] In coming to grips with the question before us we must assay the statute in the crucible of constitutional law. In that appraisal we are faced with the long-established principle that a state legislature may not regulate or control private business unless it is affected with a public interest, which is not the case here, *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, or unless it is necessary for the public safety, public health or public morals, or any phase of the public welfare—all of which come under the head of the police power and no other constitutional power. The public safety may require that a filling station be controlled or regulated so as to eliminate the danger from fires or explosions of gasoline; the public health may possibly require that gasoline fumes be controlled; the public morals that gasoline filling stations should operate as such and not as fronts for businesses inimical to public morality. But just how signs of the character here involved can possibly endanger or affect the public safety, the public health, the public morals or the public welfare we fail to see, and in that aspect the brief of the attorney general is not convincing. To be sure the price which the great host of consumers—the general public—must pay for an article affects more or less the financial welfare of this great segment of the public, but even so it has never yet been held that a legislature may regulate prices under the public welfare concept. In that aspect *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, is the leading and controlling authority to the contrary.

If it is important to the public welfare to steer the public away from filling stations that advertise upon large signs, in large letters, the word "Save"—without stating in detail the saving, then it is equally true that the public welfare requires that all other businesses who do the very same thing should be pilloried by like statutes. There is nothing about the filling station business in its endeavor to sell a gallon of gas that differentiates it from the grocer who endeavors to sell a can of peas. The public is not harmed if it chooses to buy a gallon of gas, without service, at a price less than a gallon with service, but the welfare of a conventional dealer who gives the service may well be affected. That, however, does not affect the public welfare, but only the welfare of competitors in the business of supplying gasoline.

[7,8] The operator of a serve-yourself filling station is engaged in selling gasoline without service and in order to compete with the conventional type of station he must sell for less. His product appeals to the passing motorist only if such motorist prefers to wait on himself in return for a saving on the regular price of the product. The appeal is akin to that made to a housewife by the serve-yourself grocery. To compete, the grocery and the filling station must advertise the fact that a patron will save. The word "Save" blazoned on a sign upon the grocery store cannot be differentiated in its appeal, in its drawing power, or in its opportunity for fraud from that of a like sign at a filling station. A sign bearing only the word "Save" or "Serve-Yourself and Save" is not *per se* misleading or fraudulent. It is only when the commodity is sold at a price at which there is no saving that the sign may be said to attain the status of being misleading or fraudulent. The passing motorist is no more entitled to have the saving spelled out for him than is the passing consumer entitled to have the grocery do likewise. The fact that the statute applies to dealers of petroleum products only and not to dealers of other commodities is not by this mere difference a sufficient classification to save

the statute from a charge it is discriminatory and violates the equal protection clauses where the end operation or result is the same. Cf. *Liggett Co. v. Lee*, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929.

A motorist may be inconvenienced when he drives into a filling station which does not advertise that it is a self-service station or which does not advertise by large signs the price of the product sold. Likewise he is inconvenienced if the price is higher than he expects to pay regardless of whether there is or is not a large sign bearing the word "Save." But any such inconvenience suffered by the prospective purchaser is not a fraud upon him or of such moment as to warrant the exercise of the police power to save him from the inconvenience.

[9] The statute not only interferes arbitrarily with private business, but in addition it imposes unreasonable and unnecessary restrictions upon such business. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747. Moreover, the statute violates our state constitution, Art. IV, sec. 25(33), in that it is a special law that is unnecessary because a general law is and can be made applicable. Such a law is Business and Professions Code, § 17500, which makes it unlawful for dealers, such as we have here, to advertise a fact which is untrue or misleading.

The statute before us differs from the statutes of several other states which have sought to restrict filling stations from advertising their product in that those statutes endeavored to bar all advertising of prices save upon the very small signs permitted on the pumps, whereas our statute permits such additional price signs but only if they spell out the saving. However, the principle applied in holding such statutes unconstitutional is equally applicable here. The cases all proceed on the theory that such additional signs have no detrimental effect upon, and bear no reasonable relation whatsoever to, public safety, health, morals or welfare. *State v. Miller*, 1940, 126 Conn. 373, 12 A.2d 192; *Regal Oil Co. v.*

*State*, 1939, 123 N.J.L. 456, 10 A.2d 495; *Levy v. City of Pontiac*, 331 Mich. 100, 49 N.W.2d 80; cf. *People v. Mestichelli*, 1939, Cty.Mag.Ct., 18 N.Y.S.2d 406; *Alabama Independent Serv. Station Ass'n v. McDowell*, 242 Ala. 424, 6 So.2d 502; *State v. Hobson*, Del. 1951, 83 A.2d 846. Views contrary to those reached by the Connecticut, New Jersey and Michigan courts are those of Massachusetts and New York. *Slome v. Godley*, 304 Mass. 187, 23 N.E.2d 133; *Merit Oil Co. v. Director of Division of Necessaries of Life*, 319 Mass. 301, 65 N.E.2d 529, and *People v. Arlen Service Stations*, 284 N.Y. 340, 31 N.E.2d 184.

As in our view the act is unconstitutional as applied to the signs here involved the judgment appealed from should be and it is reversed.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 698

**SANDERS et al. v. PARK BEVERLY  
CORP. et al.**  
Civ. 18527.

District Court of Appeal, Second District,  
Division 2, California.

March 13, 1952.

Hearing Denied May 8, 1952.

David Sanders and another brought action against the Park Beverly Corp., and others, for damages arising out of fraudulent statements made in course of negotiations for sale of two apartment buildings. The Superior Court, Los Angeles County, C. C. McDonald, Judge of the Superior Court of Yolo County, presiding under a judicial council order, awarded judgment to plaintiffs, and the named defendant and another appealed. The District Court of Appeal, Moore, J., held that evidence sustained finding of misrepresentations as to income producing capacity of the buildings.

Judgment affirmed.

**1. Fraud** ⚡58(2)

In purchasers' action for damages arising out of fraudulent statements made in course of negotiations for sale of two apartment buildings, evidence supported findings that vendors fraudulently misrepresented gross income of buildings and minimum rental being received for apartments at time of negotiations.

**2. Fraud** ⚡58(1)

Vendors' misrepresentations as to earnings of income producing property in community where taxes are high and cost of maintenance is burdensome could have been made only for purpose and with intent that purchasers rely thereon, and constituted a lawful, sufficient and proper basis for finding that vendors' conduct was fraudulent.

**3. Fraud** ⚡50

Where vendor has by false representations or concealments deceived purchaser to buy property, vendor cannot avoid responsibility for wrongful acts by saying purchaser was not compelled to rely upon misrepresentations, but must show that statements were in fact not relied upon.

**4. Fraud** ⚡64(5)

While purchaser has reasonable duty to investigate representations concerning property made by vendor, question as to whether known facts were sufficient to put purchaser on inquiry is one of fact.

**5. Fraud** ⚡21

Where vendors falsely represented average monthly income of apartment buildings, and income and expense records were not available and were said to be non-existent, so that purchasers merely inspected physical features of buildings and did not acquire a full, dependable knowledge of productive powers of property, falsity of statement was not apparent from inspection and purchasers were not precluded from relying thereon.

**6. Trial** ⚡84(2)

In action for damages arising out of fraudulent statements made by vendors in course of negotiations for sale of two apartment buildings, objections interposed to opinion testimony of an expert ap-

praiser and another as to true market value of apartment buildings at time of sale were merely arguments on weight to be given to testimony and were not adequate to defeat admissibility of opinions.

**7. Fraud** ⚡62

Damages of \$20,000 for fraudulent statements made in course of negotiations for sale of two apartment buildings was proper where it was proved that property was not worth more than \$170,000, and that purchasers paid \$200,000.

**8. Appeal and Error** ⚡204(1)

Party who sought to predicate error on admission of evidence should have objected to question and moved to strike answer.

**9. Evidence** ⚡474(16)

In purchasers' action for damages arising out of fraudulent representations in negotiations of sale of property, purchaser could testify as to value without qualifying as an expert.

**10. Evidence** ⚡501(7)

Where, in purchasers' action for damages for false representations made in course of negotiations for sale of property, purchaser was asked question as to value of property and was told to base testimony on anything he wants to take into consideration, answer which did not contain anything improper was not objectionable. Civ.Code, § 3343.

**11. Appeal and Error** ⚡1033(3)

In purchasers' action for damages arising out of false representations as to income producing capacity of apartment buildings, testimony that actual expenses were less than those set forth in description of operating expenses in brochure which was a part of the false representations was necessarily favorable to vendors and could not be basis for objection by them.

---

S. L. Kurland, Los Angeles, and Simon, Fox & Fraider, Beverly Hills, for appellants.

Victor Bewley and Kimball Fletcher, Jr., Los Angeles, for respondents.



MOORE, Presiding Justice.

Judgment was awarded respondents against appellant corporation and its president for damages arising out of fraudulent statements made in the course of negotiations for the sale of two apartment buildings in Los Angeles. Reversal is demanded on the grounds of (1) insufficiency of the evidence to establish fraud, (2) nonreliance by respondents "upon any representation," (3) errors in rulings at the trial.

When the buildings were offered for sale in August, 1949, president Perry prepared a brochure<sup>1</sup> describing them. Among other factual recitals, the booklet declared that the premises grossed an average monthly income of \$3,720. It was delivered to appellants' agents, Newcomb and Taggart, on September 14, 1949. Respondents learned of the properties through their own broker, one Franklin, and with him first visited the premises on November 7, 1949. All subsequent negotiations were conducted by respondents and Franklin with appellants' brokers. They had no personal contact with Perry. After several inspections of the buildings, relying upon declarations in the brochure, respondents offered to purchase both buildings and their furniture and furnishings for \$200,000. Appellants accepted, whereupon an escrow agreement was executed by the parties on November 30, 1949, and the transaction was duly closed. Within the succeeding month, however, respondents made a pertinent discovery, to wit: that the average monthly income from the buildings for the six months immediately preceding the date of sale had been substantially less than that published in the brochure. Immediately following such denouement respondents served a notice of rescission of the purchase on the ground of fraud and promptly filed this action in 8 counts to enforce their demand, for restoration of all moneys paid to appellants and for a cancellation of notes executed in partial payment of the purchase price, and in the alternative for damages. Prior to the trial respondents elected to stand upon their claim for damages and dismissed all counts for equitable relief.

The court made findings of fact in pursuance of respondents' allegations: that appellants had fraudulently misrepresented the gross income of the buildings and the minimum rentals being received for the apartments at the time of their negotiations with respondents.

[1, 2] There is ample proof to support the findings. The brochure's recitals as to the income were that the average, monthly, gross receipts were \$3720. The booklet was prepared and distributed by Perry. While, under later questioning by respondents as to the apartment income, Perry told respondents that the \$3720 represented the average monthly income as computed by his auditors for the first seven months of 1949, yet when requested to produce more recent figures, Perry's reply was that the average monthly income of \$3720 was his latest information and that he had no other record of income. Such statement was proved to be false by the fact that Perry had been, and was still receiving a monthly written report of gross income from his apartment house manager. Moreover, testimony established that daily records were checked many times during each month. Also, as proof of Perry's knowledge of the true income, testimony was introduced to show that in late September, 1949, Perry ordered his manager to attempt to achieve a gross income of \$3,150 for the month of October. Such evidence, when believed as against conflicting proof, establishes more than "mere silence without actionable fraud," as appellants assert. On the contrary, it discloses an affirmative course of conduct consisting of misstatements, half-truths and concealments of known material facts, all designed to deceive respondents and to prevent discovery of the true fact that the income during and prior to the interval of the negotiations was actually less than the amount represented by appellants. Such misrepresentations as to the earnings of an income-bearing property in a community where taxes are high and cost of maintenance is burdensome, could have been made only for the purpose and with the intent, as the

1. Appellants referred to it as a "set-up."

court found, that respondents rely thereon. They constitute a lawful, sufficient and proper basis for a finding that appellants' conduct was fraudulent, *Chamberlain v. Wakefield*, 95 Cal.App.2d 280, 288, 213 P.2d 62.

Appellants contend that the evidence compels application of the rule that when a purchaser undertakes to make his own investigation and is allowed to proceed without hindrance, he is presumed to have acquired full knowledge of all the facts necessary for his guidance, and that he relied upon his own investigation and the information thereby acquired and not upon representation of the vendor. They cite *Cameron v. Cameron*, 88 Cal.App.2d 585, 593, 199 P.2d 443; *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 71, 62 P.2d 1397, in support of such doctrine and they argue that Mr. Sanders is actively engaged in dealing with income property; that he retained a broker to assist him in the negotiations; that he had inspected the buildings four or more times. Therefore, they urge, he must necessarily have relied upon his own investigation.

[3-5] The answer to such contention is not far to seek. Respondents' investigation was not complete and could not have been made without hindrance. The income and expense records of the buildings were not available for their perusal. In fact it was insisted at the time that such records did not exist. Thus respondents merely inspected the physical features of the buildings and did not acquire a full, dependable knowledge of the productive powers of the property to which they were entitled from appellants. Moreover, after a vendor has by his false representations or concealments deceived a purchaser into buying a property he comes with poor grace to deny the vendee's right to rely upon such misrepresentations. One who deliberately makes positive assertions that are untrue will not avoid responsibility for his wrongful act by saying that his adversary was not compelled to rely upon them. He must show that his statements were not in fact relied upon. *Dow v. Swain*, 125 Cal. 674, 58 P. 271. While there is a reasonable

duty for a buyer to investigate, the question as to whether the known facts were sufficient to put him on inquiry is a fact for the trial court. *Bank of America v. Greenbach*, 98 Cal.App.2d 220, 235, 219 P.2d 814. It follows that respondents were not precluded from relying upon appellants' statements where their falsity was not apparent from an inspection. *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 748, 192 P.2d 935.

[6, 7] It is contended that damages were not proved despite the studied opinion of an expert appraiser and the intelligent and reasonable observations of Mr. Sanders. Both testified that the true market value of the two apartment buildings at the time of the sale was \$170,000. The objections interposed as to the basis for such opinions are merely arguments on the weight to be given to such testimony but they were not adequate to defeat the admissibility of the opinions. In view of the price of \$200,000 paid for properties, proved to have been worth not to exceed \$170,000, damage in the amount of \$20,000 has been generously established.

[8-11] Three rulings on the admissibility of evidence are criticized. (1) When Mr. Sanders was interrogated upon the question of value he was told to base his testimony on "anything you want to take into consideration." There are three answers to that criticism. (a) No objection was made to the court's inclusion of the last quoted phrase in the question. Neither was a motion made to strike the answer. (b) As owner of property, a witness may testify as to value without qualifying as an expert. *Stroman v. Lynch*, 91 Cal.App. 2d 406, 408, 205 P.2d 409. As owner, therefore, he had more freedom of expression with reference to the value of his property. (c) The witness did not consider anything that was improper in giving his opinion, or anything violative of section 3343 of the Civil Code. (2) A general objection was interposed to a question propounded to Mrs. Farrel, manager of the apartments as to their gross income for January, 1950. It was sustained. (3) Criticism is made of "lengthy testimony that the actual expenses were

less than that set forth in the description of the operating expenses in the brochure." Such proof was necessarily favorable to appellants.

Judgment affirmed.

McCOMB, J., concurs.

FOX, J., deeming himself disqualified, declines to participate in the decision



**COLE et al. v. RUSH et al.\***  
Civ. 18784.

District Court of Appeal, Second District,  
Division 2, California.

March 19, 1952.

Hearing Granted May 15, 1952.

Wrongful death action by Dorothea Cole, and others against Paul Rush, and others. The father of plaintiff children became intoxicated by drinking liquor purchased in defendants' saloon and engaged in fight which resulted in injuries from which he died. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment for defendants after sustaining their general demurrer to amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that complaint failed to state cause of action for negligence in the selling of intoxicating liquor to decedent.

Judgment affirmed.

Moore, P. J., dissented.

**1. Intoxicating Liquors** ⇨291

In absence of statutory provision, serving of alcoholic beverage to patron in obviously intoxicated condition is not proximate cause of injury subsequently received by him because of his intoxication.

**2. Intoxicating Liquors** ⇨306

Complaint, which alleged that, after decedent's wife had asked saloon keepers on numerous occasions not to sell decedent sufficient liquor so that he would

become intoxicated, saloon keepers sold decedent intoxicating liquors with result that decedent became intoxicated and engaged in fight which resulted in fatal injuries, failed to state cause of action against saloon keepers for negligence causing death.

John C. Stevenson and Lionel Richman, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, John Henry Peckham, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants predicated upon the sustaining of their general demurrer to the amended complaint without leave to amend, in an action to recover for wrongful death.

*Facts:* The pleading alleges:

Plaintiffs are the widow and children of James Bernard Cole, deceased; October 13, 1950, decedent visited a saloon known as the Tropic Isle owned and operated by defendants; at the time he entered the bar he was sober, but while there he purchased quantities of intoxicating liquor which he consumed resulting in his becoming intoxicated; decedent was well known to defendants who knew that when he was sober he was of a quiet demeanor, but when he was intoxicated he became belligerent, quarrelsome and pugnacious; plaintiff Dorothea Cole had on numerous occasions asked defendants not to sell her husband sufficient liquor so that he would become intoxicated.

It was also alleged that after decedent became intoxicated on October 13, 1950, he challenged a patron of the bar, Franklin Leonard, to a fight and in the altercation that followed decedent was struck by Leonard and fell to the pavement striking his head as a result of which he died.

*Question: Did the amended complaint fail to state a cause of action for negligence against defendants in selling decedent intoxicating liquor, as a result of which he became intoxicated, engaged in a fight and received injuries from which he died?*



[1] *Yes.* In the absence of a statutory provision the serving of alcoholic beverage to a patron in an obviously intoxicated condition is not the proximate cause of an injury subsequently received by him because of his intoxication. (*Hitson v. Dwyer*, 61 Cal.App.2d 803, 806[3a], 143 P.2d 952, et seq.; *Fleckner v. Dionne*, 94 Cal.App.2d 246, 248[1], 210 P.2d 530.)

[2] Since the facts in the instant case fall squarely within the foregoing rule the trial court properly sustained the general demurrer without leave to amend.

In view of the decisions of the appellate courts of our own state, *Peck v. Gerber*, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996; *Masted v. Swedish Brethren*, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803; *Molloy v. Coletti*, 114 Misc. 177, 186 N.Y.S. 730, and *Curran v. Olson*, 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733, are not here applicable. (*Schneider v. Schneider*, 82 Cal. App.2d 860, 862[2], 187 P.2d 459.

*Affirmed.*

FOX, J., concurs.

MOORE, Presiding Justice.

I dissent. The authorities relied upon by respondent (*Fleckner v. Dionne*, 94 Cal. App.2d 246, 210 P.2d 530, and *Hitson v. Dwyer*, 61 Cal.App.2d 803, 143 P.2d 952) are not controlling in this action. In the *Fleckner* complaint it is alleged that the proprietor of the saloon sold and served the minor *Dionne* intoxicating liquors while he was already drunk knowing that his automobile was nearby and that he would thereafter drive it and that such conduct was a negligent disregard of rights of plaintiffs. In the *Hitson* complaint, it is alleged that "while [he was] obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from said stool to the floor;" he was dragged by defendants from his position on the floor; "as a result of said fall or the dragging, or both, plaintiff suffered a fracture, and other injuries". Both cases allege no more than negligence in serving liquors which the courts held was too remote to be actionable. In the action at bar the plead-

ing charges that prior to the date of decedent's injuries "and on occasions too numerous to name, plaintiff *Dorothea Cole*, requested defendants and each of them not to give, sell or furnish intoxicating beverages to *James Bernard Cole* sufficient to allow him to become intoxicated" but that defendants refused to desist from selling *James* intoxicating beverages; prior to *James'* coming to the saloon on the day he was injured he was not intoxicated by reason of the use of alcoholic beverages; at their saloon defendants gave, sold and furnished to *James Cole* alcoholic beverages which he drank until he was intoxicated; by reason of such intoxication from the alcoholic beverages, *James* became quarrelsome, belligerent and pugnacious; quarreled with one *Leonard* who struck *Cole*; the latter then fell to the pavement resulting in his death.

Moreover, it was also alleged that defendants had specific knowledge, derived from decedent's numerous prior visits to the saloon, that he habitually became intoxicated and while in this state was invariably rendered belligerent and quarrelsome. Such definite knowledge of *Cole's* character must have given defendants reason to foresee such harm as resulted from his use of alcohol at the time in question. The fact that other events contributed to assure his death does not erase or minimize the evil of respondent's service of alcohol to decedent. It is these allegations of express knowledge on the part of defendants that serve to distinguish the case presented from the *Fleckner* and *Hitson* decisions.

If decedent had been allergic to sodium chloride and *Mrs. Cole* had notified defendants of such fact and if in disregard of such notice they had sprinkled salt on the eatable they served to *Mr. Cole*, and as a result he had died would they still be free from liability for causing his death? I see no such magic attached to the word "alcohol" as to make those who engage in the sale of it stand above the plane of ordinary mortals. Dealing in poison may be good cause for all men to beware, but it should place upon the dealer the responsibility for serving it to a person whom the dealer knows will probably cause injury to others.

or death or injury to himself while under the alcoholic influence. Alcohol has from time immemorial been under the ban of the law and is allowed upon the counter of the merchant or on the bar of a saloon solely by license. Because he is licensed to sell it does not exempt the vendor from the duty he owes to every member of the public: not to place it in the hands of a person he knows to be irresponsible and who, while under its influence, may do incalculable mischief.

The argument of Mr. Justice Dooling's dissent (*Fleckner v. Dionne*, supra) is apropos with additional cause for reliance upon it.



109 Cal.App.2d 634

**Application of FISHMAN.**

**Cr. 847.**

District Court of Appeal, Fourth District,  
California.

March 6, 1952.

Proceeding in the matter of the application of petitioner for admission to bail and stay of execution of judgment pending appeal. The District Court of Appeal, Griffin, J., held that trial court in felony prosecution did not abuse its discretion in denying application of petitioner for admission to bail pending appeal.

Application denied.

See, also 241 P.2d 605.

**1. Bail ☞49**

On application to admit petitioner to bail and to stay judgment of conviction pending appeal, evidence established that trial court in felony prosecution did not abuse its discretion in denying bail pending appeal. Rules on Appeal, rule 32(b).

**2. Criminal Law ☞1001**

Where trial court in felony prosecution was justified in denying bail pending appeal, and effect of the granting by District

Court of Appeal of stay of execution, pending appeal would be only to retain petitioner in county jail pending appeal, and petitioner emphatically stated that if application for bail should be denied by District Court of Appeal his application for stay of execution should likewise be denied, because petitioner's health would be better protected, from a medical standpoint, in state prison than in county jail, and defendant had already been delivered to the state prison, application for stay of execution would be denied by District Court of Appeal.

**3. Fines ☞2**

A judgment imposing a fine, without any alternative, is equivalent to a civil money judgment, and its collection is subjected to the same rules. Pen.Code, §§ 1206, 1214; Code Civ.Proc. § 681(a).

Thomas Whelan, San Diego, John W. Preston, Los Angeles, for petitioner.

James Don Keller, Dist. Atty., Clifford L. Duke, Jr., Deputy Dist. Atty., of San Diego County, San Diego, Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondents.

GRIFFIN, Justice.

Petitioner was convicted of a felony by a jury in the Superior Court of San Diego County. The trial judge imposed a prison sentence and in addition ordered defendant to pay a fine of \$3,500. After denying a motion for new trial and after hearing had, the trial court denied petitioner's application to that court for bail and denied his application for stay of judgment pending appeal.

Petitioner instituted, in this court, this proceeding. The application for bail is predicated upon the ground that petitioner was and is suffering from a cancer of the nasal areas, diabetes, and general ailments, and that immediate treatment is necessary, claiming that incarceration in the county jail in his present condition would mean that his health and years of his life would be in danger. In support of the contention that the court erred in denying the appli-

cation for bail, petitioner cites such cases as *In re Pantages*, 209 Cal. 535, 291 P. 831. Affidavits of two physicians were attached to the petition in support of the allegations, stating that unless petitioner can have proper diet and adequate exercise, incarceration would result in grave danger to his diabetic condition and general health. An additional affidavit of another physician was submitted to this court for consideration, which affidavit was used in the habeas corpus proceeding. See *Ex parte Fishman*, Cal.App., 241 P.2d 605, for a more complete statement of the medical testimony produced.

[1] Rule 32(b) of the Rules on Appeal provides that an application to a reviewing court for bail on appeal pending therein shall be made on such notice to the District Attorney and the Attorney General as the court may determine, and shall include a showing that proper application for bail or a reduction of bail was made to the Superior Court and such court *unjustifiably* denied the application. The trial court apparently considered the question of petitioner's health at the time of that application and was satisfied that it would not be impaired by incarceration. The showing now made in this court, on the hearing of the petition, is equally convincing. The application was not *unjustifiably* denied and no abuse of discretion of the trial court appears in denying petitioner bail pending appeal. *People v. Davis*, 67 Cal.App.2d 837, 839, 155 P.2d 675, and cases cited.

It is also argued in this proceeding that since the appeal from the judgment is not frivolous, and since the record shows a probable cause for the appeal, petitioner is, as a matter of right, entitled to an order for stay of execution pending appeal, and that the trial court abused its discretion in denying this right, citing such cases as *People v. Gallanar*, 144 Cal. 656, 79 P. 378; *People v. Mayen*, 49 Cal.App. 314; *People v. Davis*, 67 Cal.App.2d 837, 155 P.2d 675; *In re Burnette*, 35 Cal.App.2d 358, 95 P.2d 684; and *People v. Burnette*, 34 Cal.App. 2d 663, 94 P.2d 339.

As to this point, the people question the right of the trial court, since the amendment of Penal Code Section 1243 in 1927,

to issue a certificate of probable cause, and the right of the appellate court to pass on the question of probable cause, except on review in those cases where the trial court has abused its discretion or *unjustifiably refused to grant the stay*. See history of amendment in *Re Martinson*, 87 Cal.App. 393, 394, 262 P. 474, and Rule 32(a), Rules on Appeal; but see *People v. Rodgers*, 38 Cal.App.2d 360, 101 P.2d 157; and *People v. Cox*, 65 Cal.App.2d 712, 151 P. 269.

The record on appeal is not before us and accordingly, we are unable to properly pass on the question whether the appeal is or is not frivolous, whether debatable questions are presented, or whether the trial court *unjustifiably* denied the application. In this proceeding we deem it unnecessary to determine this question.

[2] The effect of granting the applicant a stay of execution would be only to retain petitioner in the County Jail pending appeal. Since the trial court was justified in denying bail, petitioner's confinement would be in the County Jail pending appeal. Petitioner, through his counsel, emphatically stated in open court and in his brief, that if the application for bail is denied his application for stay of execution should likewise be denied because petitioner's health would be better protected, from a medical standpoint, in State's prison than in the County Jail. Under these circumstances, and since the defendant has already been delivered to the State's prison, the application for a stay of execution of the judgment is denied.

Lastly, petitioner, in his hearing before the trial court, made no particular mention of that portion of the judgment imposing a fine nor did he attempt to segregate it. After denial of the "stay of execution of the judgment" by the trial court, and after argument of this petition before this court, apparently an execution did issue and an attempted levy was made on the applicant's property to collect the fine imposed. It is argued that a stay of execution upon that portion of the judgment should be ordered by this court as a matter of right.

[3] A judgment imposing a fine, without any alternative, is equivalent to a civil



money judgment, and its collection is subjected to the same rules. *Grady v. Superior Court*, 64 Cal. 155, 30 P. 613; Sec. 1214, Penal Code; Sec. 1206, Penal Code; 12 Cal. Jur. 516, sec. 3; Sec. 681(a), Code of Civil Procedure.

Under the circumstances, the application to admit petitioner to bail and stay the judgment pending appeal is denied.

BARNARD, P. J., and MUSSELL, J., concur.



109 Cal.App.2d 632

**Ex parte FISHMAN.**

Cr. 846.

District Court of Appeal, Fourth District,  
California.

March 6, 1952.

Proceeding in the matter of the application of petitioner for writ of habeas corpus to have petitioner released on bail pending appeal from felony conviction, on ground that his release was necessary, so that he could secure medical treatment to safeguard his health. The District Court of Appeal, Griffin, J., held that trial court in felony prosecution did not unjustifiably deny application of petitioner for release on bail.

Application denied.

**Habeas Corpus** ⇨85(1)

On application for writ of habeas corpus to have petitioner released on bail pending appeal from felony conviction, on ground that release of petitioner so that he could secure medical treatment was necessary to safeguard his health, evidence established that trial court in felony prosecution did not unjustifiably deny application for release on bail pending appeal. Rules on Appeal, rule 32(a).



Thomas Whelan, San Diego, John W. Preston, Los Angeles, for petitioner.

James Don Keller, Dist. Atty. of San Diego County, Clifford L. Duke, Jr., Deputy Dist. Atty., San Diego, Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondents.

GRIFFIN, Justice.

Petitioner recited in his application that he was on bail pending the trial of the action against him, and after his conviction by a jury of a felony, he was committed to the county jail; that pending his motion for a new trial he applied to the trial court for bail pending his contemplated appeal and that this request was denied.

This application for a writ of habeas corpus is predicated upon a statement of petitioner of his immediate need of insulin treatment, proper diet, and radium treatments for a cancerous condition of the nasal passage, and that if such request is not granted, his health will be seriously affected; that these conditions require "immediate" consideration. An accompanying affidavit of a physician recites these facts.

Upon this showing, this court granted the petitioner bail pending the hearing of the application for the writ. Before the hearing thereon, petitioner's motion for new trial in the Superior Court was denied and he was sentenced and committed to the State's prison. On the hearing of the application in this court, the applicant produced the affidavits of two physicians who attended the applicant before his incarceration in jail. Their statement of his physical condition is set forth in Application of Fishman, Cal.App., 241 P.2d 603. Counsel for petitioner re-offered the affidavit of the physician which accompanied the original petition for a writ of habeas corpus. The people then produced a new verified statement of this latter physician, wherein, for some unknown reason, he greatly qualifies his original affidavit and states that he did not then completely read his affidavit before signing it; that where he stated that petitioner should have "immediate radium treatment", that statement was not intended; that his examination did, in fact, show that the cancerous condition was not active but it was true that a proper treatment for the diabetic condition was indicated; that

this last condition was based upon petitioner's statement to him; that he since has discovered that the medical care available in California prisons is adequate and that petitioner's health could be safeguarded under these conditions; that he would like to withdraw his former affidavit signed by him in this connection, because, on rereading it, he finds it is not his opinion, medically; that had he conferred with the other specialists who examined petitioner and who filed affidavits herein for the people, his opinion would have been the same as theirs respecting applicant's condition today. These other two specialists stated that they had made independent examination of the applicant; that their examination revealed some evidence of a previous treatment of a growth in the left nasal passage, which growth was, at that time, arrested; that there is no evidence of any recurrence of the condition, and that in their opinion petitioner could be confined in jail without danger or detriment under the circumstances related. The trial court did not unjustifiably deny the application nor did it abuse its discretion in so doing. Rule 32(a), Rules on Appeal; *People v. Pantages*, 104 Cal.App. 396, 286 P. 467.

Application for writ of habeas corpus denied.

BARNARD, P. J., and MUSSELL, J., concur.



109 Cal.App.2d 642

**KRITT v. ATHENS HILLS DEVELOPMENT CO.**  
Civ. 18486.

District Court of Appeal, Second District,  
Division 1, California.  
March 10, 1952.

Action by Samuel Krittr, and others, against Athens Hills Development Co. to recover commissions allegedly due. The Superior Court of Los Angeles County, Alfred

L. Bartlett, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that contract by which broker was to be paid \$50 for selling each of 143 lots, and which contained provision that in event any money deposited by buyer was declared forfeited by seller, same was to be divided between seller and broker, except that broker was not to receive more than \$50 out of division, did not embrace within its purview, option contract of purchase in which buyer had option to purchase or not as he saw fit.

Judgment affirmed.

**1. Appeal and Error** ⇨757(1)

Rules relating to briefs on appeal contemplate that they shall contain a statement of only material facts, being those facts which possess weight of character which tends to throw decision one way or the other, and do not contemplate that resume of evidence shall be presented.

**2. Brokers** ⇨40

Contract by which broker was to be paid \$50 for selling each of 143 lots, with provision that if sale of lot was cancelled for any reason, then money deposited by buyer which was declared forfeited by seller was to be divided between seller and broker, except that broker was not to receive more than \$50, did not embrace within its purview option contract of purchase in which buyer had option to purchase or not as he deemed fit, and broker was not entitled to commission for procuring signing of such contracts, since same was not contract of sale.

**3. Evidence** ⇨442(4)

In action by broker on written contract with owner for commissions, wherein it appeared that contract did not give broker exclusive right to sell group of lots owned, parol evidence to show that broker was to receive commission upon procuring contract with buyer with option reserved in latter to cancel, and that contract gave exclusive right to sell was inadmissible and properly rejected.

**4. Brokers** ⇨76

Where contract by which broker was to be paid \$50 for selling each of 143 lots for owner contained provision that if sale of lot was cancelled for any reason, money

deposited by buyer which was declared forfeited by seller was to be divided between seller and broker, except that broker should not receive as his share more than \$50, no duty was imposed upon seller to declare forfeiture when he was entitled to do so, in absence of language in contract imposing such duty, and broker was not entitled to recover full commissions on contracts on which seller might have, but did not, declare forfeiture.

#### 5. Brokers ⇨49(1)

Where contract between broker and owner specified terms upon which broker was to sell 143 lots of owner, broker's rights were to be measured by such contract and not by option contracts subsequently entered into with prospective buyers.

#### 6. Brokers ⇨86(1)

In action by broker against owner of lots to recover commissions, wherein it appeared that contract did not give broker exclusive right to sell, evidence was insufficient to establish that owner had prevented broker from procuring option purchasers for certain of lots involved, but established that broker had abandoned his contract and had ceased to perform it.

---

Sander Cotlow, Los Angeles, David Schwartz and Herbert Baerwitz, Beverly Hills, for appellants.

Frank J. McCarthy, Los Angeles, for respondent.

HANSON, Justice pro tem.

In its final analysis the question for decision is whether a broker who was engaged to sell 143 lots with homes to be completed thereon was entitled under the terms of his written contract with the seller to a commission of \$50.00 the moment the seller approved a buyer's written conditional proposal to buy a lot or only when the proposal was consummated. A subsidiary question is whether the broker abandoned his rights under the contract by want of performance on his part.

The defendant Development Co. which was the owner of the 143 lots here in question, along with some 50 other lots in the

subdivision, was engaged in the business of selling lots with homes to be constructed thereon of a character to be selected by the buyer from a group of plans and specifications it had prepared for the purpose.

The plaintiff, a real estate broker, having been employed as a broker to find a purchaser of fifty lots for the defendant, for which he was paid his commission, thereupon sought an exclusive agency with the defendant to represent it in the sale of the remaining 143 lots upon which homes were to be built. To that end the plaintiff caused to be prepared a written agency contract which he submitted to the defendant. This contract was thereupon executed by the plaintiff and the defendant on January 28, 1948, and will hereafter be referred to merely as the "broker's contract." This contract briefly summarized required the defendant to provide an office for the broker on the tract premises and that it advertise the lots for sale in newspapers and otherwise; that the broker's name would be placed on all advertisements, all without any expense to the broker; that it would pay to the broker \$50.00 "for selling each and every lot and/or home"; "that if any deals for the sale of said lots and/or homes are cancelled for any reason whatsoever, any moneys deposited on said deals and declared forfeited, shall be divided equally," except that the broker was not to receive in any such division more than \$50.00; that the seller might withdraw from the broker "the sale of any home if it is not sold 40 days after final FHA approval is received by the [seller] for said home"; that the broker would "diligently pursue and make every effort to transact deals and complete same to the best of his ability"; that he would "present all deals and sales contracts" to the seller "for approval and acceptance"; the seller not to disapprove except for just cause; that the agreement "shall be irrevocable and remain in full force and effect until each and every lot and/or home is sold and deals consummated on [the] Tract." Other provisions in the contract need not be narrated at this point.

Upon the execution of the broker's contract the broker prepared a printed contract, which we will hereafter refer to as the



"buyer's option contract," and which, after a few minor changes by the defendant, was used by the broker in every instance. This latter contract by its very terms contemplated a sale not of a lot alone but of a lot with a completed house thereon.

It recited the receipt of \$—— from —— [the buyer] as part payment of "Lot —— \* \* \* House Plan #——"; that the price should be the amount set by F.H.A. but in no event not more than \$8,500, to be paid out of any loans made by F.H.A. or Veterans ten days after such loan or loans were available and the balance due, if any, in cash from the buyer upon the close of escrow; that upon the receipt of the whole purchase price the seller would issue its grant deed to buyer. The writing expressly contemplated that the seller would endeavor to procure the loan or loans for the buyer and if it failed to do so within 90 days that it would return any deposit made by the buyer. Moreover, the agreement recited that if the buyer did not otherwise see fit to exercise his option the seller would return his deposit except for the sum of \$50.00, which it would retain as liquidated damages.

[1] Before proceeding to a statement of the salient facts we wish to observe that appellant's so-called statement of the facts as set forth in his brief is not such a statement but instead is in large part a resume of all the evidence. This is not what is intended by the Rules on Appeal. The rules contemplate a statement only of the material facts, i. e., the facts which possess weight of a character which tends to throw the decision one way or the other. We may add that respondent likewise has not been helpful to us for he too has only followed the lead of appellant by stating in the same fashion merely what he regards as "omitted facts."

At or shortly after the transactions narrated the parties ascertained that 35 out of the 143 lots were not eligible for F.H.A. loans. Nevertheless, the broker proceeded to solicit purchasers for the remaining 108 lots. Before the end of February he procured signed options, approved by the seller, along with deposits for all of these 108 lots which he turned over to the seller. Owing

to the apparent public demand the broker established a waiting list, as early as March 11th, for people desiring to enter into options taking deposits from them with the assurance he would substitute them, in order, as quickly as cancellations came in. Cancellations began as early as March 11th. As soon as the broker was advised of a cancellation he substituted another person from his waiting list. This procedure continued until June 24th when the broker, after a conference with the defendant, ceased not only this procedure but made no attempt thereafter to procure further signed options for any of the lots available. Some of the lots were optioned as many as four times before they were finally sold and conveyed. In fact, six were optioned four times; 26 were optioned three times; 67 were optioned two times and only six were optioned once.

In the interval between the execution of the broker's contract and June 24th it seems that at least 12 options were cancelled before they had been outstanding 90 days. The defendant accordingly retained out of each of the twelve deposits the sum of \$50.00 and paid over to the broker one half thereof. By June 24th all options dated on or prior to March 24th were subject not only to cancellation for the failure of defendant to procure an F.H.A. loan but upon such a cancellation the defendant was obligated by the terms of the contract to return the deposits *in toto* without the deduction of the sum of \$50.00. How many loans of that character had been cancelled by June 24th is not disclosed by the briefs. At all events it was plainly apparent to the broker at that time that the persons who had not cancelled could do so at any time after their option had run for 90 days and thus require the defendant to return their deposits in full. In the light of that knowledge the broker on June 24th demanded of the defendant that the broker's contract be amended so as to provide a commission of \$100.00 rather than \$50.00 as was provided therein. This was refused by the defendant. While the contract was not cancelled by the parties the broker thereafter did nothing towards procuring new options for any of the options which were thereafter

cancelled. In short, he ceased to perform further under the contract.

In excuse of any such performance the broker contends that he was entitled to a commission of \$50.00 on each of the 108 lots when he procured the approved options regardless of whether the option holder exercised his option, and if this be not true he was entitled to the sum because all the 108 lots were sold as a result of his and the defendant's activities; that to the extent the defendant personally or through other brokers procured completed sales the plaintiff broker was entitled to his commission as he held an exclusive sales contract. In short, the contention here is that the defendant could not personally sell any of the lots without paying the plaintiff the commission to which he would be entitled had he sold it.

[2, 3] Turning to the language of the broker's contract we find that the broker was to be paid \$50.00 for selling each of the 143 lots. If, however, the sale of a lot was cancelled for any reason whatever then and in that event any money deposited by the buyer "on the deal" which was declared forfeited by the seller was to be divided between the seller and the broker, except that the broker in any such division was not to receive more than \$50.00 out of the division. The contract may not be interpreted, as appellant contends, as embracing within its purview option contracts of purchase, i. e., where the buyer has an option to purchase or not as he sees fit. Such a contract is not a contract of sale. *Hicks v. Christeson*, 174 Cal. 712, 164 P. 395; *Pehl v. Fanton*, 17 Cal.App. 247, 119 P. 400; *California Land Security Co. v. Ritchie*, 40 Cal.App. 246, 180 P. 625; *Woolley v. Batchelder*, 35 Cal.App. 177, 169 P. 408; *Dreyfus v. Richardson*, 20 Cal.App. 800, 130 P. 161. By the terms of the broker's contract before us the broker was entitled to a commission of \$50.00 upon a sale consummated and in case it was not consummated then to one half of the buyer's deposit (but not in excess of \$50.00) only if the seller had declared a forfeiture of the contract, but not in the case of a cancellation without such declaration. Moreover, the contract does not give the broker the exclusive right to

sell the lots. Parol evidence to show (1) that the parties intended that the broker was to receive the commission upon procuring a contract with a buyer with an option reserved in the latter to cancel; (2) that the contract gave an exclusive right to sell was inadmissible and rightly rejected by the trial court.

[4, 5] From what we have so far said it is evident that the broker was entitled to a commission of \$50.00 only if the buyer he procured exercised his option and consummated the sale. There were only five instances in which this occurred. In addition to the commissions on these sales aggregating \$250.00 the plaintiff broker was entitled, as we have said, to one half but not in excess of \$50.00 of all deposits made by option purchasers which were declared forfeited by the seller. The proper proportion of all the deposits declared forfeited it appears were paid to the broker. The latter's contention that many deposits which were returned by the seller to the buyers should instead have been declared forfeited is without merit. In the first place the contract does not impose a duty upon the seller to declare a forfeiture where he could do so; in the second place there does not appear from the briefs to be any evidence on which the contention may be supported. The burden was on the broker to show the facts. If the broker intended to require the seller to declare forfeitures where forfeitures could be declared, he failed to insert the necessary language in the broker's contract. It is the broker's contract not the printed form of the option contract that measures the broker's rights.

[6] A further contention made by the broker is that he was entitled to a commission on the 35 lots sold by the defendant after July 2nd. This contention is sufficiently answered by what we have so far said, i. e., that the seller had the right to sell all the lots without incurring a liability for commissions. The claim that the seller prevented the broker in August from procuring option purchasers for these lots is not sustained by the record. Moreover, it appears that the seller had sold some of these 35 lots, but just how many is not disclosed by the record. Here again the broker

failed in his burden of proof. What is more to the point is that the trial court on substantial evidence not only found that the broker had abandoned his contract, but that he had ceased to perform under it. As the broker was in default for want of performance he failed in the burden of proof imposed upon him and hence was not entitled to recover upon the contract.

Other errors assigned are too inconsequential to require discussion. It is enough here to say that the court in granting judgment for \$350.00 not only gave judgment for all that was coming to the plaintiff, but possibly \$100.00 more.

The judgment is affirmed.

**DORAN, Acting P. J., and DRAPEAU, J., concur.**



109 Cal.App.2d 852

**PEOPLE v. MITCHELL.**

**Cr. 2788.**

District Court of Appeal, First District,  
Division 2, California.

March 21, 1952.

Defendant pleaded guilty to a violation of Penal Code, § 288 and thereafter in a proceeding initiated by him was determined by the Court to be a sexual psychopath and he was ordered committed to the state hospital. Thereafter defendant submitted a written motion to the Superior Court in which he alleged that he was fully recovered and completely cured of his former mental illness, and moved the court to set a date for trial by jury on question of defendant's sanity. The motion was denied by the Superior Court in and for the County of Alameda, O. D. Hamlin, J., and from the order of denial defendant appealed. The District Court of Appeal, Dooling, J., held that statutory provisions for determining question of sexual psychopath's recovery are exclusive and in absence of required certification of recovery by hospital superintendent there was no pred-

icate for jury trial on question of defendant's recovery.

Order affirmed.

**1. Insane Persons ⇨86**

Statute providing that after being confined for not less than one year a person adjudicated insane on his successful plea of not guilty by reason of insanity and thereafter committed to a state hospital for the criminal insane, may make an application for his release on ground that his sanity has been restored, whereupon court must hold a hearing to determine that question, is not applicable to a person charged with or convicted of a crime who has thereafter been ordered committed as a sexual psychopath. Pen.Code, § 1026a; Welfare and Institutions Code, §§ 5125, 5500-5518, 5512.5.

**2. Insane Persons ⇨86**

Statutes providing specific methods for determining question of sexual psychopath's recovery and the initiation of proceedings by certification of hospital superintendent are specific and exclusive in case of persons adjudged sexual psychopaths. Welfare and Institutions Code, §§ 5517, 5518.

**3. Insane Persons ⇨86**

Where defendant, who had been committed as a sexual psychopath, neither alleged nor showed that hospital superintendent had issued certificate of recovery or had been asked to do so, in absence of certification by superintendent there was no predicate for trial of question of defendant's recovery provided for in statutes providing method for determining question of sexual psychopath's recovery. Welfare and Institutions Code, §§ 5517, 5518.

Paul Mitchell, Talmadge, in pro per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., for respondent.

DOOLING, Justice.

On January 6, 1950 defendant pleaded guilty to a violation of Penal Code, § 288. Thereafter in a proceeding initiated by him for that purpose he was determined by the



court to be a sexual psychopath, sentence was suspended and on February 24, 1950 he was ordered committed to the State Hospital at Talmadge. On August 1, 1951 defendant submitted a written motion to the Superior Court in which he alleged "that he is now fully recovered and completely cured of his former mental illness" and moved the court "to set a date for trial by jury on the question of defendant's sanity." This motion was denied and from the order of denial defendant has appealed.

The procedure for committing and releasing a sexual psychopath is found in Div. 6, Part 1, Chap. 4 of the Welfare and Institutions Code, §§ 5500-5518. In the provisions governing such commitments is found sec. 5512.5 reading: "Persons found by the court to be sexual psychopaths under this chapter shall have the same rights to jury trial as provided in this code for persons mentally ill or insane." Such persons are given a right to jury trial if within 5 days after commitment demand is made for a jury trial. Welf. and Inst. Code, § 5125. No such demand was made in this case and appellant does not rely on this section.

Instead he argues that he is entitled to a trial under Pen.Code, § 1026a which provides in effect that after being confined for not less than one year a person adjudicated insane upon his successful plea of "not guilty by reason of insanity," and thereafter committed to a state hospital for the criminal insane, may make an application for his release "upon the ground that his sanity has been restored," whereupon the court must hold a hearing to determine that question.

[1,2] This section is obviously not applicable to a person charged with or convicted of a crime who has thereafter been ordered committed as a sexual psychopath. Secs. 5517-5518, Welf. and Inst. Code, provide a specific method for determining the question of a sexual psychopath's recovery. The proceedings are initiated by certification of the superintendent as provided in sec. 5517 and only after such certification is the court authorized to take further proceedings. These provisions are specific and

evidently intended to be exclusive in the case of persons adjudged sexual psychopaths.

[3] There is neither allegation nor showing that the superintendent has issued the certificate provided for in sec. 5517 or has been asked to do so. In the absence of this certification by the superintendent there is no predicate for the trial provided for in sections 5517-5518. We need not speculate as to appellant's remedy in a case where the superintendent wrongfully refuses to issue such certificate since the record does not present that question.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



109 Cal.App.2d 751

**ROGERS v. RETIREMENT BOARD OF  
SAN FRANCISCO CITY EMPLOYEES'  
RETIREMENT SYSTEM et al.**

Civ. 14828.

District Court of Appeal, First District,  
Division 1, California.

March 17, 1952.

Petition by Florence Rogers against Retirement Board of San Francisco City Employees' Retirement System and others for writ of mandate directing defendant named to award petitioner a pension as a wife of a retired officer. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., issued a peremptory writ, which ordered Board to grant pension and the Board appealed. The District Court of Appeal, Peters, P. J., held that denial of pension by the Board was an abuse of discretion.

Judgment affirmed.

**1. Municipal Corporations ⇐187(8)**

Application by police officer's widow for pension is a separate and independent proceeding from that of her husband to secure disability retirement.

**2. Municipal Corporations** ⇨187(6)

A police officer's widow has the legal right to apply for a pension if her husband's death was caused by, accelerated or precipitated by the employment, regardless of whether or not her husband, during his lifetime, was or was not retired for disability.

**3. Mandamus** ⇨168(3)

In proceeding by police officer's widow for pension a letter written by a doctor to retirement board relating his opinion as to cause of police officer's death and the doctor never appeared before the board nor testified under oath, and the widow had no notice of the letter until after the adverse decision of the board was rendered, letter was inadmissible when case was submitted for judicial review.

**4. Municipal Corporations** ⇨187(8)

A board of retirement which acts as a judicial body with limited jurisdiction, is not bound by technical rules of judicial procedure but must afford the parties appearing before them a reasonably fair hearing and cannot lawfully, decide cases on evidence not submitted to or known by the other side.

**5. Mandamus** ⇨168(4)

Where evidence showed without contradiction that death of police officer from progressive type of heart disease was accelerated by amount of walking officer was required to do after being transferred from motorcycle duty to alleged "light duty", court, in mandamus proceedings, was justified in finding that retirement board of city in denying application to widow for pension abused its discretion.

---

Dion R. Holm, City Atty., Louis T. Kruger, Deputy City Atty., San Francisco, for appellants.

George B. White, San Francisco, for respondent.

PETERS, Presiding Justice.

The Retirement Board of San Francisco denied Florence Rogers, the widow of a police officer, a pension. On writ of mandate to the Superior Court a peremptory

writ issued ordering the board to grant Mrs. Rogers a pension. The board appeals.

Respondent is the widow of John Rogers, who was a member of the police force in San Francisco. In June of 1944, after nineteen years of service, Rogers then aged 52, applied for a disability retirement, claiming to be suffering from traumatic arthritis caused by injuries received by him in 1930 or 1931 in the course and scope of his employment.

Rogers testified that before entering the police department he had had no trouble with his back; that in January, 1930, while operating a motorcycle in responding to a police call, he bumped into an obstruction and received a terrific jar, dislocated a vertebra, and developed an acute neuritis. A severe pain developed in his right arm and lower back. He was treated by the police doctor, his own doctor, and a chiropractor, and gradually improved. In 1941, while attempting to arrest an intoxicated man, the two were catapulted down some stairs, resulting in a twisted ankle and a sore back. He testified that after the 1930 accident his back was always "tender," and that he had acute attacks of pain every couple of months.

In 1942, Rogers, because of his condition and at his request, was transferred to traffic duty, operating a three-wheel motorcycle. In 1943, while starting this motorcycle, the starting pedal kicked back, again injuring his back. X rays showed no broken bones, but his doctor then informed him that he had developed arthritis. The police doctor ordered that Rogers be taken off the motorcycle detail and assigned to light duty. Rogers testified that from that date until the date of the hearing (May 2, 1945) he had had continuous pain in his back, and was unable to perform his duties. By stipulation, all of the records of the police department and retirement board pertaining to Rogers, were considered as having been introduced.

Dr. Shumate, a doctor connected with the retirement board, testified that he examined Rogers in 1943 and found a back muscle spasm, and considerable arthritis, which could have been traumatic in origin. He was of the opinion that Rogers was perma-

nently disabled for active duty of any strenuous character. No mention was made during these hearings of any heart condition, Rogers and the doctors being unaware that, in addition to his other ailments, he also had a bad heart.

The retirement board approved Rogers' application for disability retirement, finding that he was disabled and that such disability had been "incurred in performance of duty during 1930 or 1931." Since the board approved the retirement request, Rogers did not, of course, apply for any rehearing. He retired, moved to Sonoma County, and died April 4, 1946.

On April 10, 1946, Mrs. Rogers filed the present application, on a form furnished by the retirement board, for a "continuation" of the retirement allowance. It was her theory that her husband had died from a heart condition that had been aggravated by his activities as a police officer.

At the hearing of Mrs. Rogers' application several witnesses testified as to Rogers' condition during the period from 1943 to 1945 when he was on so-called "light" duty. McCann, a fellow police officer, testified that Rogers was assigned the duty of serving traffic warrants; that there is always a backlog of 160 to 200 such warrants to be served; that only one officer is used for this purpose; that service of a warrant requires the officer to climb stairs of the many old houses and apartments in the area; that Rogers was engaged in such activities from about 9:30 a. m. to 4 p. m. each day; that Rogers would accompany him on special details about five times a month; that during these periods Rogers complained about shooting pains up his back and right arm; that Rogers' condition was such that he, McCann, would not have thought of asking Rogers to help him make an arrest.

A Mrs. Davis, a sister of Mrs. Rogers, prepared Mr. Rogers' lunch each day while he was on duty serving warrants. She testified that Rogers constantly complained of exhaustion and shortness of breath, of severe pains in his arms and back, and of having to climb so many stairs. She also testified that during these periods of exhaustion Rogers' lips would turn blue.

Mrs. Rogers testified that shortly after her husband retired in May of 1945 they moved to Sonoma County where he rested; that in January, 1946, he attempted to start a real estate business, but discovered that he became completely exhausted if he tried to show properties to prospective customers. After February of 1946, he confined his activities entirely to office work. She also testified that, after her husband's injury in 1943, and after he had been placed on "light" duty, he continued to suffer severe pain in his lower back and under his arm—the same area where he mentioned pain the night of his death; that after he retired from the police force this pain got progressively more severe. She pointed out that their San Francisco home had twenty-three stairs and Mr. Rogers had great difficulty in climbing them. This was one of the factors that induced them to move to Sonoma, where the house had but two front steps.

On the date of his death, April 4, 1946, Mr. Rogers complained of not feeling well, but nevertheless went to the office in the morning and afternoon. After dinner that night, while listening to the radio, he complained of severe pains in his back and arm. After undressing, and while getting into his pajamas, he fell over dead.

The autopsy surgeon, Dr. McGrath, testified that he discovered that death was caused by a severe coronary occlusion, and that Mr. Rogers had been suffering from arteriosclerosis of the coronary arteries. The condition that he found gradually developed over a period of quite a few years, and could have started in 1930 when Rogers first noticed pains in his back and arm. Physical exertion or emotional strain would, in the opinion of the doctor, accelerate the progress of the disease. The doctor explained that when the heart muscle is diseased, as here, pain is not felt in the heart, which has no sensation of pain, but is referred to other sensory areas; that while it is not common for the pain to be referred to the back, that does happen; that the most common referral pain radiates down the arms; that the pain from which Rogers suffered just prior to his death was connected with the heart attack.



The doctor was also of the opinion that the back pains described by Rogers at the hearings of his application for disability could easily have been due to his heart condition, and that the conditions then described by Rogers—pain resulting if he ran, or climbed stairs—were consistent with a chronic heart condition. Dr. McGrath was definitely of the opinion that the so-called "light" duties performed by Rogers after he was taken off the motorcycle detail aggravated the heart condition. This, in the opinion of the doctor, hastened Rogers' death. Proper rest, during this period, would have arrested or slowed down the progress of the disease.

This concluded all of the evidence produced before the retirement board at the hearings. The matter was taken under submission on September 25, 1946. On October 14, 1946, the secretary of the board wrote to a Dr. du Bray, enclosing copies of the transcripts of the hearings, and requested a report. Dr. du Bray replied by a letter dated October 22, 1946, which was received by the board October 28, 1946, stating that he had examined the record and that, in his opinion, Rogers died of a progressive heart condition that was in no way connected with his employment.

A copy of this letter was not sent to Mrs. Rogers or to her counsel, and they had no notice of it. On October 30, 1946, the petition of Mrs. Rogers was denied by a vote of four to two, one member not voting, and a petition for rehearing was denied three to three.

Thereupon, Mrs. Rogers filed a petition for a writ of mandate in the Superior Court. That court found that the heart condition causing Rogers' death was progressive and developed during his active service; that the condition arose out of and in the course of Rogers' employment; that Rogers' life was shortened by reason of the strain imposed on his heart during the period he was required to climb stairs and serve warrants. The court also found that when Rogers was retired the cause of his retirement was mistakenly assigned as due to the physical injuries already discussed; that all of the evidence before the board on Mrs. Rogers' application showed

that death was due to heart disease aggravated by the employment, and that in denying her application the board abused its discretion. The Superior Court therefore ordered that a pension be awarded Mrs. Rogers. The retirement board appeals.

The first contention of the board is that the Superior Court had no jurisdiction of the writ of mandate because the retirement board granted Rogers retirement for a cause not connected with the cause of his death, and neither he nor his wife petitioned for a rehearing. It is urged that because no petition for rehearing was then filed in that proceeding, Mrs. Rogers is precluded in this proceeding from seeking a review by mandate. The point lacks merit. It is true that under the provisions of section 208 of the Municipal Code of San Francisco a petition for rehearing is permitted to an applicant, or, in the event of his death, to his beneficiary, if they are dissatisfied with the award. At least as to boards exercising state-wide jurisdiction, a petition for rehearing must be filed as a condition precedent to proceeding by mandate or *certiorari* to review the decision of the board. *Alexander v. State Personnel Bd.*, 22 Cal.2d 198, 137 P.2d 433; *Child v. State Personnel Board*, 97 Cal. App.2d 467, 218 P.2d 52. If it be assumed that this rule is applicable to proceedings before local boards, such rule has no application to the present case. The appellant is relying on the fact that Mr. Rogers did not apply for a rehearing to assert his heart condition as an additional ground for disability retirement, even though the evidence shows that he and the board's doctors were then ignorant of that fact, and even though Mr. Rogers had been granted everything he requested, that is, disability retirement. Mrs. Rogers had no legal right to intervene in that proceeding to protect her possible right to a widow's pension, as long as her husband was alive.

[1,2] The board urges that Mrs. Rogers' application for a widow's pension is not an independent proceeding, but a "continuation" of her husband's application for a disability retirement. In this connection the board points out that Mrs. Rogers'

application is entitled "Application for Continuation of Retirement Allowance." This was on a form provided by the board. This form cannot change the nature of the proceeding. It is too clear to require extended discussion that Mrs. Rogers' application for a widow's pension is a separate and independent proceeding from that of her husband to secure disability retirement. Mrs. Rogers could not have intervened or participated in that proceeding. The law is clear that a widow has the legal right to apply for a pension if her husband's death was caused by, accelerated or precipitated by the employment, regardless of whether or not her husband, during his lifetime, was or was not retired for disability. *Naughton v. Retirement Board of S. F.*, 43 Cal.App.2d 254, 110 P.2d 714. On her petition, Mrs. Rogers complied with the requirement that a petition for rehearing be filed. That is all that is required. What her husband did or did not do is a false issue.

The next point raised by the board is that the evidence before the board was conflicting, and, this being a local board, the Superior Court was bound by the findings of that board. It is undoubtedly the law that a local board, as distinguished from a board exercising state-wide jurisdiction, acts, under the Constitution, in a *quasi-judicial* fashion and that its findings, based on conflicting evidence, are binding on the Superior Court in the mandate or *certiorari* proceedings brought to review them. *Naughton v. Retirement Board of S. F.*, 43 Cal.App.2d 254, 110 P.2d 714; *Mogan v. Board of Police Com'rs*, 100 Cal.App.2d 270, 279 P. 1080; *McColgan v. Board of Police Com'rs*, 130 Cal.App. 66, 19 P.2d 815; *Bennett v. Brady*, 17 Cal.App.2d 114, 61 P.2d 530; *Hogan v. Retirement Board*, etc., 13 Cal.App.2d 676, 57 P.2d 520; *Murphy v. Retirement Board*, 49 Cal.App.2d 58, 121 P.2d 101. Of course, if the local board makes findings totally unsupported by the evidence, it has acted in excess of and in abuse of its discretion, and its decision will be set aside. In the instant case, all of the evidence produced before the board demonstrates, without conflict,

that the heart condition from which Rogers died was accelerated by his employment. The board admits that this was so, but contends that the letter of Dr. du Bray was properly before the board, and that it created a conflict in the evidence. The question then is, was this letter evidence that the board was entitled to consider? If so, it creates a conflict. If not, it should be disregarded.

[3,4] That this letter was not in evidence before the board is obvious. Dr. du Bray never appeared before the board, did not testify under oath, and the respondent had no opportunity to examine him; in fact, respondent had no notice of the letter until after the decision was rendered. This board acts in a *quasi-judicial* capacity. Its findings, based on conflicting evidence, are binding on the courts. It has no power to take or receive evidence, without the knowledge of the party adversely affected, or without giving him a right to cross-examine. These boards act as judicial bodies, with a limited jurisdiction. While not bound by technical rules of judicial procedure, they must afford the parties appearing before them a reasonably fair hearing. They cannot, lawfully, decide cases on evidence not submitted to or known by the other side. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13. Such "evidence" must be disregarded when the case is submitted for judicial review. *Olive Proration*, etc., *Committee v. Agricultural*, etc., Comm., 17 Cal.2d 204, 109 P.2d 918. For this reason, the letter of Dr. du Bray must be disregarded.

[5] Without the letter of Dr. du Bray, all of the evidence before the board indicated that Rogers' death was accelerated by the employment. In addition, there is a statutory rebuttable presumption that heart trouble, developing during the service of a police officer, arose out of the employment. Labor Code, § 3212.5. Under the circumstances, the board clearly abused its discretion in denying the pension, and the Superior Court quite correctly ordered that the petition be granted. *Naughton v. Re-*

tirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714; *Peters v. Sacramento City E. R. System*, 27 Cal.App.2d 10, 80 P.2d 179; *Brant v. Retirement Board of S. F.*, 57 Cal.App.2d 721, 135 P.2d 396.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



**PEOPLE v. BURNETT. \***  
**Cr. 765.**

District Court of Appeal, Fourth District,  
California.

March 18, 1952.

Rehearing Denied March 28, 1952.

Hearing Granted April 17, 1952.

Defendant was convicted in Superior Court, San Diego County, Dean Sherry, J., of issuing check drawn upon insufficient funds in violation of Pen.Code, § 476a, and he appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained the conviction.

Affirmed.

**1. False Pretenses** ⇨49(3)

Evidence sustained conviction of corporation's officer who, with willfulness and intent to defraud, gave corporation check knowing funds drawn upon were insufficient. Pen.Code, § 476a.

**2. Criminal Law** ⇨1172(8)

Instruction that it was jury question whether intent to defraud was shown by drawer who told payee that check being delivered was not covered by sufficient funds was not prejudicial, where jury failed to agree on count in reference to which instruction was given and convicted on different count. Pen.Code, § 476a.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with issuing two checks in violation of section 476a of the Penal Code. In the first count it was charged that on February 9, 1951, he fraudulently issued a check for \$992.68 to one Lewis, drawn upon the general account of William P. Osterhout, Inc. in a certain bank, knowing that there was not sufficient funds in this account or credit with said bank to meet the check. In a second count he was charged with having fraudulently issued a similar check for \$1480 to Joseph Bacorn. A jury found him guilty as charged in Count I, but disagreed on a verdict with respect to Count II. He was sentenced on Count I, and has appealed from the judgment and from an order denying his motion for a new trial.

The defendant was one of the organizers of William P. Osterhout, Inc., which was engaged in the business of building houses although no permission to issue stock had been granted and no shares had been issued. A Mrs. Winn was treasurer of the corporation and worked in the office, and the defendant was secretary and general manager, having charge of all its affairs. All checks were to be signed by him and Mrs. Winn, and none could be given out except by his direction. The defendant made collections, made the deposits in the bank, and kept possession of the bank statements. The check involved in the first count was issued at the direction of the defendant; the money in that account was insufficient to meet this check; no credit arrangements had been made with the bank; and the check was never paid.

[1] The defendant contends that the evidence is insufficient to sustain the judgment. It is argued that on February 9, 1951, this corporation had \$1577 in this bank, of which \$534 was in the general account, \$943 in the payroll account, and \$100 in the tax account; that Mrs. Winn was "the only authorized" manager of the bank account and the defendant had no reason

Edgar G. Langford, San Diego, for appellant.

\* Subsequent opinion 247 P.2d 828.



to know that there was less than \$992.68 in the general account on February 9; that during the preceding days of February Mrs. Winn had taken it upon herself to deposit certain funds in the payroll account instead of the general account; and that Mrs. Winn should have deposited a large sum in the company bank accounts after the delivery of the check to Mr. Lewis.

The fact that the corporation had some money in its payroll and tax accounts is immaterial as those funds were not available for the payment of this check, which was drawn on the general account by direction of the defendant. Disregarding conflicts, it appears from the evidence that the defendant had charge of the finances of this corporation; that he received the monies, made the deposits in the bank, and had personal possession of such records; that a few days before February 5, he told Mr. Lewis that the funds in the bank were insufficient to pay the entire amount due him; and that at his direction a check for \$300 was given to Mr. Lewis on February 5, and he was told to come back later for the balance. About an hour before the check was given to Mr. Lewis on the morning of February 9, the defendant personally gave a check for \$1480 to Mr. Bacorn, telling him at the time that there was not enough money in the bank to take care of the check, and that they would make the check good as soon as they were able to do so. There was not enough money in the bank to cover the Lewis check, irrespective of the \$1480 check just given to another. The defendant knew what collections and deposits had been made since a few days before February 5, and since he was personally handling the bank account he must have known that the funds in the bank were not sufficient to take care of the check. The evidence, with the reasonable inferences therefrom, is sufficient to support the judgment of conviction.

[2] The only other point raised is that the court committed prejudicial error in failing to answer a question as to the law, asked by one of the jurors. After the jury had retired to deliberate upon a verdict it returned to the court room. When the court asked whether it had reached a ver-

dict one juror replied that they had agreed on one count, but were hopelessly deadlocked on the other. A discussion then took place as to how many ballots had been taken and as to whether the jurors felt that it was "worthwhile to try longer to reach a verdict." During this discussion it developed that the jury had agreed upon the first count, and that one juror felt that it was possible to reach an agreement on the second count if they spent more time on it. The court ordered the jury returned to the jury room "to further deliberate upon a verdict upon the other count on which you have not agreed." One juror then asked to have the instruction read on whether the crime of issuing insufficient checks included the crime of intent to deceive and defraud. The court then reread four instructions which had been previously given on the question of intent to defraud, as applicable to this case. One of the jurors then asked whether an intent to defraud is shown where a person giving a check informs the payee, at the same time, that the funds are insufficient to pay the check. The court replied that this was a question for the jury to determine from a consideration of all of the facts and circumstances of the case. The jury was then sent out, and shortly thereafter returned a verdict of guilty on the first count, without agreeing as to the second count.

The defendant argues that the question asked by this juror called for an instruction as to a point of law; that the court should have instructed the jury that the evidence is insufficient to show an intent to defraud where the maker of a check at the time of delivery makes known to the payee that there are no funds in the bank to meet it; and that the failure to do so was prejudicial. This contention would be more persuasive had the defendant been convicted on the second count, but no prejudice here appears. This entire matter took place in a discussion relating to the second count after the jury had reached its verdict on the first count, having been fully instructed on the question of intent. There is no evidence in the record that anything was said about the insufficiency of the funds in the bank at the time the check was delivered to

Mr. Lewis, and there was no evidence requiring such an instruction in connection with the first count. The defendant himself testified that at the time he signed and directed the delivery of the check involved in the first count he did not say anything to Mr. Lewis about the check, or discuss it with him in any way.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



109 Cal.App.2d 745

**SMITH v. DOWNEY.**

Civ. 4344.

District Court of Appeal, Fourth District,  
California.

March 14, 1952.

Hearing Denied May 12, 1952.

Proceeding in mandamus against Wallace K. Downey, as Insurance Commissioner of the State of California to review an order of the Commissioner suspending petitioner's licenses to act as bail agent and as bail permittee. The Superior Court of Fresno County, Arthur C. Shepard, J., entered a judgment ordering the alternative writ discharged and denying the issuance of a peremptory writ and petitioner appealed. The District Court of Appeal, Barnard, P. J., held that insurance commissioner was authorized to suspend and revoke such licenses, because of violation of rule he was authorized to make, whether or not licensee has been first convicted for such violation in court of criminal jurisdiction and that the rules adopted by the commissioner were not unreasonable, unnecessary or oppressive.

Judgment affirmed.

#### 1. Bail ⚡60

Insurance commissioner is authorized to suspend or revoke licenses to act as bail agent and as bail permittee because of violation of rules he is authorized to make, whether or not licensee in question has been first convicted for such violation in

court of criminal jurisdiction. Insurance Code, §§ 1805-1807, 1812-1814.

#### 2. Bail ⚡60

Rules promulgated by insurance commissioner for regulation of parties licensed to act as bail agent and as bail permittee imposing certain conditions upon doing such business under a fictitious name, permitting solicitation of bail bonds in public institutions, requiring bail bondsmen to obey regulations of proper public authorities governing their conduct in public places, requiring the giving of receipts signed by licensee showing all charges made for a bail bond, money paid on account and balance, requiring that every application for bail bond contains certain data setting forth circumstances at time of negotiation of bonds and requiring licensee to keep complete records of all business done under his licenses are not unreasonable, unnecessary or oppressive. Insurance Code, §§ 1805-1807, 1812-1814.

#### 3. Administrative Law and Procedure ⚡486

##### Bail ⚡60

Where insurance commissioner found that petitioner who was licensed to act as bail agent and as bail permittee had shown that he was not a fit and proper person to hold his license, and that such conduct constituted grounds for suspension of petitioner's licenses and it was stipulated in hearing that those findings were supported by evidence introduced at hearing before commissioner and trial court so found, those findings alone were sufficient to support judgment appealed from, and under such circumstances judgment of trial court could not be reversed. Insurance Code, §§ 1805 (g), 1806, 1807, 1810.

Neil Cunningham, San Francisco, J. J. Nagel, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is a proceeding in mandamus to review an order of the insurance commissioner suspending licenses to act as bail agent and as bail permittee.

Since 1942, the appellant Smith has been licensed as a bail agent and as a bail permittee under sections 1802 and 1802.5 of the Insurance Code. In 1949, he was served with an accusation, Gov.Code, Sec. 11503, charging him with having committed acts showing that he is not a fit and proper person to be permitted to retain his licenses. Among other reasons given therefor it was alleged that he had made gifts to various law enforcement employees for the purpose of inducing said employees to favor him in his bail business, which gifts were so scaled that the most valuable ones were given to persons in a position to aid him in securing applications for bail; and that he had knowingly permitted jailers to solicit bail business for him and to favor him over his competitors. He was further charged with many violations of sections 2081, 2082, 2074, 2094, 2101 and 2102 of the California Administrative Code.

The appellant requested a hearing and served notice of defense. A hearing was had before a hearing officer, whose proposed decision with its findings of fact and a proposed order were adopted by the respondent insurance commissioner pursuant to sec. 11517(b) of the Government Code. It was therein found that the appellant had violated sections 2081, 2082, 2074, 2094, 2101 and 2102 of the Administrative Code, with specific findings as to the acts done in violation of these sections. It was further found that it had been shown that the appellant was not a fit and proper person to hold his licenses, the reasons being given in about the language of the accusation, with findings as to the specific acts done. The order as proposed by the hearing officer and adopted by the commissioner orders (1) that the two licenses of the appellant be suspended for a period of ninety days; (2) that this order of suspension be stayed for a period of three years upon the terms and conditions that he refrain from making gifts to such public employees (except for gifts not over \$3.50 in value at the Christmas season), that he cease from soliciting bail in any penal institution, and that he conform to all rules and regulations of the insurance department relative to bail transactions; and (3) that upon compliance with

these conditions he shall be restored to all the privileges of his license and the order of suspension shall be permanently stayed.

The appellant filed a petition for a writ of mandamus in the trial court, seeking an order requiring the respondent commissioner to vacate and annul the order of suspension and decision made by him. At the hearing certain portions of the proceedings before the commissioner, including the accusation, the proposed decision and the final order, were introduced as exhibits. A transcript of the proceedings before the hearing officer was not presented but it was stipulated that the findings made by the commissioner are supported by the evidence introduced at that hearing, and the trial court accordingly found this to be true. The court made appropriate findings and conclusions, and entered a judgment ordering the alternative writ discharged, and denying the issuance of a peremptory writ. This appeal was taken from that judgment.

Appellant's main contention is that the insurance commissioner has no power to suspend or revoke such a license, because of a violation of the rules authorized by section 1812 of the Insurance Code, without first having secured a conviction for such violation in a court of criminal jurisdiction. It is argued that there is neither express nor implied authorization for the suspension or revocation of licenses for a violation of any rules thus established; that section 1813 does not mention a violation of the rules; that section 1814 mentions both a violation of the statutes and of the rules, but the only penalty provided therein is by prosecution in a court of criminal jurisdiction; that the penalty of suspension or revocation prior to a conviction was intentionally omitted from section 1814 in order that the question of the reasonableness, advisability and convenience of the rules established by the commissioner should be passed upon by a court of criminal jurisdiction; that the legislative intent to deny the commissioner authority to suspend or revoke a license prior to conviction in a criminal court further appears from the references to a final judgment of conviction in section 1731 and section 1733 of the Insurance Code; and that if it had been in-



tended to give the commissioner power to discipline a bail licensee for violation of rules, prior to his conviction in a court of criminal jurisdiction, this would have been plainly stated in section 1813.

We are unable to agree with these contentions. The bail bond licensing provisions were adopted to meet a well-known condition which obviously called for some real regulation of the business of furnishing such bail bonds. Such regulation was placed in the hands of the insurance commissioner, and while some statutory regulation was provided he was given a further rule-making power similar to that given to many other administrative agencies, and for similar reasons. While rules so established must be reasonable, it seems inconceivable that it could have been intended to leave the question of their reasonableness exclusively to the criminal courts.

Chapter 7 of the Insurance Code provides for the licensing of persons engaged in this business. Section 1805 provides eight grounds for refusing to issue a bail license. Section 1807 provides that such a license may be suspended or revoked for the same reasons. Section 1806 also provides that such a license may be suspended or revoked whenever it is made to appear to the commissioner that the holder of the license is not a fit or proper person to be permitted to hold it. Section 1812 authorizes the commissioner to make reasonable rules for the administration and enforcement of all of the provisions of this chapter. Section 1813 provides that the commissioner may suspend or revoke such a license whenever he finds that the holder has violated any provision of the chapter. By necessary implication the violation of the rules adopted is forbidden by these provisions. Section 1814 then makes the violation of any of the foregoing provisions, or of any such rule, punishable as a criminal offense. This is another provision making the violation of such rules an act forbidden by this code.

[1] Section 1814 provides an additional penalty but it is not a substitute for the other provisions of the chapter, and is not to be taken as providing an essential pre-

requisite to the exercise of the power theretofore given to suspend or revoke such a license. A criminal conviction, as authorized by section 1814, is only one of the eight grounds for suspending or revoking a license provided for in sections 1805 and 1807. Another of those grounds is that a licensee has committed an act forbidden by this code, and the violation of the rules which the commissioner is authorized to make is an act forbidden by this code. Another and different ground for suspension is provided for in section 1806. From a consideration of all of the provisions of Chapter 7, we conclude that the insurance commissioner is authorized to suspend or revoke such licenses, because of the violation of the rules he is authorized to make, whether or not the licensee has been first convicted for such violation in a court of criminal jurisdiction. Any other interpretation would not only have the effect of nullifying and setting aside a large part of the provisions of Chapter 7, but would largely destroy the beneficial effects of the entire system of regulation which the legislature intended to provide for this business.

The appellant also contends that the rules adopted by the commissioner are invalid as being unreasonable, unnecessary, and not advisable or convenient for the administration and enforcement of the provisions of Chapter 7. It is argued that these rules bear no reasonable relation to the purposes for which they were authorized; that they are beyond the authority conferred and constitute an attempt to alter, add to and extend the specific code provisions regulating this business; that they are so impractical and extreme as to practically take away the right to engage in this business; that they evidence an assumption of arbitrary power by providing for an unwarranted and unauthorized invasion of the licensee's premises for the purpose of examining his records and papers; and that, in effect, they subject the licensee's right to earn his living to the mere will and caprice of the commissioner.

The rules material here are those set forth in the following sections of the administrative code. Section 2074 imposes certain conditions upon doing a bail bond

business under a fictitious name. It was found that the appellant violated this rule by using an unapproved fictitious name tending to indicate that he was acting as a bonding company or an insurer. Section 2081 forbids solicitation of bail bonds in public institutions. It was found that the appellant violated this rule by soliciting bail bonds at the county jail. Section 2082 requires bail bondsmen to obey the regulations of proper public authorities governing their conduct in public places. The appellant was found to have violated this rule in a number of instances. Section 2094 requires the giving of a receipt signed by the licensee showing all charges made for a bail bond, the money paid on account, and the balance. It was found the appellant violated this rule in eighteen instances, in four of which no receipt at all was given. Rule 2101 requires that every application for a bail bond shall contain certain data setting forth the circumstances and time of the negotiation for the bonds. This was found to have been violated in many instances. Rule 2102 requires the licensee to keep complete records of all business done under his licenses. The appellant was found to have violated this rule in many instances.

[2] We find nothing unreasonable, unnecessary or oppressive in connection with these rules as related to the kind of business here regulated. The provision imposing conditions upon doing such business under a fictitious name is reasonable and necessary in view of the requirement set forth in section 1810 of the Insurance Code that only natural persons may be licensed. To permit solicitation of bail bonds in county jails and other public places, especially through the aid of jailers, would naturally be conducive to many of the evils which this legislation was designed to prevent. The provisions for giving proper receipts and keeping proper and complete records, showing exactly what was done, are certainly reasonable and are absolutely essential to any proper regulation of this business.

[3] A further consideration is that the commissioner here found that the appellant has shown that he is not a fit and proper

person to hold his license, finding many facts supporting that conclusion and finding that such conduct constitutes grounds for the suspension of his licenses under sections 1806, 1807 and 1805(g) of the Insurance Code. It was stipulated at the hearing that these findings are supported by the evidence introduced at the hearing before the commissioner, and the trial court so found. These findings alone are sufficient to support the judgment appealed from, and under such circumstances the judgment of the trial court may not be reversed. *Hohreiter v. Garrison*, 81 Cal.App.2d 384, 184 P.2d 323.

We find no reversible error, and the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



109 Cal.App.2d 735

**In re COSTA'S ESTATE,  
MARSHALL et al. v. STATE.**

Civ. 8045.

Sac. 6191.

District Court of Appeal, Third District,  
California.

March 14, 1952.

Hearing Denied May 12, 1952.

Action by Arthur P. Marshall, and Sheldon Brandenburger, as administrator of the estate of Joas Ignacio Costa, deceased, against the State of California to recover sum of money left by decedent in two savings accounts, which became dormant, and the balances thereof deposited in the state treasury pursuant to the Abandoned Property Act. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment for Arthur P. Marshall for one-fifth of total sum on deposit and both administrator and Arthur P. Marshall appealed. The District Court of Appeal, Schottky, J. pro tem., held that finding that Marshall was entitled to only one-fifth of the money of decedent on deposit in the state treasury was supported by the evidence and that refusal of trial

court to order all of the remainder of said money paid over to administrator for administration in the probate court was not error.

Judgment affirmed.

### 1. Escheat Ⓒ2

A state has a power to legislate regarding the disposition of abandoned or ownerless property and such legislation is not an impairment of constitutional rights of last owner of property, even though legislation is subsequent in time to creation of bank deposit or other type of property declared to be abandoned.

### 2. Escheat Ⓒ2

Although under probate code, title of heirs vested upon death of the decedent, and all of decedent's property is subject to possession of administrator and to the control of the Superior Court for the purposes of administration, legislature has power to provide otherwise with reference to the disposition of moneys deposited in the state treasury under the Abandoned Property Act. Code Civ.Proc. §§ 1274.1-1274.17; Probate Code, § 300.

### 3. Escheat Ⓒ8(1)

Where decedent, who died intestate, was at time of his death owner of two savings accounts which became dormant and balances thereof deposited in state treasury pursuant to Abandoned Property Act, successor in interest of one of decedent's five brothers and sisters was entitled to only one-fifth of money on deposit. Code Civ.Proc. §§ 1274.1-1274.17, 1274.10, 1274.10a.

### 4. Escheat Ⓒ8(1)

Where successor in interest of one of decedent's five brothers and sisters was entitled to only one-fifth of decedent's money on deposit in state treasury and shares of the other four brothers and sisters of decedent had lapsed, Superior Court of Sacramento County did not err in refusing to order all or remainder of said money paid over to administrator for administration in Probate Court. Code Civ.Proc. §§ 1274.1-1274.17, 1274.10, 1274.10a.

### 5. Evidence Ⓒ23(1)

Appellate court will take judicial notice of the fact that in formulating and enacting legislation, legislature has assistance and

advice of a well-trained and very efficient Legislative Counsel Bureau and that it was therefore aware of rule that interests of nonresidents who fail to appear and claim within five years, pass to state rather than to other heirs.

### 6. Escheat Ⓒ8(1)

In action by administrator of estate of decedent and by heir of decedent to recover sum of money left by decedent in savings account, which became dormant, and balances thereof deposited in the state treasury pursuant to Abandoned Property Act, everything that could be determined in administration of the estate in the probate court could be determined in the Superior Court pursuant to Abandoned Property Act. Code Civ. Proc. §§ 1274.1-1274.17; Probate Code, § 300.

### 7. Escheat Ⓒ8(1)

In all proceedings brought to recover escheated property under Code of Civil Procedure and in all proceedings brought to recover property distributed to the state pursuant to Probate Code, it is necessary for Sacramento County Superior Court to make determinations as to whether or not a particular claimant is kindred to the decedent, whether or not there are other kindred related to the decedent in closer degree, whether there are other kindred related to the decedent in the same degree as claimant, and the amount which each claimant is to receive and this jurisdiction has been exercised exclusively by the Sacramento County Superior Court. Code Civ. Proc. §§ 1274.1-1274.17; Probate Code, § 300.

### 8. Courts Ⓒ472(1)

In proceeding by administrator of an estate to recover abandoned funds on deposit with state treasury, Superior Court of Sacramento County had exclusive jurisdiction to determine what person or persons were entitled to receive abandoned deposits and then to order money paid over to persons so entitled. Code Civ.Proc. §§ 1274.10, 1274.10a.

---

Brandenburger & White, Sacramento, for appellants.



Edmund G. Brown, Atty. Gen., William J. Power, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Joas Ignacio Costa died intestate in San Francisco on January 12, 1919. At the time of his death he was the owner of two savings accounts in Oakland and San Francisco in the aggregate sum of \$2,449.55. Said accounts became dormant and on October 15, 1946, the balances thereof were deposited in the State Treasury pursuant to the Abandoned Property Act, Sections 1274.1-1274.17 of the Code of Civil Procedure. On March 17, 1947, Arthur P. Marshall filed a petition pursuant to the provisions of section 1274.10 of the Code of Civil Procedure, alleging the fact of the death of Joas Ignacio Costa and that petitioner was, through his grandmother, the sole heir of said decedent, and sought to recover said accounts for himself. The State of California filed an answer which admitted the existence of the accounts but denied the other allegations of the petition. On January 6, 1950, Sheldon Brandenburger was appointed administrator of the estate of said decedent by the superior court in San Francisco, and on February 2, 1950, an amended petition was filed by Arthur P. Marshall and by Sheldon Brandenburger, as administrator of the estate of said decedent, which petition contained substantially the same allegations as the first petition, and the prayer of which sought an order requiring said funds to be paid to Sheldon Brandenburger as such administrator.

An agreed statement of facts was stipulated to by the parties and upon that statement the matter was submitted to the court. Said stipulation shows the following: That decedent left neither ancestor, descendant nor spouse surviving; that decedent was born on the Island of Pico, Azores, Portugal, on or about February 15, 1856; that of decedent's parents there was also born on said Island of Pico, on November 22, 1850, a daughter, Francesca Leopoldino Costa, a sister of decedent; that Francesca married Antonio Gomez Pinho; this sister survived decedent; she resided in San Luis Obispo, California, and died there intestate on or

about August 1, 1927, and left surviving two daughters, namely, Mabel Frances Marshall, born in New Bedford, Massachusetts, on June 17, 1876, and Mayme Pinho Anderson, born in said New Bedford on January 4, 1881; that Mabel died intestate in said San Luis Obispo on June 16, 1942, leaving as her next of kin, Manuel A. Marshall, her husband, and Arthur Pinho Marshall, a son, one of the appellants here; that Manuel, the surviving husband, died in said San Luis Obispo on November 11, 1945, leaving said son, Arthur, as his next of kin; that Mayme Pinho Anderson died intestate in San Francisco on May 5, 1944, leaving as her next of kin her nephew, said Arthur.

The agreed statement of facts also contains the following:

"That there was also born the issue of the marriage of said decedent's parents, in addition to the decedent and the daughters, hereinabove referred to, two other sons and two other daughters, all of whom were born in the Azores Islands, Portugal; that no evidence has been introduced herein by petitioners or by respondents, or at all, tending to establish the fact of the survival or death of any of said other sons and daughters of said decedent's parents, or the fact of the survival of any possible issue of any of said other sons and daughters who may have predeceased said decedent.

"That it affirmatively appears from the evidence herein that said Arthur Pinho Marshall, one of the petitioners herein, is the successor in interest of said Francesca Leopoldino Pinho, who was a sister and heir at law of said Joas Ignacio Costa, deceased, and that said Arthur Pinho Marshall will ultimately be entitled to distribution of a portion of said funds on deposit in the Treasury of the State of California, after payment of expenses of administration in the estate of said Joas Ignacio Costa, deceased."

The trial court made findings in accordance with the stipulated facts and concluded that petitioner Arthur P. Marshall was entitled to judgment for recovery of one-fifth of the total sum on deposit, and that the co-petitioner administrator was entitled to recover nothing. Judgment was entered

accordingly and both the administrator and Arthur P. Marshall have appealed.

Appellants and respondent agree that the only question before the court on this appeal is the matter of the construction of section 1274.10a of the Code of Civil Procedure. This section was adopted in 1947 as an urgency measure, Stats. 1947, ch. 342, p. 908, and reads as follows: "Whenever any claim is made or petition filed under Section 1274.10 of this code, or any other provision of law, to recover funds on deposit in the State Treasury by the representative of an estate, or other person, no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive the money or creditors of the deceased owner of the claim whose claims are valid and are claims which were in existence prior to the death of such deceased owner of the claim. Where only creditors exist, and there are no heirs or legatees, said claims shall be allowed only to the extent necessary to pay such claims and the reasonable costs of administration of the estate, including court costs, administrator's fees and attorney's fees. This section shall apply to all claims which are pending at the time that this section goes into effect as well as to claims arising hereafter."

The urgency clause (Stats. 1947, p. 909) reads: "There is on deposit in the State Treasury sums of money presumed to have been abandoned by owners. This act clarifies the terms and conditions under which heirs, legatees, or creditors may claim said funds. There are pending and unsettled in California numerous problems affecting these funds which should be immediately made subject to the conditions of this act. In order to protect the legal rights of all parties, it is necessary that this act take effect immediately."

It is to be noted that said section relates to a "claim made or petition filed under Section 1274.10," which section was enacted in 1945 and which provides in part as follows:

1. Stats. 1951, ch. 1708, adds Title 10, including sections 1300-1355, to the Code of Civil Procedure and repeals former Title 8A, including sections 1274.1 to 1274.14. The name of the title is

"Any person who claims property so delivered to the State Treasurer or State Controller on the presumption of abandonment shall file a verified petition in the Superior Court in and for the County of Sacramento, stating facts necessary for the court to determine his right thereto. \* \* \* If, upon trial of the issues, the court is satisfied of the claimant's right or title to the money or property claimed, it shall grant him a certificate to that effect \* \* \*."

Said section provides further that when the money claimed is less than \$300, the claimant may, in lieu of filing such petition in the Superior Court, present his claim to the State Board of Control.<sup>1</sup>

Appellants contend that only the Probate Court has jurisdiction to determine who are the heirs and the amount to which each is entitled and that the Superior Court, not sitting in probate, has no power to take over the functions of a Probate Court, and that the trial court here erred in not ordering the entire deposit delivered to the appellant administrator to be dealt with by the Probate Court. Respondent in reply argues that if appellants' contention is sound, then said section 1274.10a is meaningless and that there could have been no purpose in enacting it.

In 1945, Title 8A, including sections 1274.1 to 1274.17, was added to the Code of Civil Procedure. It was known as the "Abandoned Property Act." It provided that deposits of money in banks and other credit institutions which remained unclaimed for more than 20 years after the date of deposit or the withdrawal of any part thereof, would be presumed to be abandoned when the whereabouts of the depositor was unknown. Procedure was provided to result in the deposit of such moneys in the office of the State Treasurer to the credit of the "Abandoned Property Fund." Section 1274.10, hereinbefore quoted from, was a part of said title, and section 1274.10a, also hereinbefore quoted, and the

changed from "Abandoned Property" to "Unclaimed Property," and section 1274.10a has been superseded by section 1354 with no substantial change in its provisions.

construction of which is involved in the instant case, was added to said title in 1947.

[1] It should be kept in mind that the money or property referred to in said sections 1274.10 and 1274.10a are the result of deposits which have remained unclaimed for more than 20 years. There can be no question as to the power of the state to legislate regarding the disposition of abandoned or ownerless property, *Anderson National Bank v. Lockett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692; *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078, and such legislation is not an impairment of the constitutional rights of the last owner of the property, even though the legislation is subsequent in time to the creation of bank deposit or other type of property declared to be abandoned. *Standard Oil Co. v. New Jersey*, supra. As was said by the Court of Appeals of Kentucky in *Commonwealth v. Thomas' Adm'r*, 140 Ky. 789, 131 S.W. 797, at page 800; "The state may in its generosity, or sense of fairness, say that it will not in such case hold the proceeds against the original claimant, if he subsequently appears, and may provide for his reimbursement. It may do less, as by shortening the time in which it will make reimbursement, or it may exact conditions. In the instance here the state has declared that, for escheated property which it dedicates to purposes of education, it will not make reimbursement. Rather, it fails to make provisions for it in such instances. It was in the competency of the state to so provide, or fail to provide as it saw fit. The policy is one of legislative discretion, and is not a condition precedent to the state's exercise of power."

See, also, *Gorny v. Trustees of Milwaukee County Orphans Board*, 7 Cir., 93 F.2d 107, 115 A.L.R. 1000; *Engle v. State Land Board of Oregon*, 164 Or. 109, 99 P.2d 1018.

Appellants argue that "the Superior Court of the County of Sacramento, in the exercise of its jurisdiction under the provisions of Sec. 1274.10 of the Code of Civil Procedure, had the duty to determine only the question of whether or not there were heirs surviving the decedent, to whom

distribution would ultimately be made; that upon a finding that there were heirs, or that there was at least one heir, judgment should be rendered in favor of the Administrator for recovery of the entire fund for due administration \* \* \* whereupon the Probate Court \* \* \* had exclusive jurisdiction to determine to whom and in what proportions the estate descended."

[2] While it is true that under section 300 of the Probate Code the title of heirs vests upon the death of a decedent but all of decedent's property shall be subject to the possession of the administrator and to the control of the Superior Court for the purposes of administration, there can be no question as to the power of the legislature to provide otherwise with reference to the disposition of moneys deposited in the State Treasury under the "Abandoned Property Act." For as stated in *Re Wilmerding's Estate*, 117 Cal. 281, at page 284, 49 P. 181, at page 182: "\* \* \* The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion."

See, also, *Estate of Watkinson*, 191 Cal. 591, 217 P. 1073; *Estate of Perkins*, 21 Cal. 2d 561, 134 P.2d 231.

[3, 4] It is clear that section 1274.10 provides that the claimant shall file a verified petition in the Superior Court in and for the County of Sacramento, "stating facts necessary for the court to determine his right thereto", and that said Superior Court shall try the issues with reference to his claim. It is also clear that 1274.10a provides that when such claim is filed "by



the representative of an estate, or other person, no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive the money." Upon the record here it affirmatively appears that appellant Arthur P. Marshall is entitled to only one-fifth of the money and we believe that the trial court correctly determined that he was entitled to recover only that amount. The four brothers and sisters of Arthur P. Marshall's grandmother were born in Portugal and there was no evidence that they ever left Portugal, so it must be presumed that they remained there and remained citizens of that country. Code Civ. Proc., sec. 1963, subd. 32. Nor was there any evidence that they left heirs who did not remain in Portugal. Hence, so far as appears from the record here, the shares of said four brothers and sisters of decedent would have long since lapsed by virtue of section 1026 of the Probate Code. It would have been a useless act to order the entire sum on deposit to be paid over to appellant administrator, because in that event appellant Marshall would have had distributed to him only one-fifth of the amount, and the remainder, less the expenses of administration, would have to be returned to the State Treasury.

[5, 6] We may take judicial notice of the fact that in formulating and enacting legislation the legislature has the assistance and advice of a well-trained and very efficient Legislative Counsel Bureau, and that it was therefore aware of the rule laid down in *Estate of Pendergast*, 143 Cal. 135, 76 P. 962, that the interests of non-residents who fail to appear and claim within five years pass to the state rather than to the other heirs. Hence one of the reasons which may well have actuated the legislature in seeking to have the right of heirs determined in the Superior Court of Sacramento County and the share of each heir paid directly to him was to avoid the expenses of administration, particularly in cases where a portion must be returned to the state. Everything that could be determined in the administration of the estate in the Probate Court could be determined in the Superior Court of Sacramento

County under said sections 1274.10 and 1274.10a.

Appellants do not question the power of the legislature to so provide, but state that it is their "sincere belief that section 1274.10a does not, expressly or by implication, provide for any recovery of a decedent's estate by an heir, where the estate is on deposit in the State Treasury, without the necessity of administration."

However, it is not without significance that the original petition was filed by appellant Marshall individually and prayed that all of said money be paid to him. The administrator of the estate of decedent was not appointed until nearly three years after the original petition was filed, and the amended petition by appellants was thereafter filed praying that the money be paid to the administrator. It is fairly inferable that the amended petition was not filed until it became apparent that appellant Marshall would be unable to prove that he was the sole heir of decedent.

[7] While sections 1274.10 and 1274.10a have not been construed by any appellate tribunal, other sections which provided for proceedings in the Superior Court of Sacramento County have been passed upon. In all proceedings brought to recover escheated property under sections 1272 and 1272a of the Code of Civil Procedure, and in all proceedings brought to recover property distributed to the state pursuant to Probate Code section 1027, it is necessary for the Sacramento County Superior Court to make determinations as to whether or not a particular claimant is kindred to the decedent, whether or not there are other kindred related to the decedent in closer degree, whether or not there are other kindred related to the decedent in the same degree as claimant, and the amount which each claimant is to receive. This jurisdiction has been exercised exclusively by the Sacramento County Superior Court since the original Code of Civil Procedure was adopted in 1872.

In *Re Kehr*, 190 Cal. 401, 212 P. 913, the court said: "The application for a writ of *mandamus* to compel the respondent

[Superior Court] to proceed and hear the petition for distribution in this case, where money has been paid to the state treasurer under provisions of section 1737 of the Code of Civil Procedure, is denied, on the ground that petitioners' remedy is by proceedings in the superior court of Sacramento county under the provisions of section 1272a of the Code of Civil Procedure (Stats. 1917, p. 254)."

In the case of *State v. Superior Court of San Diego County*, 133 Cal.App. 65, 23 P. 2d 1076 (hearing denied), a writ of prohibition was issued to prevent the Probate Court from hearing and determining who was entitled to money deposited with the State Treasurer. The court said at page 71 of 133 Cal.App., at page 1078 of 23 P.2d:

"\* \* \* When the money was received by the state treasurer, the probate court in San Diego county lost jurisdiction over the same and over the question of ownership thereof. If effect, the situation is somewhat similar to a case where a probate court loses jurisdiction where money is distributed to a wrong heir. While proper proceedings may be brought to obtain the same by a person in fact entitled thereto, a different proceeding is required. Likewise, a different proceeding is required, when money of this nature is paid into the state treasury, to establish the right of the parties who may be legally entitled thereto to withdraw the same. This proceeding is authorized by section 1272a of the Code of Civil Procedure and takes the place of the equitable remedy available in an ordinary case where an erroneous distribution has been made.

"The state has a right to fix the place where it may be sued and whether or not the proceedings provided for such a case as this be considered as a suit against the state, they, like all probate proceedings, are purely statutory, and the Legislature has placed the exclusive jurisdiction thereof in the superior court of Sacramento county. The question of heirship is inseparably connected with the right to receive the money. If the superior court of San Diego county were to attempt to determine whether these claimants were the rightful heirs of the deceased, it could make no effective order

because the money has been placed where it can only be reached in the manner provided by law. The respondents urge that these claimants have the right to establish their claim in San Diego county and thereafter look to the county treasurer or his bondsmen for wrongfully transferring the money. Not only does it appear that this officer has transferred the same by order of court, but, if successful in that court, these claimants would then be under the necessity of repeating their showing in a similar proceeding in Sacramento county in order to obtain the money. No such double jurisdiction can exist and, in our opinion, the superior court of San Diego county is now without jurisdiction in the premises. We conclude, therefore, that the prayer of the petitioner should be granted."

And in the case of *Umbesen v. Crocker First National Bank*, 33 Cal.2d 599, at page 601, 203 P.2d 752, 753, the court said:

"Under the provisions of the Abandoned Property Act there is a presumption that a bank deposit unclaimed for more than 20 years has been abandoned, Code Civ.Proc. § 1274.3, and the holder thereof is required to report it to the State Controller and subsequently deliver it to the State Treasurer. Code Civ.Proc. § 1274.6. It is then held by the State Treasurer subject to recovery by the rightful owner.

"A claimant may establish that he is the rightful owner of abandoned property either before or after its delivery to the State Treasurer, Code Civ.Proc. §§ 1274.6, 1274.10, and may assert his claim within five years from the time judgment has been obtained in an escheat proceeding commenced by the attorney-general, provided he is not a party to such a proceeding. Code Civ.Proc. §§ 1274.9, 1268. If the claim of the owner is not established within the time prescribed, his rights are forever barred. Under the Act, therefore, plaintiff as a claimant of presumptively abandoned property has the burden of showing that she is the owner of the fund."

[8] We are satisfied that the trial court was correct in concluding that, inasmuch as appellant Marshall had proved that he was entitled to only one-fifth of the money of

decendent on deposit in the state treasury, the only order that the court could properly make under said sections 1274.10 and 1274.10a was an order that he recover said amount, and that the court did not err in refusing to order all or the remainder of said money paid over to appellant administrator for administration in the Probate Court. We are convinced, also, that it was the intention of the legislature in enacting said sections 1274.10 and 1274.10a to provide that the superior court of Sacramento county should have exclusive jurisdiction to determine what person or persons were entitled to receive said abandoned deposits and then to order said money paid over to the persons so entitled. To require, as appellants contend, the court in the instant case to order the money paid over to the administrator, and then have the Probate Court determine who is entitled to said money, would, in our opinion, be doing the very thing that the legislature was seeking to prevent.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



109 Cal.App.2d 793

**PEOPLE v. RENOSO.**

Cr. 2332.

District Court of Appeal, Third District,  
California.

March 18, 1952.

An accused was convicted in the Superior Court, Sacramento County, Grover W. Bedeau, J., of murder of the first degree and he appealed. The District Court of Appeal, Van Dyke, J., held that evidence justified conviction.

Judgment affirmed.

**1. Criminal Law** ⚡1144(13)

On appeal from murder conviction evidence was required to be taken in aspect most favorable to jury's verdict.

**2. Homicide** ⚡253(3)

Evidence justified conviction of first degree murder of an accused who allegedly strangled a woman accused had allegedly taken to hotel room for purposes of sexual intercourse, as against contention that there was no evidence of premeditation or deliberation.

**3. Homicide** ⚡270

In first degree murder prosecution of an accused who allegedly strangled a woman accused had allegedly taken to hotel room for purposes of sexual intercourse, whether accused was intoxicated and drugged was for jury.

Thomas C. Perkins, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy, for respondent.

VAN DYKE, Justice.

Appellant, Jorge Rodriguez Renoso, was convicted of the crime of murder of the first degree in a trial before a jury which set the punishment at life imprisonment. He appeals from the judgment imposed in accordance with the verdict, and urges that the record shows no justification for a conviction of first degree murder; that appellant could have been convicted of second degree murder at most.

Appellant argues that there is no evidence of premeditation or deliberation and that the killing was not in perpetration of or in connection with any activity or endeavor which by force of statute disposes of the necessity of proving willfulness and premeditation.

On September 4, 1950, the decedent, one Audrey Wilson, while sitting in a cafe in Sacramento, entered into conversation with appellant and agreed to go with him to his hotel room for the purpose of sexual intercourse at a price agreed upon. They left the cafe and went to the room sometime between 10:30 and 11:30 p. m. About midnight a woman's screams were heard coming from appellant's room, and later on a woman was heard moaning therein. About 3:00 a. m. the body of Audrey Wilson was



discovered in the lavatory on the second floor of the hotel. Autopsy examination revealed the decedent to have been approximately 35 years of age, 5' 5" in height, and weighing approximately 125 pounds. Her body bore evidence of severe beating. There was a large contused wound on the back of her head which had a considerable amount of blood beneath the skin, although the skin itself was not broken. On her face there were multiple contusions and abrasions. Thus the lower left jaw was abraded; the left eye and right nostril were discolored, the left ear lobe was discolored and swollen; there was a large contusion and several abrasions over the bone of the left cheek; on her neck, in the region of the trachea, there were 11 small abrasions, 5 or 6 on either side, and the underlying tissues were deeply bruised; there was a large black and blue spot over the left collar bone and on the left arm, and there were contusions on the upper part of each arm; there were multiple contusions on both thighs, and an abrasion in the kidney region of the back; the nail of the left middle finger had been torn off, and there was a hemorrhage beneath the nail of the right index finger; there was a tear about 1.7 centimeters long by .7 centimeters wide in the lower rectal area. The autopsy physician testified that death was caused by asphyxiation induced by strangulation.

Appellant was not immediately apprehended, but in June of 1951, while at Immigration Headquarters in San Francisco, pending deportation to Mexico, he talked with another Mexican national, one Alvarez. He told Alvarez that in Sacramento, and while under influence of some pills he had taken, he had bought drinks for an American girl he found at a bar and had invited her to his room where she said she would go if he would give her \$5; that they went to the room where he paid her the stipulated price and they engaged in sexual intercourse; that she then wanted to leave, but he refused to let her go, as she had promised "to give him a good time"; that when she tried to leave he grabbed her by the neck and held on until she turned "kind of black"; that while she was in a fainting

condition he took her to the bed and "used her" the second time, committing an act of sodomy upon her; that after she regained consciousness she again tried to leave the room and he again grabbed her by the throat and choked her until she became "black"; that he again placed her on the bed and "did the same thing"; that thereafter he attempted to revive her, slapping her in the face, and, concluding that she was either fainting or dead, he took her out of his room and to the lavatory where he left her sitting on the seat. Alvarez informed the authorities and appellant was taken into custody. He made statements to the police, admitting he had been registered at the hotel which was the scene of the killing, and at the time thereof. He repeated the same statements he had made to Alvarez up to the conclusion of the act of sexual intercourse, and said that he had then fallen asleep, had been awakened by a noise and found the woman searching his pockets and taking his money. He said he asked her to return his money several times and she refused, whereupon he "got a little mad," grabbed her by the neck, threw her in bed and choked her for about five minutes; that she went limp and he left her in bed for a while, then took her down to the lavatory and left her on the seat.

Appellant took the stand in his own defense. He admitted that the decedent died after he had choked her, and that he took her body to the lavatory and left it on the seat. He repeated the story he had told to Alvarez up to the same point where his recital to the police differed from that to which Alvarez testified. Although he stated that he grabbed the woman by the neck, he insisted he did not intend to kill her. He exhibited his left arm to the jury, which arm appears to have been atrophied, and said he had little strength in it. He further said he had taken some pills but did not remember what kind they were, and that he was drunk during the affair in the bedroom. He denied making any statement to Alvarez.

[1,2] We think there is ample support for the jury's verdict of murder in the first

degree, and that the foregoing evidence, taken as we must take it on appeal—in the aspect most favorable to the jury's verdict—was sufficient to prove a willful and premeditated killing. It is fairly inferable, if indeed the inference is not compelled as a matter of law, that appellant not only administered a severe beating to the decedent at some time during the period of time before he carried her body to the lavatory, but that in order to make her submit to his sadistic desires he deliberately choked her into a state of insensibility, which means that with the purpose of rendering her helpless he induced asphyxiation almost to the point of death the first time, and beyond that point the second time. When one intends to strangle until his victim has been rendered insensible he intends to strangle almost to the point of death, for death occurs from continuous strangulation within a short time after insensibility occurs. It, therefore, under the law, does not aid appellant that he declares he had no intent to kill, for by the nature of the attack he made, he furnished grounds for the jury's finding that notwithstanding his denial he did so intend. "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and, in the absence of evidence to the contrary, this presumption must prevail. The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent." *People v. Besold*, 154 Cal. 363, 368, 97 P. 871, 873.

In *People v. Isby*, 30 Cal.2d 879, 889, 186 P.2d 405, 411, the court declared that where "one assaults another violently with a dangerous weapon, and takes his life, the pre-

sumption is that the assailant intended death, or other great bodily harm."

"If a person voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life." 40 C.J.S., Homicide, § 17, page 864. By parity of reasoning, strangling has a direct tendency to kill, and he who does it as appellant did subjects himself to the inference he meant to kill.

Fingers on the throat, cutting off air, have, throughout history, been used to take life. Appellant not only used them in that way once and to the point where death was imminent, but used them that way a second time, with fatal results. The jury were well warranted in concluding that appellant was guilty of willful and premeditated murder.

[3] As to the effect and as to the existence of intoxication and drugging, the sufficient answer is that the matter was one for the jury's consideration. The record shows that they were adequately instructed upon the subject of intoxication and the influence of drugs, and in view of appellant's demonstrated ability to recall in detail the series of happenings at the scene of the crime, the jury may well have disbelieved appellant's testimony as to the extent and even as to the existence thereof. From his own statements it is apparent that he knew what he was doing and possessed the mental and physical capacity to carry out his purposes.

In view of what has been said concerning deliberation and premeditation it is unnecessary to discuss appellant's contentions that without proof of deliberation and premeditation no ground existed for the jury's determination that he was guilty of first degree murder.

The judgment appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

109 Cal.App.2d 787

**In re CONTRERAS.****Civ. 4700.**

District Court of Appeal, Second District,  
Division 1, California.

March 18, 1952.

Proceeding in the matter of a person under the age of 21 years charged with committing an assault. From orders of the Superior Court of Los Angeles County, sitting in separate session as a Juvenile Court, William B. McKesson, J., committing the minor to Youth Authority of the State and denying a motion to vacate such order, the minor and his mother appealed. The District Court of Appeal, White, P. J., held that denial of motion to vacate order of commitment constituted abuse of discretion in view of absence of sufficient legal evidence to establish even reasonable or probable cause of the minor's guilt.

Order denying motion to vacate previous order reversed and cause remanded with instructions.

**1. Infants ☞16.8**

Issues presented to juvenile court may be determined upon the preponderance of the evidence in view of statutory provision that an order adjudging a person to be a ward of the juvenile court shall not be deemed to be a conviction of crime. Welfare and Institutions Code, §§ 700(m), 736.

**2. Infants ☞16.12**

Statutory provision that an order adjudging a person to be a ward of the juvenile court shall not be deemed to be a conviction of crime is for all practical purposes, a legal fiction, presenting a challenge to credulity and doing violence to reason. Welfare and Institutions Code, §§ 700(m), 736.

**3. Evidence ☞5(2)**

It is a common knowledge that an order adjudging a person to be a ward of juvenile court, when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and a serious impediment to the future of such minor. Welfare and Institutions Code § 700(m).

**4. Infants ☞16**

The Juvenile Court Act should not be made an instrument for denying to a minor a constitutional right or a guarantee afforded by law to an adult. Welfare and Institutions Code, § 700(m).

**5. Infants ☞16.8**

While mere technicalities of procedure as distinguished from rules which protect substantial rights should be disregarded in searching out the truth in proceedings in juvenile court, the regular processes of the law provided to produce evidence and the ordinary rules established to aid courts in testing and weighing it are not scrapped because the proceeding is summary.

**6. Infants ☞16.8**

Record of proceedings in juvenile court on charge of committing an assault with a deadly weapon or by means of force likely to produce great bodily injury, based on alleged participation in a gang fight, contained insufficient legal evidence to establish even reasonable or probable cause of accused minor's guilt. Welfare and Institutions Code, § 700(m).

**7. Infants ☞16.8**

Removal of a minor from custody of his parents and commitment to Youth Authority is not justified unless facts be shown by evidence, the verity of which has been carefully and legally tested. Welfare and Institutions Code, § 700(m).

**8. Infants ☞16.8**

The juvenile court is a judicial institution and where a minor brought before it denies alleged delinquency, he should not be deprived of his liberty until his guilt of the charge made against him is established by legal evidence. Welfare and Institutions Code, § 700(m).

**9. Infants ☞16.12**

Denial of motion to vacate order committing a minor to Youth Authority on charge of committing an assault with a deadly weapon or by means or force likely to produce great bodily injury constituted abuse of discretion, in view of absence of sufficient legal evidence to establish even reasonable or probable cause of minor's guilt and letters attesting to his good char-



acter and reputation presented on such motion. Welfare and Institutions Code, § 700(m).

---

Ibanez & Snider and Richard A. Ibanez, all of Hollywood, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

This is an appeal by the above named minor and his mother, Maria Luisa Contreras, from an order of the Supreme Court sitting in separate session as a juvenile court, declaring the aforesaid minor a ward thereof and committing him to the Youth Authority of the State of California and denying a motion to vacate and set aside the aforesaid order.

The original order declared said minor to be a person coming within the provisions of section 700(m) of the Welfare and Institutions Code in that, on March 19, 1951 he "committed an assault upon the person of Henry Davila with a deadly weapon or instrument or by means of force likely to produce great bodily injury".

The findings and judgment set forth that the alleged assault was committed in the following manner: "Minor participated in a gang fight, accompanied with other minors, in which said victim received a stab wound in the stomach inflicted by sharp-edged instrument, and also received several abrasions about the face and head as a result of being kicked and beaten".

After finding "that minor's welfare requires that his custody be taken from his mother", the judgment directed that said minor be committed to the Youth Authority of the State of California.

On this appeal it is contended that the evidence fails to support the judgment declaring the minor herein a ward of the juvenile court and committing him to the Youth Authority.

The record reflects that in this proceeding five boys, including the minor Lupe Cardenas Contreras, were charged with engaging in a "gang" fight during the course of which one Henry Davila was stabbed with a knife and otherwise set upon and beaten.

It appears that at the hearing in the juvenile court, proceedings were first had as to Salvadore Gill, one of the boys accused with the minor herein. These proceedings were had outside the presence of the minor with whom we are here concerned. Gill gave no testimony involving Contreras, whereupon the mother of the former, and Probation Officer Sorkin advised the court that the witness was "afraid" and "reluctant" to testify. The judge then said to the minor Gill, "I am not going to tell any of these boys I got any information out of you. You don't need to worry about that. You can tell us anything you want to tell us. I also want you to know we already know what you told the officers, but we are not going to tell the rest of the boys that you told us anything. We are interested in finding out all we can about this matter so we can make sure we have the right guy and not the wrong fellows are accused in this difficulty. Let's get the record straight."

With these assurances, the witness continued but did not incriminate Contreras. Officer McAuliffe, however, testified that the witness Gill had theretofore told him, "He thought if anybody stabbed Davila, it was Contreras". Producing a miniature baseball bat, the officer further testified, "When Contreras was arrested \* \* \* he had this. \* \* \* I believe it was Salvadore (Gill) who saw somebody with something like this". Gill denied making this statement.

Contreras, the minor herein, denied any participation in the fracas, stating that on the night in question he was riding in an automobile with two boys, Richard Marques and Frank Chavez. Both of these boys corroborated this statement but admitted having told Probation Officer Sorkin to the contrary, contending that they did so because of threats made against them by other boys.

Henry Davila, victim of the assault, testified that eight or nine boys "jumped" on him as he was on his way to a drugstore. Salvadore Gill was the only one the victim recognized. With reference to the minor herein, the victim testified, "I know him by looks and everything, *but I didn't see him that night.* Maybe he was there, and may-

be he was not; I don't know". (Emphasis added.)

Following this testimony Officer McAuliffe testified that the victim had previously told him, "I think Contreras (the minor herein) cut me, he was the one who used the knife \* \* \* it was Contreras who was on top of me, I am pretty sure that he is the one that used the knife \* \* \*. I'll get them when I get out". The officer also testified that "anyone that was mentioned by anybody was apprehended".

[1] Section 736 of the Welfare and Institutions Code provides that "An order adjudging a person to be a ward of the juvenile court shall not be deemed to be a conviction of crime." In consonance therewith it has been held that issues presented to the juvenile court may be determined upon the preponderance of the evidence, *Matter of Cannon*, 27 Cal.App. 549, 553, 150 P. 794. In the instant proceeding the minor was not represented by counsel upon the hearing at which he was adjudged a ward of the court. A reading of the transcript of the testimony taken immediately suggests the probability that had the minor been represented by counsel considerable of the evidence given would have been excluded through timely objections.

[2] While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings.

[3, 4] It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile court record. And further, as in this case, the minor is taken from his family, deprived of his liberty and confined in a state institution. True, the design of the Juve-

nile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult. Regardless of the provisions of section 736 of the Welfare and Institutions Code, the fact remains that the minor herein was taken from the custody of his parents, deprived of his liberty and ordered confined in a state institution.

[5] As was said in *Re Hill*, 78 Cal.App. 23, 27, 247 P. 591, 592, with reference to proceedings in the juvenile court: "And so, while the exact truth should be searched out, and all mere technicalities of procedure as distinguished from rules which protect substantial rights should be disregarded, the regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding is a summary one." In the instant case there can be no doubt that had the minor herein been an adult, an indictment or information filed against him, under the evidence here present, would have been set aside on motion under section 995 of the Penal Code.

[6-8] Surely, a minor charged in the juvenile court with acts denounced by law as a felony does not have lesser constitutional statutory rights or guaranties than are afforded an adult under similar circumstances in the superior court. The record herein is barren of sufficient legal evidence to establish even reasonable or probable cause of the minor's guilt, and he should have been returned to his family, an institution that has ever been recognized as the foundation of society, and the sanctity of which the law has always upheld. A charge against a minor resulting in his removal from the custody of his parents cannot be regarded lightly, and such action is not justified unless facts be shown by evidence, the verity of which has been carefully and legally tested. We find nothing in the juvenile court law that attempts to impose any unlawful restraint upon personal liberty. In practically all of the cases affecting juvenile court proceedings

that have come to our attention, the minor has admitted the charge lodged against him and the only problem presented to the court was how to best guide and control the minor with a view to his rehabilitation and further development. In the case at bar however, the minor emphatically and at all times denied his alleged delinquency. Under such circumstances his liberty should not be taken from him until his guilt of the charges lodged against him was established by legal evidence. That however praiseworthy, according to the viewpoint of the individual, may be the motives of the juvenile court, that tribunal may not impinge upon the legal rights of one brought before it is emphatically set forth in *Re Tahbel*, 46 Cal.App. 755, 760, 761, 762, 763, 189 P. 804; in *Re Hill*, supra, 78 Cal.App. at pages 26, 27, 28, 247 P. 591; and in *Re Rauch*, 103 Cal.App.2d 690, 698, 230 P.2d 115. In the final analysis the juvenile court is a judicial institution.

If it be true, as some of the hearsay and legally-inadmissible evidence indicates, that the minor herein may have been connected with the "gang" fight in question, and possibly unfortunate that a rehearing should be required, nevertheless, consequences fraught with far greater evil would inevitably result from the sanction of individual abuses of the character here presented.

Even though, as held in some of the cases, the quantum of proof necessary to sustain an order declaring a minor a ward of the juvenile court is not the same as in a criminal proceeding affecting an adult, In *re Dargo*, 81 Cal.App.2d 205, 183 P.2d 282, and cases therein cited, it cannot seriously be contended that the constitutional guarantee of due process of law does not extend to minors as well as to adults.

When the motion to set aside the order committing the minor to the Youth Authority was made, several letters were presented attesting to his good character and reputation. These letters have been brought here on this appeal. One from the Principal of the school attended by the minor stated in part, "My principal contact with Lupe was on the playground during noon and after-school hours. Here he

always exhibited good sportsmanship, good judgment and self control. He was honest and fair in all his dealings with fellow players, and was liked and respected by everyone. He showed definite leadership qualities and I confidently anticipated a successful future for the lad.

"I had a liking for Lupe and am very much surprised and concerned that he is involved in any kind of trouble."

Another letter from the school Vice-Principal contained the following: "Lupe's disciplinary record in my office shows that he had been sent in for minor class room disturbances only twice during the year and one half he was here.

"The following statements from two of his teachers may also be significant as to Lupe's true character:

"'Not a bad kid—worked well for me. He lacks initiative and followed the wrong crowd.' Phys. Ed. Teacher.

"'Not a disciplinary case, but just not much work.' English Teacher.

"On the whole, I would say that we did not find Lupe to be a disciplinary problem at Garfield High School. I hope this letter may be of some value in helping Lupe."

Other similar and complimentary letters were written by a former teacher of the minor as well as by neighbors of his family.

[9] We are persuaded that in denying the motion to vacate and set aside its order committing the minor herein to the Youth Authority of the State of California, the juvenile court abused its discretion. The motion should have been granted thereby enabling said minor, with the aid of counsel, to properly prepare and present a defense to the charges preferred against him.

For the foregoing reasons, the order of June 7, 1951 denying the motion to vacate and set aside the previous order declaring said minor a ward of the juvenile court and committing him to the Youth Authority of the State of California is reversed and the cause remanded with directions to the court below sitting in separate session as a juvenile court, to grant said motion.

DORAN and DRAPEAU, JJ., concur.



109 Cal.App.2d 770

SHAW v. BOARD OF ADMINISTRATION et al.

Civ. 18695.

District Court of Appeal, Second District,  
Division 3, California.

March 17, 1952.

Petition by La Gulia G. Shaw against Board of Administration, State Employees Retirement System, and others, for writ of mandamus to compel board to pay death benefits to petitioner in accordance with designation of petitioner by divorced husband of petitioner as beneficiary under State Employees' Retirement System. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment adverse to petitioner, and petitioner appealed. The District Court of Appeal, Vallée, J., held that when wife had been designated as beneficiary of death benefits during marriage, and designation had not been changed by husband after divorce, and policy had been continued in force, fact of divorce by which community property settlement had been made did not abrogate wife's right to receive death benefits as beneficiary.

Reversed with directions to render judgment for petitioner.

1. States ⇨57

State Employees' Retirement Law, prior to adoption of provision that death benefits shall be paid to beneficiary designated by member, or if no beneficiary has been designated, to estate of member, required payment of death benefits to person designated in writing as beneficiary, provided that person had insurable interest of life of member at time designation was made. Government Code, §§ 21204, 21205, 21360, 21362(b), 21370; Insurance Code, §§ 286, 10110(b).

2. Insurance ⇨116(4)

Wife, during continuance of marriage, has insurable interest in life of her husband. Insurance Code, §§ 286, 10110(b).

3. States ⇨57

The provisions for death benefits under State Employees' Retirement Law are in nature of contract of life insurance to be governed generally by principles applicable to such contracts. Government Code,

§§ 21365.1, 21370; Insurance Code, §§ 286, 10110(b).

4. Insurance ⇨586

The general rule is that designation of a beneficiary in policy of life insurance initiates in favor of beneficiary an inchoate gift of proceeds of policy, which, if not revoked by insured prior to death, vests in beneficiary at time of death of insured.

5. Insurance ⇨123

A designation of a beneficiary in life policy, when valid at its inception remains so even though insurable interest or relationship has ceased. Insurance Code, §§ 22, 101.

6. Insurance ⇨585(3), 769

A decree of divorce in and of itself has no effect on right of wife to proceeds of policy on life of husband in which wife is designated as beneficiary and which was issued prior to divorce of parties, and such rule applies equally when wife is designated as beneficiary in death benefits certificate of fraternal insurance association.

7. States ⇨57

Where husband designated wife as beneficiary of death benefits under State Employees' Retirement System and maintained policy in force until his death without change of beneficiary, divorce decree procured by wife in which wife was given sum of money in lieu of her interest in community property did not abrogate right of wife to receive proceeds of policy upon death of former husband.

8. Husband and Wife ⇨266

Insurance ⇨585(3)

A wife can release her community interest in an insurance policy and still be beneficiary thereof, but if she effects such release and husband revokes his designation of her as beneficiary, she has no right to insurance proceeds on his death, but if he fails to revoke his designation, wife is entitled, like any other beneficiary, to proceeds.

9. States ⇨57

Right of divorced wife who had been designated by husband during marriage as beneficiary of State Employees' Retirement

System death benefits, to take death benefits upon death of husband when there had been no revocation of designated beneficiary, was not dependent upon any community interest wife might have had in amount paid to system prior to divorce, but wife took by virtue of contract between former husband and state.

**10. Trial**  $\S$ 388(4), 396(4)

Where controlling facts have been stipulated, findings are unnecessary and do not control stipulated facts.

Cannady & Freeman, Los Angeles, for appellant.

Eugene V. McPherson, Los Angeles, for respondent.

VALLÉE, Justice.

Petitioner, La Gulia G. Shaw, brought this proceeding for a writ of mandamus to compel the Board of Administration of the State Employees' Retirement System of California, referred to as the Board, to pay a death benefit to her. The Board was granted permission to substitute the administratrix of the estate of Frank Shaw, deceased, upon its depositing the benefit with the clerk of the court. The benefit was so deposited. The writ was denied and the Board was ordered to pay the benefit to the administratrix. Petitioner appeals.

Petitioner and Frank Shaw were married in 1923. About July 1, 1944, Shaw, while married to petitioner, became a member of the State Employees' Retirement System. He remained a member until his death on May 29, 1950. Upon becoming a member, Shaw, in writing, designated petitioner as the beneficiary of any benefits to become due upon his death as a member of the System. He did not at any time revoke the designation, and her name remained on the records of the System as his designated beneficiary at all times from July 1, 1944, to his death.

On April 13, 1948, petitioner was granted an interlocutory decree of divorce from Shaw. The decree awarded petitioner \$400 in lieu of her interest in the community property. On April 20, 1949, a final decree

was entered. Neither the pleadings nor the decrees in the action for divorce mentioned the System or the fact that petitioner was Shaw's beneficiary, nor were the rights of the parties under the System raised or litigated in the action. Petitioner and Shaw remained friends until his death, and she paid about half of his "burial expenses."

The question is: Were petitioner's rights as the designated beneficiary of the death benefit abrogated by the divorce decree?

The State Employees' Retirement Law, Government Code, Pt. 3, provides a "State Retirement System". The Board of Administration administers the System. "A member may at any time designate a beneficiary to receive such benefits as may be payable to his beneficiary or estate under this part, by a writing filed with the board. To be eligible to be so designated a person shall have an insurable interest in the life of the member." Gov.Code, § 21204. The last sentence of section 21204 was deleted in 1951. Stat.1951, p. 1785. "The designation of a beneficiary under this system \* \* \* may be revoked at the pleasure of the person who made it and a different beneficiary designated by a writing filed with the board." Gov.Code, § 21205. The Retirement Law does not provide any other means of revoking the designation of a beneficiary or of depriving a designated beneficiary of his or her right as such. The System is liable for the death benefit upon the death of a member. Gov.Code, § 21360. If a member dies without having made an election as to the manner in which the death benefit shall be paid, his beneficiary may elect to have it paid in instalments. Gov. Code, § 21362(b). In 1951 section 21365.1 was added to the Retirement Law to specifically provide: "The basic death benefit and the limited death benefit shall be paid as provided in this article to the beneficiary designated by the member under Section 21204, or, if no beneficiary has been so designated, to the estate of the member." "If the estate of the deceased member is his beneficiary, or if no beneficiary has been designated by him, or if the designated beneficiary can not be found by the board, it may in its discretion pay to the funeral director who conducted the funeral, or to

any person or organization that has paid the funeral director from his or the organization's funds, all or a portion of any amount payable under this system \* \*." Gov.Code, § 21370.

[1] We think it patent that the Retirement Law, prior to the addition of section 21365.1 in 1951, required payment of the death benefit to the person designated in writing as beneficiary, provided such person had an insurable interest in the life of the member at the time the designation was made.

[2] Petitioner, as the wife of Shaw, had an insurable interest in his life at the time she was designated beneficiary. Insurance Code, § 10110(b); 29 Am.Jur. 321, § 367. Section 286 of the Insurance Code, in part, provides: " \* \* \* an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs." As the named beneficiary having an insurable interest at that time, petitioner is entitled to the death benefit unless her right was abrogated by the divorce decree. *Rudell v. Board of Administration, Etc.*, 8 Cal.2d 600, 602, 66 P.2d 1203.

[3] The provisions of the Retirement Law providing for a death benefit are in the nature of a contract of life insurance to be governed generally by the principles applicable to such contracts. Ins.Code, §§ 22, 101; *Dom v. State Employees' Retirement Board*, 345 Pa. 489, 28 A.2d 796, 798; *Anderson v. Nelson*, 219 Minn. 433, 18 N.W. 2d 140, 141; Annotation: 63 A.L.R. 711, 712-17; 119 A.L.R. 1241, 1242; cf. *Packer v. Board of Retirement*, 35 Cal.2d 212, 215, 217 P.2d 660; *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799; *In re Estate of Barr*, 104 Cal.App.2d 506, 508-510, 231 P.2d 876; *Richards v. Wheeler*, 10 Cal. App.2d 108, 112, 51 P.2d 436; *Weinberg v. Woodward*, 67 Misc. 283, 124 N.Y.S. 480, 481, affirmed 146 App.Div. 917, 131 N.Y.S. 1149. The contract involved in the present case is one between Shaw and the State, admittedly valid and supported by good consideration, in which Shaw, exercising an undoubted right, named petitioner as beneficiary. *Rudell v. Board of*

*Administration, Etc.*, 8 Cal.2d 600, 603, 66 P.2d 1203.

[4,5] The general rule is that the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death. *Travelers Ins. Co. of Hartford, Conn. v. Fancher*, 219 Cal. 351, 353, 26 P.2d 482. It is also the general rule that a designation of a beneficiary, valid in its inception, remains so, although the insurable interest, or the relationship, has ceased. *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 557, 67 P. 970; *Sullivan v. Union Oil Co. of Cal.*, 16 Cal.2d 229, 232, 237, 105 P.2d 922; *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56.

[6] A decree of divorce in and of itself has no effect on the right of a wife to the proceeds of a policy on the life of the husband designating her as beneficiary issued prior to divorce of the parties. *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 92-93, 64 P. 103; *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 557-558, 67 P. 970; *Sandrosky v. Prudential Ins. Co.*, 217 Cal. 578, 20 P.2d 325; *Sullivan v. Union Oil Co. of Cal.*, 16 Cal.2d 229, 237, 105 P.2d 922; *Jenkins v. Jenkins*, 112 Cal.App. 402, 408-411, 297 P. 56; *Conn. Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457, 24 L.Ed. 251; 46 C.J.S., Insurance, § 1160, p. 45; 29 Am.Jur. 976, § 1309; Annotation 52 A.L.R. 386, 389; 175 A.L.R. 1220, 1224; cf. *Sheehan v. Journeymen Butchers', Etc., Ass'n*, 142 Cal. 489, 76 P. 238; *Burke v. Modern Woodmen of America*, 2 Cal.App. 611, 612, 84 P. 275. The same rule generally governs in the case of a wife designated as beneficiary in a death benefit certificate of a fraternal insurance association, and the beneficiary may recover the death benefit notwithstanding divorce. *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 67 P. 970; Annotation: 52 A.L.R. 422; 175 A.L.R. 1248.

*Sullivan v. Union Oil Co. of Cal.*, 16 Cal.2d 229, 105 P.2d 922, construed pro-



visions of the "Provident Fund" of Union Oil Company. The member's former wife was named as beneficiary of the death benefit provided by the Fund at the time he became a member, and she remained such until his death. After having been named beneficiary, the member's former wife divorced him. He was a member of the Fund at the time of his death. The former wife claimed she was entitled to the death benefit as the named beneficiary. The rules and regulations of the Fund provided that the death benefit "shall be paid to beneficiary." The court said, 16 Cal.2d at page 232, 105 P.2d at page 924: "Had there been no other limitation to the right of plaintiff herein to maintain her claim as a named beneficiary of the fund, it would seem clear that her contention on this appeal should be sustained." The court held, however, that the wife had released to the husband her interest and rights in the Fund by a property settlement agreement they had entered into at the time of the divorce. In the course of its discussion of the latter question the court stated, 16 Cal.2d at page 237, 105 P.2d at page 926: "\* \* \* it is not seriously contended that in and of itself the decree of divorce had any effect upon the asserted right of plaintiff as a beneficiary. That question heretofore has received the attention of this court, and appears to have been settled against any affirmative claim in that regard. [Citations.]"

The administratrix says the award of \$400 to petitioner by the divorce decree in lieu of her interest in the community property abrogated her rights as beneficiary. The extent of the decree in this respect, applying it to its utmost, is that petitioner lost any claim to a community interest in the amount theretofore paid to the System. If petitioner lost all community interest in the amount theretofore paid to the System by Shaw it means no more than that her right to demand a proportionate share of the death benefit, regardless of who might be the beneficiary, was lost. *Blethen v. Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 100-102, 243 P. 431; *New York L. Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 604-607, 214 P. 61. Her claim

here is not asserted on the basis of community interest or right. The question is the effect of the decree, if any, on petitioner's rights as beneficiary.

[7-9] Shaw after his divorce, was a single man. He had, in effect, a policy of insurance upon his life with petitioner named therein as beneficiary, legally competent as such, and with the power in himself of revoking the designation of the beneficiary, which power was never exercised. As Shaw had the right under the statute to change the beneficiary, his failure to do so ordinarily indicates that he did not wish to effect a change. His failure to act amounts to a confirmation of the designation of petitioner as beneficiary of the death benefit. See *Estate of Crane*, 6 Cal.2d 218, 221, 57 P.2d 476, 104 A.L.R. 1101. He kept the policy in force until his death, at which time the right of the beneficiary, theretofore expectant, became vested. A wife can release her community interest in an insurance policy and still be a beneficiary thereof. *Grimm v. Grimm*, 26 Cal.2d 173, 175, 157 P.2d 841. If she effects such a release—in the present case by accepting an award of \$400 in lieu of her interest in the community property—and the husband revokes his designation of her as beneficiary, she has no right to the insurance proceeds on his death; but if he fails to revoke his designation of her as beneficiary she is entitled, like any other beneficiary, to the proceeds of the policy at his death. (*Idem.*) To hold, as did the trial court, that the divorce decrees abrogated the right of petitioner, as beneficiary, to receive the death benefit, is to read "divorce" into the contract between Shaw and the System in place of "death." The divorce decrees took away from petitioner all right or claim to any interest in the community property by virtue of her then status as wife, but they did not constitute a renunciation of the right to receive the death benefit in the event Shaw did not revoke her designation as beneficiary. Petitioner takes the death benefit, not by reason of any community interest she may have had in the amount paid to the System prior to the divorce decrees, but by virtue of the contract between Shaw and the State.

We hold that petitioner's rights as the designate beneficiary of the death benefit were not abrogated by the divorce decrees and that she was entitled to receive it upon the death of Shaw.

[10] The controlling facts were stipulated to. Findings were unnecessary and do not control the stipulated facts. *People v. Gabriel*, 57 Cal.App.2d 788, 792, 135 P.2d 378. Petitioner is entitled to judgment on the facts as stipulated.

The judgment is reversed with directions to render judgment for petitioner.

SHINN, P. J., and VICKERS, Justice pro tem., concur.



109 Cal.App.2d 803

UTZ v. AUREGUY et al.

Civ. 14726.

District Court of Appeal, First District,  
Division 2, California.

March 19, 1952.

Proceeding by Hazel Utz against Carmelita Theobald Aureguy, administratrix of the estate of Eugene Aureguy, deceased, and others. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment dismissing the action and plaintiff appealed on the judgment roll. The District Court of Appeal, held that where motion to dismiss was based on defendants' four affidavits, all the pleadings in the case, and deposition of plaintiff, but record on appeal consisted of only the third amended complaint and its amendment and demurrer thereto in which no error appeared, judgment of dismissal would be affirmed.

Judgment affirmed.

#### 1. Appeal and Error ⇐901

On appeal on judgment roll from a judgment dismissing the action, it is incumbent upon appellant to make it affirma-

tively appear that error was committed by the court below.

#### 2. Appeal and Error ⇐907(3)

When appeal is to be determined upon the judgment roll alone, all intendments will be made in support of judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken and if any matters could have been presented to court below which would have authorized entry of this judgment, it will be presumed on appeal, in support of judgment, that such matters were so presented, and that judgment was entered in accordance therewith.

#### 3. Dismissal and Nonsuit ⇐51

Superior Court has inherent power to dismiss action which is made to appear fictitious and sham.

#### 4. Appeal and Error ⇐901, 938(3)

Where error appears on face of judgment roll, it is not to be presumed on appeal that the error was cured by some proceeding not appearing in transcript, but it is incumbent on appellant to present a transcript which affirmatively shows on its face that error occurred. Rules on Appeal, rule 52.

#### 5. Appeal and Error ⇐762

Every point relied on for reversal should be stated and argued in the opening brief for appellant, and should not be presented for the first time in reply brief.

#### 6. Appeal and Error ⇐554(3)

Where motion to dismiss action was based on defendant's four affidavits, all the pleadings in the case and a deposition of plaintiff, but record on appeal on judgment roll contained none of them save third amended complaint and its amendment and demurrer thereto in which no error appeared, judgment dismissing action would be affirmed.

Alfred J. Hennessy, San Francisco, for appellant.

W. Byron Bryant, Jay Pfothenhauer and Simpson Finnell, Jr., all of San Francisco, for respondents DeLancey C. Smith and George K. Ford.

## PER CURIAM.

This is an appeal on the judgment roll from a judgment dismissing the action.

The record consists of the third amended complaint; notice of motion to amend the same, and the amendment; motion to dismiss; demurrer to third amended complaint and to the amendment thereto; points and authorities; order of substitution; judgment; notice of appeal, and request for transcript.

The motion to dismiss the action was made on the grounds that "As originally begun with the filing of the complaint herein, the action was sham and based on false allegations" and the first, second and third amended complaints were "likewise sham and based upon false allegations"; that the filing of the third amended complaint and its amendment, and the maintenance of the action, "were and are an abuse of the process of the court by the plaintiff", and that "the interests of justice will be served by the dismissal \* \* \*." The motion was based on four affidavits theretofore filed by defendants, and all the records, papers and pleadings, including the original complaint, the first, second and third amended complaints, the amendment to the latter, the demurrers and answers thereto, the motions to strike, and a deposition of the plaintiff.

Appellant, an attorney at law, sued for damages arising from being deprived of what she claimed to be her share in attorney fees recovered by respondents, from certain heirs of the late Michael F. O'Dea, whose estate—of large value—was in probate.

The judgment recites that after full argument on the motion and demurrer, the motion was granted and the demurrer sustained without leave to amend.

## The record on appeal:

Although the motion to dismiss was based on (a) defendants' four affidavits, (b) *all* the pleadings in the case, and (c) a deposition of the plaintiff, this record contains none of them save the third amended complaint and its amendment and the demurrer thereto. Indeed the request for a transcript called for none of them; it called

for the notice of appeal, the notice of motion and the motion to substitute a party, the order granting such motion, and for nothing else.

In the absence of defendants' four affidavits, plaintiff's counter-affidavits (if any were filed), plaintiff's deposition, and the first three complaints, all of which constituted the showing before the trial court, there is no way of knowing anything about that showing. Without the three earlier complaints there is no basis for the comparison of one with another to ascertain if there were any departures, variances, inconsistencies, or conflicts within them, or other evidence of a shifting of theories, all of which as a rule are highly important on such a motion.

[1] "It is incumbent upon the appellant to make it affirmatively appear that error was committed by the court below." *Cockrill v. Clyma*, 98 Cal. 123, 126, 32 P. 888, 889.

[2] "When an appeal \* \* \* is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. \* \* \* If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith." *Caruthers v. Hensley*, 90 Cal. 559, 560, 27 P. 411. In *Riley v. Dunbar*, 55 Cal.App.2d 452, 455, 130 P.2d 771, the rule is restated and 2 Cal.Jur. § 499, p. 852 et seq. cited.

[3] In *Helvey v. Security etc. Bank*, 99 Cal.App.2d 149, 151, 221 P.2d 257, the court said: "No record of the evidence before the trial court has been supplied to this Court. Therefore, it must be presumed that the evidence supports the order. *Vieth v. Klett*, 88 Cal.App.2d 23, 198 P.2d 314; *Lucich v. Lucich*, 75 Cal.App.2d 890, 172 P. 2d 73. \* \* \* The Superior Court has inherent power to dismiss actions which are made to appear fictitious and sham. *Cun-*



ha v. Anglo California National Bank, 34 Cal.App.2d 383, 93 P.2d 572.”

In *Oakley v. Rosen*, 76 Cal.App.2d 310, 312, 173 P.2d 55, 56, the court said that it is “well settled that when an appeal is based upon the judgment roll alone a reversal cannot be ordered except for a fatal error on the face of the judgment”.

In *Nulsen v. Nulsen*, 84 Cal.App.2d 306, 307, 190 P.2d 316, 317, the court said: “The record on appeal consists of the clerk’s transcript only. And it is well settled that when the record on appeal consists of the judgment roll alone, only the alleged errors appearing therein may be considered. No such errors appear.” The same may be said here.

[4] Since the adoption of Rule 52, Rules on Appeal, if an error appears on the face of a judgment roll or other partial transcript it is not to be presumed on appeal that the error was cured by some proceeding not appearing in the transcript, *Estate of Pierce*, 32 Cal.2d 265, 196 P.2d 1; *Alkus v. Johnson Pacific Co.*, 80 Cal.App. 2d 1, 181 P.2d 72; *Palpar, Inc., v. Thayer*, 82 Cal.App.2d 578, 186 P.2d 748, but it is still incumbent on an appellant to present a transcript which affirmatively shows on its face that an error occurred. *Palpar, Inc., v. Thayer*, 83 Cal.App.2d 809, 189 P.2d 752; *Van Cise v. Lencioni*, 106 Cal.App.2d 341, 235 P.2d 236, and cases collected at 106 Cal. App.2d 350, 235 P.2d 241; *Glogau v. Hagman*, 107 Cal.App.2d 313, 237 P.2d 329.

The briefs on appeal:

Appellant’s opening brief consists of 7 pages, more than 5 of which are devoted to a statement of earlier procedural steps and an argument that the last complaint states a cause of action for fraud and deceit. It contains a short paragraph on the statute of limitations and one on exemplary damages. It presents no point and cites no authority attacking the dismissal. See Rule 13, Rules on Appeal, 36 Cal.2d 14.

In respondents’ brief counsel say: “the brief of appellant is so faulty that it presents difficulty in the making of a proper reply as it is not possible to determine from it upon what ground, if any, appellant is seeking to reverse the judgment of the low-

er court in granting the motion of respondents to dismiss the case \* \* \*.” With this we have to agree. Respondents add: “Appellant states that this is an appeal from the judgment granting the motion to dismiss the case but thereafter does not again in her brief mention the motion or the court’s ruling thereon. We assume from such failure that appellant has abandoned her appeal from the judgment of dismissal.”

Respondents quote the following from *Estate of Scott*, 90 Cal.App.2d 21, 24-25, 202 P.2d 357, 360: “the rule is settled that where, as in the instant case, the appealing party fails to furnish this court with either argument or authority upon a point urged as ground for reversal of the judgment, the point will be deemed to have been abandoned.” Respondents cite also *Ver Bryck v. Luby*, 67 Cal.App.2d 842, 845, 155 P.2d 706; *Bagley v. International Harvester Co.*, 91 Cal.App.2d 922, 206 P.2d 43; *Ellerhorst v. Blankman*, 102 Cal.App. 133, 282 P. 507. None of these cases cited by respondents has been answered or even mentioned in appellant’s closing brief.

In her closing brief appellant for the first time discusses the motion to dismiss, but only to the extent of citing general rules relating to sham and fictitious pleadings, and without attempting to point out how they are supposed to apply to this case. Such relationship or applicability of course could not very well be argued in the absence of a record showing what the trial court had before it on the motion.

[5] There is no point in prolonging this discussion since the closing brief (a) is not only general in so far as the dismissal is concerned, and (b) fails entirely to answer the authorities cited by respondents, but (c) the case falls squarely within the following rule stated in 2 Cal.Jur. p. 734; “In fairness to the court and to counsel for the respondents, every point relied on for research [“reversal” obviously] should be stated and argued in the opening brief for the appellant, and should not be presented for the first time in the reply brief. Points so presented will be passed over by the courts as a general rule \* \* \*.”

[6] It follows that the judgment of dismissal must be affirmed.

No purpose will be served by a discussion of the demurrer which was sustained without leave to amend. If the motion to dismiss the action was well taken on the grounds on which it was based that ended the case.

The judgment is affirmed.



109 Cal.App.2d 681

**JACOBS v. BOZZANI MOTORS,**  
Limited, et al.  
Civ. 18391.

District Court of Appeal, Second District,  
Division 1, California.  
March 12, 1952.

Rehearing Denied March 31, 1952.

Louis Jacobs brought action against Bozzani Motors, Ltd., a corporation, and others to recover for injuries sustained by plaintiff when struck by an automobile. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered a judgment for plaintiff, and the defendants appealed. The District Court of Appeal, White, P. J., held that evidence was insufficient to establish that the named defendant was the owner of the automobile within meaning of statute relating to the liability of the owner of a motor vehicle when the vehicle is operated by one other than the owner.

Judgment reversed as to the named defendant and affirmed as to the other defendants.

See also, 103 Cal.App.2d 754, 230 P.2d 51.

#### 1. Automobiles ⇨246(30)

In action by plumber for injuries sustained when struck by automobile while standing near rear of his parked truck where he was cutting and threading pipe, instruction that there is no duty imposed on a workman to be consistently on the lookout for motor vehicles, and that if a workman on a public street is exercising care ordinarily exercised by a workman under similar circumstances he may properly assume

that motorists will not be negligent in running him down without warning, especially where workman remains within space especially provided by law for the parking of automobiles, was erroneous.

#### 2. Automobiles ⇨219

Where plumber, who was injured when struck by automobile while standing near rear of his parked truck where he was cutting and threading pipe, was not reasonably required to use the street for his work, but nevertheless chose to do so, he was required to exercise the same quantum of care as any other person in the street, and was not excused from exercising such care by reason of the necessity of giving attention to his work.

#### 3. Appeal and Error ⇨1170(9)

Where it did not appear from record that different results would have been probable had erroneous instructions not been given, verdict of jury would be upheld on appeal. Code Civ.Proc. § 475; Const. art. 6, § 4½.

#### 4. Automobiles ⇨242(6)

In action by plumber for injuries sustained when struck by automobile while standing near rear of his parked truck where he was cutting and threading pipe, burden of proving that automobile was owned by employer of one in whose name automobile was registered rested on plumber. Vehicle Code, § 66.

#### 5. Automobiles ⇨244(32)

Evidence that employee bought automobile from employer, that certificate of ownership was indorsed and forwarded to Department of Motor Vehicles which issued a new certificate in name of employee, that employee drove automobile to and from work, that employee loaned automobile out twice to employer's customers and was paid nothing therefor, and that employee left automobile at employer's garage when employee went on vacation, and that employee informed his assistant to lend automobile to employer's customer while customer's automobile was being repaired, was insufficient to establish that employer was owner of automobile within meaning of statute relating to liability of owner of a motor vehicle when vehicle is operated by

one other than owner. Vehicle Code, § 66.

#### 6. Evidence ⇐98

If existence of an essential fact on which a party relies is left in doubt or uncertainty, party on whom burden rests to establish that fact should suffer, and not his adversary.

#### 7. Evidence ⇐597

A judgment cannot be based on guesses or conjectures.

Eugene S. Ives, Los Angeles, for appellant Harry Bernstein.

Spray, Gould & Bowers, Henry F. Walker, Los Angeles, for appellants Bozzani Motors, Ltd., and J. O. Reade.

Samuel P. Young, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff brought an action to recover for personal injuries sustained when he was struck by an automobile operated by defendant Bernstein. The vehicle was registered with the Department of Motor Vehicles as being owned by defendant J. O. Reade, an employee of defendant Bozzani Motors, Ltd. The vehicle had been loaned to defendant Bernstein for use while his own automobile was being repaired at Bozzani Motors, Ltd. A jury trial resulted in a verdict and judgment against all of the above-named defendants, the judgment against Reade and Bozzani being limited to the sum of \$5,000 pursuant to the provisions of section 402 of the Vehicle Code. All of the defendants have appealed, assigning error in the giving and refusal of instructions pertaining to the issues of negligence and contributory negligence; and in addition it is contended, with respect to the question of ownership by Bozzani Motors, that the evidence was insufficient to support the jury's finding that Bozzani Motors was a co-owner of the vehicle with Reade, and that erroneous instructions were given to the jury in this regard.

Inasmuch as we have concluded, upon a consideration of the evidence and the entire charge to the jury, that prejudicial error

has not been shown, Const. Calif., sec. 4½, Art. VI, a somewhat detailed exposition of the evidence is necessary.

Plaintiff, a journeyman plumber, was employed to install a water pipe upon premises on North Soto Street in the City of Los Angeles, near the intersection of City Terrace Avenue. The owners of the premises having refused him permission to bring his truck upon their property, he parked the truck on Soto Street, parallel to and 6 to 10 inches from the west curb, and 63 feet south of City Terrace Avenue. Along the left side of the truck, over the fenders, there was a rack to hold pipe, as well as a pipe vise for use in cutting and threading pipe on the job. At about 2:30 in the afternoon defendant Bernstein, traveling east on City Terrace Avenue, brought his vehicle to a stop at Soto Street, made a right turn, proceeded south on Soto Street, and struck the plaintiff at or near the rear of the truck. It is asserted that there is a conflict in the evidence as to whether plaintiff was behind the truck, or out to the left of it when he was struck. (This question will be considered in connection with defendants' attack on the instructions given with respect to plaintiff's duty of care in the circumstances.)

It is contended that the court erred in giving the following instruction: "It is a part of the duty of the operator of a motor vehicle to keep his machine always under control, so as to avoid collision with pedestrians using the highway. He has no right to assume that the road is clear, but, under all circumstances, and at all times, he must be vigilant, and must anticipate and expect the presence of others."

It is argued that an autoist does have the right to assume that the road is clear of the presence of negligent persons and is not required to anticipate the presence of others "under all circumstances and at all times", but may assume that others will obey the law; that he is not under the absolute duty to exercise such control of his vehicle that a collision will not occur, but that his duty is to exercise reasonable care to that end.

The court, at the request of plaintiff, instructed the jury as follows: "There is no duty imposed on a workman to be constant-



ly on the look-out for motor vehicles. If a workman on a public street is exercising the care ordinarily exercised by a workman under similar circumstances, he may properly assume that the automobile drivers will not be negligent in running him down without warning, and especially is this true where the workman remains within a space especially provided by law for the parking of automobiles."

[1] It is immediately apparent that the error in this instruction lies in applying it to a workman who is working in the street solely for his own convenience, and not from any reasonable necessity. The situation to which the instruction properly applies is illustrated in *Scott v. City and County of San Francisco*, 91 Cal.App.2d 887, 890, 206 P.2d 45, 47, where a workman attending a tar kettle was struck by a street car. The court there said:

"Respondents suggest that the rule with regard to the quantum of care required of workmen in public streets should be limited to those whose work has a direct relation to the streets, i. e. to street sweepers, trackmen, etc. The rule has not been so limited. In *Zumwalt v. E. H. Tryon, Inc.*, 126 Cal. App. 583, 14 P.2d 912, the rule was applied to a shepherd driving his band of sheep along a public road, and in *Ostertag v. Bethlehem, etc., Corp.*, supra, 65 Cal.App.2d 795, at page 801, 151 P.2d [647] at page 650 the rule was applied to one working in the interior of a building under construction, the court saying:

"The courts have often recognized that where a person *must* work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.'" (Emphasis added.)

Illustrative, on the other hand, of the type of case in which the instruction is erroneous, is *Milton v. Los Angeles Motor Coach Co.*, 53 Cal.App.2d 566, 573, 128 P.2d 178, 181, where a commercial photographer was injured while taking a picture in the street, and it was held: "Plaintiff's testimony that it was customary for photographers in Beverly Hills to use the streets in

the taking of pictures and that it was necessary for him to place his camera in the street in order to get the particular picture he wished to take with the lens he was using, was evidently intended to bring him within the rule stated in the instruction, but that rule cannot be extended to protect photographers or others who may occasionally use the streets in the pursuit of their occupations if they do so from choice and not from necessity. In *Carlsen v. Diehl*, 1922, 57 Cal.App. 731, at page 737, 208 P. 150, it was held that a truck driver who was loading his truck in a hazardous position alongside a driveway and who was not forced to remain in that particular place as a matter of duty, although he had a right to be there, was not to be classed with laborers engaged in street work; an instruction in less objectionable form than the one in the instant case was held to be erroneous."

[2] In the case now before us, as in the case immediately above referred to, there was no reasonable necessity for the plaintiff to use the street for his work. Having nevertheless chosen to do so, he was required to exercise the same quantum of care as any other person in the street, and was not excused from exercising such care by reason of the necessity of giving attention to his work. The operations of cutting and threading pipe could have been performed at any number of other safer, although less convenient, locations. From a consideration of the authorities, we conclude that the proper rule to be applied is that of reasonable necessity—that the quantum of care is less not only where a workman is doing work to the street, but where reasonable necessity requires his work to be done in the street. In the present case we find no reasonable necessity for a plumber doing a job within private premises to use the public street for the purpose of cutting and threading pipe.

[3] We have concluded, however, from an examination of the entire record, that prejudicial error has not been shown, and that it does not appear from the record that a different result would have been probable had the questioned instructions not been given. In such circumstances, the verdict

of the jury should be upheld. Const.Calif., Art. VI, sec. 4½; Code Civ.Proc., sec. 475; *Marr v. Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 686, 105 P.2d 649; *Dieterle v. Yellow Cab Co.*, 53 Cal.App.2d 691, 128 P.2d 132; *Anderson v. Freis*, 61 Cal.App.2d 159, 164, 165, 166, 142 P.2d 330.

The instruction first hereinabove quoted (with reference to the duty of the operator of a motor vehicle to keep his machine always under control, etc.) has been held subject to criticism because, standing alone, it might be understood by the jury to impose on the operator the absolute duty to avoid a collision. *Stickel v. San Diego Electric Ry. Co.*, 32 Cal.2d 157, 167, 195 P.2d 416; *Anderson v. Freis*, supra, 61 Cal.App.2d at page 164 et seq., 142 P.2d 330. In the last-cited case, however, it was found that there was no prejudicial error, in view of the other instructions given upon the subject of negligence, and the language of the court in that case is directly applicable to the situation presented in the instant cause. The court said, in part, 61 Cal.App.2d at page 165, 142 P.2d at page 333: "But here, as in the authorities cited, we find no prejudicial error in the giving of said instruction. The jury was fully instructed upon the subject of negligence. The trial court instructed the jury on the definition of negligence; that plaintiff affirmatively alleged in his complaint that defendant Freis negligently operated his automobile; that the 'affirmative of the issues must be proved by a preponderance of the evidence'; that 'the affirmative here is upon plaintiff \* \* \* as to all affirmative allegations of the complaint'; and that in order to impose liability upon the defendant, 'his negligence must have been the proximate cause of plaintiff's \* \* \* injuries'. Reading all of the instructions together, it appears impossible that the jury could have understood that there was any absolute duty on defendant to avoid a collision and it appears certain that the jury must have understood that in order to impose liability upon defendant, it must have been shown by a preponderance of the evidence that he failed in his duty to exercise ordinary care."

While the instruction concerning the quantum of care required of a workman in

the street is not properly applicable to one who puts himself in a position of danger simply for his own convenience, we are convinced that the jury was not misled thereby, but on the contrary found that plaintiff was actually in a place of safety where he had a right to assume that operators of vehicles in the exercise of ordinary care would not strike him. It is to be noted that the criticized instruction emphasizes the right of the workman to relax his vigilance when he remains within a space provided for the parking of automobiles, and to that extent is correctly applied to one who is working behind a properly parked truck. *State Compensation Ins. Fund v. Scamell*, 73 Cal.App. 285, 290, 238 P. 780; *Medlin v. Spazier*, 23 Cal.App. 242, 137 P. 1078. Further, as was held in *Regan v. Los Angeles Ice & Cold Storage Co.*, 46 Cal.App. 513, 189 P. 474, 475, where the plaintiff was standing in the street behind the left rear fender of a vehicle parked at the curb and was struck from behind by defendant, "negligence is always relative and to be determined in view of all the circumstances of the particular case. Thus, if there was a plainly visible obstruction in a street, a person taking position on or immediately in front of it would be in a position of safety and might be relieved from the duty of observing traffic as he would be if he remained on the sidewalk."

It is highly improbable that the jury, on the strength of the instruction in question, rendered a verdict for plaintiff even though they believed that he was in the street alongside the truck and not maintaining a lookout for approaching vehicles. The reasonable assumption is that the jury applied the instruction to the situation of a workman actually working behind a parked truck in a place of comparative safety. Considering the instruction in the light of the instructions preceding it, the jury could not but understand that whether it was necessary for the plaintiff to work in the street or not, it was his duty if he ventured out in the path of traffic to exercise the same amount of care as would be required of any other person who might do so.

A conclusion that the errors, if any, were not prejudicial, is fortified by a considera-

tion of the evidence. The testimony of the defendant driver was in many respects self-contradictory and in conflict with inferences to be drawn from physical facts in connection with the accident. Plaintiff's helper, Mr. Chavez, testified that he was standing behind the center of the rear of the truck and plaintiff was standing about two feet to the rear of the left rear fender of the truck; that he (Chavez) heard a scream, looked around and saw defendant's automobile; he cried, "Look out!" but there was no time to get out of the way. Chavez was also injured and his eyeglasses broken, as he was knocked against the truck. A witness who was in a building near the scene heard a scream, then a thud, looked out a window and saw defendant's car passing the left rear of the truck and Chavez picking himself up in the street near the curb behind the truck. Defendant's automobile, as she saw it, was at an angle of 45 degrees, facing southeasterly, with its right rear corner 3 to 4 feet from the curb.

The issue of whether plaintiff was struck while behind the truck or while out in the street was fully and vigorously tried, and the issue resolved against the defendants.

It is contended that the evidence is insufficient to support the judgment against Bozzani Motors as an owner of the vehicle and that the court erred when it instructed the jury as follows:

"In determining whether or not defendant, Bozzani Motors, Ltd., a corporation, was also an owner of the Plymouth automobile at the time of the accident, you should consider all of the evidence, direct or indirect in this case pertaining to ownership and the incidents of ownership which you may consider are in part as follows:

"1. Possession of the automobile.

"2. Free use of the automobile for its benefit.

"3. Claim of ownership of the automobile.

"4. Paying for or furnishing gas and oil and lubrication for the automobile.

"You are also instructed that there is a rebuttable presumption that things which a

person possesses are owned by him, and also that a person is the owner of property from exercising acts of ownership over it, that Section 66 of the California Vehicle Code which was given you provides in part that an owner is entitled to possession." (Underlining is as it appears in the reporter's transcript.)

Appellants urge that the instruction erroneously assumes that there was evidence of each of the four enumerated matters and that each of these had been established; that in so doing the instruction invaded the province of the jury.

We conclude that the special verdict of the jury finding Bozzani Motors, Ltd., to be an owner of the vehicle is without substantial support in the evidence. The undisputed facts are that defendant J. O. Reade was the superintendent of the parts and repair department of Bozzani Motors. Several months prior to the accident Reade bought a 1935 Plymouth automobile from Bozzani Motors for \$25 and the cost of some repairs, and the certificate of ownership was indorsed and forwarded to the Department of Motor Vehicles, which issued a new certificate in the name of Reade. Reade drove the car to and from work and also used it in transacting his personal affairs. His wife also used it, although they had another car. He bought gasoline for it when on a long trip, but his employer furnished gasoline for driving back and forth to work and for driving on his employer's business. Between June 2, 1949 and June 18, 1949, Reade loaned his car out twice to customers, and was paid nothing therefor. Reade was away on vacation from June 18, 1949, to July 5, 1949. He left the Plymouth at the shop. Shortly before taking his vacation, Reade told Charles Bozzani, his assistant, that Bernstein's car would shortly be brought in for repairs which would require four to five days, and to lend Reade's Plymouth to Bernstein while the latter's car was being repaired. While Reade was on vacation Bernstein brought his car in for repairs and asked for the loan of a car pending completion of the repairs. He was given the Plymouth and signed a receipt therefor, a printed form addressed "To the



Bozzani Motors, Ltd.," whereby he agreed to safely keep the car and return it in good condition, or to pay any loss or damage sustained, and to save Bozzani Motors harmless from all suits or demands arising from injuries to persons or property caused by operation of the vehicle. The accident occurred while Bernstein was returning the Plymouth to Bozzani Motors, Ltd. Bernstein paid Reade \$20 to cover damages to the vehicle resulting from the accident and Reade paid Bozzani Motors \$20 for the necessary repairs.

We are in accord with appellants' contention that "The most which can be said under the evidence is that it established Bozzani Motors, Ltd., or Charles Bozzani to have been made a limited or special bailee of the Plymouth sedan by its owner, Reade, for the purpose of letting Bernstein have and use it while his car was being repaired and while Reade was away on his vacation. The bailee of a vehicle, even a general unlimited bailee, who is not driving it at the time of the accident, is not liable under section 402 of the Vehicle Code and judgment in favor of the injured or damaged party cannot be supported against such bailee. (*Overgard v. Beaverson*, 89 Cal. App.2d 449 [201 P.2d 67].)" As stated in the cited case, quoting from *Graf v. Harvey*, 79 Cal.App.2d 64, 179 P.2d 348, "The Vehicle Code does not declare that a bailee or one who borrows the car from the bailee is an owner within the meaning of section 402(a). Their liability is to reimburse the owner, and is not a primary liability to the injured person." [89 Cal.App.2d 449, 201 P.2d 68.]

[4-7] Arguing that there was sufficient evidence to go to the jury on the issue of ownership, respondent points out that the receipt was from Bernstein to Bozzani Motors; that Bozzani Motors had possession of the automobile and had free use of it and furnished gas, oil and lubrication. In addition, it is argued that the jury was justified in not believing Bozzani's claim that it did not own the automobile, in that although defendant Amerigo Bozzani, president and general manager, testified that his company never loaned out automobiles to customers, nevertheless a supply of forms

of "Automobile Loan Receipts" was kept in defendant's service department, and a clerk testified she had filled out over 10 of these forms in the previous two years. We consider these asserted facts insufficient. The furnishing of gas and oil, for example, was, it was testified, in pursuance of an employment agreement whereby the employer furnished department heads with gas and oil for their personal automobiles used in going to and from work and in connection with the business, such as going out to make estimates on repair work. The "possession" by Bozzani Motors was temporary, while Reade was on vacation, and pursuant to authorization by Reade. The "free use" of the automobile consisted merely in that it had been loaned out on two or three previous occasions, and Reade used it in making trips on his employer's business. Reade testified that he paid for taxes and repair work on the car; that he was under no obligation to let Bozzani Motors use it; it was his car to use as he saw fit. Whatever argument might be advanced as to credibility of witnesses, the fact remains that the burden of proving ownership in Bozzani Motors rested upon plaintiff, and that burden is not met by what amounts to no more than a showing that Bozzani Motors derived some occasional slight benefit by the use of an employee's automobile. As was said in *Reese v. Smith*, 9 Cal.2d 324, 328, 70 P.2d 933, 935, "If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. \* \* \* A judgment cannot be based on guesses or conjectures." The case of *Nash v. Wright*, 82 Cal.App.2d 467, 473, 474, 186 P.2d 686, 690, relied upon by respondent, is readily distinguishable. There the court held that the defendant "could not by virtue of a private agreement enjoy the free use of a truck registered to the name of his associate and thereafter avoid liability on the ground of nonownership of the vehicle so used." The facts there were that the vehicle was being operated by an employee of defendant and came from a "pool" of vehicles used jointly by defendant and another company. In the present cause the evidence

fails to show that Bozzani Motors, Ltd., made any claim of ownership of the vehicle or that its asserted acts of ownership in connection therewith were other than pursuant to instructions from Reade whereby it was made a bailee of the vehicle.

The views herein expressed sufficiently cover all the points raised on this appeal.

The judgment is affirmed as to defendants Bernstein and Reade, and reversed as to defendant Bozzani Motors, Ltd., with instructions to enter judgment that plaintiff take nothing against Bozzani Motors, Ltd. Respondent to recover costs on appeal against appellants Bernstein and Reade; appellant Bozzani Motors, Ltd. to recover from respondent its fair proportionate share of costs on appeal incurred in the presentation of the single issue of ownership.

DORAN and DRAPEAU, JJ., concur.



109 Cal.App.2d 859

**HICKS v. BARNES et al.**

Civ. 4361.

District Court of Appeal, Fourth District,  
California.

March 21, 1952.

Maude Hicks sued Donald Edge Barnes, and others, for injuries sustained when she was allegedly struck by Barnes' automobile as she crossed intersection in crosswalk. The Superior Court, Kern County, Warren Stockton, J., gave judgment for Maude Hicks, and Barnes and co-suitors appealed. The District Court of Appeal, Mussell, J., held that pleadings and evidence raised issue of contributory negligence of Maude Hicks, and that failure of trial court to make finding on that issue necessitated a reversal.

Judgment reversed.

#### 1. Automobiles ⇨244(6, 36)

In action for injuries sustained by pedestrian, allegedly in intersection cross-

walk when struck by defendant's automobile, evidence was sufficient to support findings that defendant negligently drove automobile so as to strike pedestrian and that negligence directly and proximately resulted in the injuries.

#### 2. Appeal and Error ⇨1071(6)

##### Trial ⇨388(1)

Where an action is tried before the court without a jury, in absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence and if court renders judgment without making such findings, judgment must be reversed.

#### 3. Appeal and Error ⇨1071(6)

##### Trial ⇨388(1)

Where pleadings and conflicting evidence raised issue of contributory negligence of pedestrian, who was allegedly in intersection crosswalk when struck by defendant's automobile, it was trial court's function to make finding of fact on this issue and the rendering of judgment without such finding necessitated reversal.

#### 4. Appeal and Error ⇨1122(2)

##### Trial ⇨388(1)

The function of the trial court as the normal and primary finder of the facts has been uniformly recognized and it was never intended that the appellate court should perform those functions in the first instance. Code Civ.Proc. § 956a.

#### 5. Appeal and Error ⇨1122(2)

Where pleadings and evidence raised issue of contributory negligence of pedestrian allegedly in intersection crosswalk when struck by defendant's automobile, failure of trial court to make proper findings on issue of contributory negligence was not as matter of law inadvertent and, therefore, such failure could not be cured by appellate court. Code Civ.Proc. § 956a.

Deadrich, Gill & Bates, Bakersfield, for appellants.

Dorris, Fleharty & Phillips, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action for damages suffered by plaintiff when, while walking across north Chester Avenue in the City of Bakersfield, she was struck by automobile operated by the defendant, Donald E. Barnes. The court, sitting without a jury, found for plaintiff and gave judgment in the sum of \$2,000. Defendants appeal on the grounds that the evidence was insufficient to sustain the court's findings and judgment and that the court failed to make a finding on the issue of contributory negligence.

The accident occurred at the intersection of north Chester Avenue and McCord Street. North Chester Avenue at this point is a four-lane, surfaced highway with a "center island" about 3 feet wide with 6 inch raised ribs. McCord Street runs east and west and there is a pedestrian crosswalk at the south edge of McCord Street extending east and west across north Chester Avenue. On December 19, 1949, at approximately 6:00 o'clock p. m., plaintiff alighted from a bus at the northwest corner of the intersection, walked south across McCord Street, and turned east to walk across north Chester Avenue in the pedestrian lane. She looked to the north and then to the south, saw no cars approaching, and proceeded to cross the avenue. When she was at or near the center island, defendant, Donald E. Barnes, who was driving south on north Chester Avenue, pulled out into the east southbound traffic lane to pass a truck which was traveling in the same direction and then crossing the pedestrian lane. He testified that when he had pulled up "almost abreast" of the truck, he heard and felt an impact to his immediate left; that he immediately glanced to his left and saw the plaintiff "spinning around" in the center island; that this thud or impact occurred approximately 30 feet south of the pedestrian crosswalk; that he was traveling between 20 and 25 miles per hour; that his lights were on; that the night was dark and it had been raining; that after the impact, he stopped his car within approximately 2 car lengths and ran back to plaintiff, who was then lying 36 feet south

of the pedestrian crosswalk; that he did not see plaintiff until after the accident.

Plaintiff, an elderly lady, testified that when she got off the bus, she was carrying four packages of Christmas toys in her arms; that before crossing north Chester Avenue, she looked north and south, that there was no traffic coming; that she started across in the crosswalk, intending to go to her residence on east McCord Street; that she saw no cars coming and did not remember what happened after that until she regained consciousness in the hospital.

Mr. Jack Campbell, who had started across north Chester Avenue from east to west in the crosswalk at the time of the accident, testified that he saw plaintiff directly ahead; that "to the best of my knowledge she was in the crosswalk"; that plaintiff hit the front fender of a dark sedan and was thrown "clear down over onto the middle section of the highway." On cross examination he stated that he did not see the plaintiff until after the impact and that she then appeared to be "bending over the fender."

Mr. Fitzgerald testified that he was driving north on Chester Avenue at the time of the accident; that the first time he saw plaintiff, she was in the air; that when he next saw her, she was lying on the pavement; that defendant's car was about even with the truck when he first saw plaintiff; that about that time something struck and shattered his windshield (apparently one of the packages being carried by plaintiff); that he stopped his car about "half a car's length" south of the crosswalk and ran back to where plaintiff was lying, 25 or 30 feet south of his car.

A traffic officer testified that when he arrived at the intersection, he found plaintiff lying on the ground in the center strip of north Chester Avenue at a point approximately 36 feet south of McCord Street; that he found broken glass 25 or 30 feet south of the crosswalk; that he examined the defendant's car and found that the spotlight on the left side was damaged and that there were two fresh dents in the left front fender.



[1] The evidence was amply sufficient to support the trial court's findings that the defendant Donald Barnes "so carelessly, recklessly and negligently drove, operated and maintained the aforementioned automobile \* \* \* so as to cause the same to strike and collide with \* \* \* the plaintiff \* \* \* that as a direct and proximate result of the carelessness, recklessness and negligence on the part of the defendants \* \* \* and the striking, colliding with plaintiff \* \* \* plaintiff sustained severe and permanent injuries \* \* \* to her damage in the sum of \$2,000." However, the court failed to make a finding on the issue of contributory negligence, if any, of plaintiff. Both of the answers filed by the defendants contained an allegation that plaintiff was herself careless and negligent in crossing the highway and that said negligence proximately contributed to said accident and resulting damage.

[2] Appellants argue that the trial court's failure to find on the issue of contributory negligence was prejudicially erroneous and direct our attention to the rule announced in *Lowe v. Pierce*, 76 Cal.App.2d 316, 172 P.2d 936, where the court stated that the plea of contributory negligence as a defense in a personal injury action, with evidence to support it, presents an issue upon which the court is required to make a finding, and its failure to do so is reversible error. (Citing cases.)

Respondent contends that the trial court's failure to make findings on the issue of contributory negligence was inadvertent, and had such findings been made, they obviously would have been made in favor of respondent. However, as was said in *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 576, 177 P.2d 4, 13, 172 A.L.R. 1107; "It is settled law in California that where an action is tried before the court without a jury, in the absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence. If the court renders judgment without making such findings, the judgment must be reversed. *Fairchild v. Raines*, 24 Cal.2d 818,

830, 151 P.2d 260; *James v. Haley*, 212 Cal. 142, 147, 297 P. 920; *Wilcox v. Sway*, 69 Cal.App.2d 560, 564, 160 P.2d 154; *Bertrand v. Pacific Electric Ry. Co.*, 46 Cal. App.2d 7, 13, 115 P.2d 228. Although an appellate court may properly make findings to support the judgment when 'no contrary conclusion from the evidence could reasonably be drawn' (*Tupman v. Haberkern*, 208 Cal. 256, 266, 267, 280 P. 970, 974; see Code Civ.Proc., § 956a; *Bertrand v. Pacific Electric Ry. Co.*, supra, 46 Cal.App.2d at page 12, 115 P.2d 228) the record now under review shows a substantial conflict in the testimony, requiring a finding or findings by the trier of fact."

[3,4] In the instant case there was evidence upon which the trial court could have found that the plaintiff was negligent and that her negligence contributed to the accident and her resulting injuries. Since there was a conflict in the evidence on the issue of contributory negligence, it was and is the trial court's function to find the facts in accordance with the rule announced in *Severance v. Knight-Counihan Co.*, supra. As was held in *Larson v. Thoresen*, 36 Cal. 2d 666, 670, 226 P.2d 571, since section 956a of the Code of Civil Procedure was first construed and applied in *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, the function of the trial court as the normal and primary finder of the facts has been uniformly recognized and it was never intended that the appellate court should perform those functions in the first instance.

[5] In *Johndrow v. Thomas*, 31 Cal.2d 202, 207, 187 P.2d 681, 684, the court exercised the power to amend findings to cure a "patent inadvertence-clerical error." In the instant case, on the record before us, we cannot hold as a matter of law that the trial court "inadvertently" failed to make proper findings on the issue of contributory negligence.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

109 Cal.App.2d 777

**PEOPLE v. FRANQUELIN.**  
**Cr. 4711.**

**District Court of Appeal, Second District,**  
**Division 3, California.**

March 17, 1952.

Rehearing Denied March 28, 1952.

Hearing Denied April 14, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of attempted extortion and he appealed. The District Court of Appeal, Vallee, J., held that evidence sustained conviction.

Judgment affirmed.

**1. Criminal Law** ⇨543(2), 1153(6)

Determination of what constitutes due diligence to secure presence of witness which will authorize reading to jury of testimony taken at preliminary hearing, is largely within discretion of trial court, and depends upon facts of each particular case, and decision of trial judge will not be disturbed on appeal unless it appears that there was abuse of discretion. Pen. Code, § 686.

**2. Criminal Law** ⇨543(2)

In prosecution for attempted extortion, wherein testimony of prosecuting witness given at preliminary examination was read at trial, evidence supported conclusion of trial court that due diligence had been exercised to secure presence of prosecuting witness.

**3. Extortion** ⇨1

To commit offense of attempt to commit extortion there must be specific intent to commit the crime, and direct ineffectual act done toward its commission but effect produced on person at whom act is directed is immaterial. Pen.Code, §§ 518, 519, 524.

**4. Extortion** ⇨15

In prosecution for extortion, evidence warranted jury inference that defendant, when masquerading as member of police vice squad, had threatened to arrest prosecuting witness and accuse her of prostitution unless she paid sum of \$250. Pen. Code, §§ 518, 519, 524.

**5. Criminal Law** ⇨44

Preparation alone is not sufficient to justify conviction for attempt to commit

specific crime, but there must be some appreciable fragment of crime committed, and it must be in such progress that will be consummated unless interrupted by circumstances independent of will of attemptor.

**6. Criminal Law** ⇨44

"Preparation" is devising or arranging means or measures necessary for commission of criminal offense, whereas "attempt" is direct movement toward commission after preparations are made.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempt" and "Preparation".

**7. Extortion** ⇨15

Evidence sustained conviction for attempted extortion. Pen.Code, §§ 518, 519, 524.

**8. Criminal Law** ⇨772(2)

In prosecution for attempted extortion, instruction defining attempt which specifically told jury that it was necessary to distinguish between mere preparation and actual commencement of criminal act, and that mere preparation was not sufficient to constitute an attempt was sufficient. Pen.Code, §§ 518, 519, 524.

**9. Extortion** ⇨16

In prosecution for attempted extortion wherein it appeared that defendant had threatened to arrest victim and accuse her of prostitution unless she paid him \$250, instruction that if jury found that defendant did not receive the \$250, it must acquit defendant, was properly refused as erroneous statement of law. Pen.Code, §§ 518, 519, 524.

**10. Extortion** ⇨16

In prosecution for attempted extortion, instruction that in every crime there must exist union, or joint operation, of action and intent was properly refused in that offense of attempt to commit extortion requires specific intent, and instruction proffered would have tended to mislead and confuse jury. Pen.Code, §§ 518, 519, 524.

**11. Criminal Law** ⇨814(8)

In prosecution for attempted extortion, allegedly committed when defendant, mas-

querading as police vice officer, had threatened to arrest victim and accuse her of prostitution unless she paid him certain sum of money, wherein there was no evidence that victim had arranged to bring about arrest of defendant because she was angry at him, refusal of instruction that if jury believed that victim had arranged to bring about arrest of defendant solely because she was angry at him, it must acquit defendant, was not error. Pen.Code, §§ 518, 519, 524.

---

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

VALLEE, Justice.

Defendant was convicted by a jury of attempted extortion. He appeals from the judgment and the order denying his motion for a new trial. As grounds for reversal he urges 1) it was not shown that Bette Cole, the prosecuting witness whose testimony given at the preliminary examination was read at the trial, could not with due diligence be found within the state; 2) the evidence is insufficient to support the verdict; and 3) the court erred in instructions given and refused.

Penal Code, section 686, provides that in a criminal prosecution the defendant is entitled "to be confronted with the witnesses against him, in the presence of the court," except that the testimony of a witness given at the preliminary examination of the defendant may be read in evidence upon its being satisfactorily shown to the court that he "cannot with due diligence be found within the state."

On February 5, 1951, trial of the action was set for March 20, 1951. On March 20, 1951, the trial was continued to April 3, 1951, and commenced on that date. On February 9, 1951, Corrigan, a process server, received a subpoena for Bette Cole. He commenced looking for her that day. He first went to 3230½ Sunset Boulevard, Los Angeles, the address which Bette had

given at the preliminary examination. Not finding her at that address, he went to a downstairs store and talked to a Mr. Walsh who told him Bette "had moved some little time ago"; that he had not heard from her, and had no idea where to find her. Corrigan then ascertained that Bette had not left a forwarding address with the post office department. He mailed a card to her at 3230 Sunset Boulevard and the card came back. He next asked the Los Angeles Police Department to try to find her and gave them a subpoena. The police department had not been able to find her up to the day of trial. Corrigan checked all the large hospitals, the registry of voters, the Retail Merchants' Association, and the jails. He did not find any record of her. He then secured the assistance of Lovell, another process server in the district attorney's office. He located Bette's sister, Lois Cortez, in Wilmington who told him she had no idea where Bette was or where she could be found. During the course of his search Corrigan saw a photograph of Bette at the police department, found that Bette Cole was not her name, endeavored to learn her true name, and interviewed several police officers who were also looking for her. Corrigan was unable to find Bette.

Lovell received a subpoena for Bette on March 6, 1951, and secured her photograph from the police department. He did not find her at the Sunset Boulevard address, and then talked to a police officer who told him he might find her through her sister Lois Cortez. He found Lois on March 7. Lois had no knowledge of Bette's whereabouts and had little knowledge of Bette since the latter's arrival in California. At various times Lovell called the Lincoln Heights jail in Los Angeles, the county jail, South Gate police station, and the Huntington Park police station to see if she "had been booked or picked up," without success. On April 2, Lovell went to the Wilmington police station, and with police officers went to the "519 Club," a place he "had information she had visited quite frequently in the past." He went to about every bar on Main and Fifth Streets in Los Angeles trying to locate



her. In most of these places he was told she had not been seen for a month. He also made inquiry at Pacific Coast Collection Agency, a national credit agency, and the California Unemployment Compensation Agency. Lovell was unable to locate her.

Police officer Phillips knows Bette personally. He testified: she was formerly engaged in prostitution; she had not been a waitress; prior to the trial he made many attempts to find her, checking various locations which she supposedly frequented; he knew her automobile and endeavored to locate it; he alerted several vice squads to be on the lookout for her and gave them pictures of her; the squads checked numerous "night spots." Phillips was unable to locate her.

Lois Cortez testified: Bette was 24 years old and is her sister; she last saw her a few days after the preliminary which was held on January 12, 1951; since that date she had not heard from her directly or indirectly and had not seen her, had no information as to her whereabouts; she had received mail from her parents; they had not indicated they had heard from Bette. Lois also testified: she did not know what Bette was doing for a living at the time of the preliminary; she had no idea where Bette "might be."

[1] The rule governing our consideration of the question whether the court erred in holding that a sufficient showing had been made that Bette could not with due diligence be found within the state is stated in *People v. Cavazos*, 25 Cal.2d 198, 200, 153 P.2d 177, 178: "The question of what constitutes due diligence to secure the presence of a witness which will authorize the reading to the jury of testimony taken at the preliminary hearing of the case is largely within the discretion of the trial court, and depends upon the facts of each particular case. The decision of a trial judge on the question of diligence and of the propriety of receiving or rejecting the evidence will not be disturbed on appeal unless it appears that there was an abuse of discretion. [Citations.] The problem is primarily for the trial court, and its

solution will not be disturbed if there is evidence of substantial character to support its conclusion. [Citations.]"

[2] It is patent no abuse of discretion is shown. The search was extensive and as thorough as reasonably could be expected under the circumstances. There is evidence of a substantial character to support the conclusion of the trial court and its determination may not be disturbed.

*People v. McDonald*, 66 Cal.App.2d 504, 152 P.2d 448, and *People v. Kuranoff*, 100 Cal.App.2d 673, 224 P.2d 402, relied on by defendant, are not helpful. In those cases no diligence was shown and it was held the court abused its discretion in permitting testimony given at the preliminary to be read. As the court said in the *Cavazos* case, whether diligence has been shown depends on the facts of each particular case.

Bette was living in an apartment in Los Angeles in September, 1950. Defendant, whom she did not know, went to the apartment knocked on the door, told her he was a police officer and if she did not let him in, he would have her arrested. Bette let him in. Defendant then told her he was on the vice squad; that he wanted to have sexual intercourse with her, and he would not bother her if she went ahead. Bette, nervous and afraid, had sexual intercourse with him. Lois was in the kitchen and defendant had not seen her. After the act defendant went into the kitchen, saw Lois stepped back hurriedly, and said to Bette, "Why didn't you tell me someone else was in the apartment? You play square with me and I will play square with you."

About two days later defendant approached Bette on the street as she was walking to her apartment. He told her he wanted to come up; that he was working on a narcotic case. In the apartment defendant said he wanted to have sexual intercourse with her. She consented.

About a week later defendant telephoned Bette and asked her to go to a movie with him. When she refused, he said he would like to come up, which he did. Bette had sexual intercourse with him again. A few days later the same thing occurred.

Bette believed defendant was a police officer and consented to the acts of intercourse because she was afraid. She did not receive any money from him.

Defendant next saw Bette on January 3, 1951. In the interim she had moved to an apartment at 3230½ Sunset Boulevard, Los Angeles. She had not told defendant she had moved. Defendant knocked on the door and said, "This is an old friend of yours." Bette recognized him and asked, "What do you want?" Defendant said he wanted to come in and talk to her about something very important. He went in and told her a vice officer friend of his had been "kicked off the force" two weeks previously, "and that this man wanted some money"; that his friend demanded \$250 to not bother her, and he would not bother her; that if he did not get the money he was going to turn her in, and "he would take the money for the man." He told Bette that if he did not get the money, she would have trouble about her past. Bette told him she did not have the money but would try to get it. Defendant told her he would transact the business, would ring her doorbell the next evening when it got dark, would then go and sit in her car parked in the lot and wait for her there.

When defendant left, Bette telephoned a friend and told her what had happened. That evening a police officer came to her apartment and she told him defendant had demanded \$250. The next day the police installed a Sound mirror, bug and switch in Bette's car. That evening she parked her car in the lot next to the apartment; four officers were with her in the apartment; the doorbell rang; Bette, with \$250 on her which she had received from the officers, went downstairs where defendant was waiting, and they proceeded to her parked car. While they were seated in the car she tried to turn on the bug, but she could not reach the switch because defendant embraced her. Defendant told her, "I had quite a time convincing my partner that the deal was all right, because," he said, 'he could not understand how I got up to the apartment so easy.' And he said, 'But I told him that it was all right, and he seemed willing that the deal would go

through.' And he said, 'I told him that I got \$500.00 and I will keep two hundred and fifty for myself, and then he, probably, won't bother you.'" Bette asked defendant for a cigarette; he said he did not have any, but would get some for her. He got out of the car and was walking toward the street when he was arrested. Bette had not given him the money.

Bette testified she "last worked as a prostitute" about two years prior to the preliminary but was not engaged in prostitution at that time, had violated no law, and had committed no crime.

[3] "Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." Pen.Code, § 518. Fear, such as will induce extortion, may be induced by a threat to accuse the individual threatened of any crime or to impute to him any crime. Pen. Code, § 519. Every person who attempts, by means of any threat such as is specified in section 519, to extort money from another is guilty of a public offense. Pen. Code, § 524. To commit the offense of attempt to commit extortion there must be a specific intent to commit the crime, and a direct ineffectual act done toward its commission. *People v. Miller*, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913. The effect produced on the person to whom it is made is immaterial. *People v. Robinson*, 130 Cal.App. 664, 668, 20 P.2d 369.

[4] The jury was warranted in inferring that defendant, from his first encounter with Bette, placed her in fear that he would arrest her and accuse her of prostitution. He told her if she did not let him in, he would have her arrested. He told her he was on the vice squad and if she had intercourse with him, he would not bother her. A reasonable inference is that he had the specific intent to obtain money from her from the beginning and that his visits were merely laying the ground work to that end. The jury was warranted in concluding that defendant threatened to arrest Bette and accuse her of prostitution unless she paid him \$250.

[5-7] It is true, as defendant argues, that preparation alone is not sufficient. The act "must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." *People v. Miller*, 2 Cal.2d 527, 530, 42 P.2d 308, 309, 98 A.L.R. 913. In the *Miller* case the court quoted from 1 Wharton's Criminal Law, 12th ed., p. 280: "There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." Preparation is devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made. Defendant did more than planning or preparation. Up to the time he rang the doorbell on the night he was to receive the money it might be argued that his acts were equivocal. They were not thereafter. Preparation had left off and execution had commenced. From that time on fragments of the crime were committed; defendant's movements, without any equivocality, were made to complete his design. He did all acts necessary to commit extortion except receive the money. His acts were such as would have apparently resulted, in the usual course of natural events if they had not been interrupted by circumstances independent of him, in receipt of the money. *People v. Miller*, 2 Cal.2d 527, 531, 42 P.2d 308. He failed to get the \$250 solely because of the interference of the officers.

Manifestly it cannot be said that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the jury. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

1. "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

"In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which

The court gave the following instruction to the jury:

"Every person who attempts to extort money or other property from another by means of a threat to accuse him, or any relative of his, or member of his family, of any crime is guilty of a crime.

"The phrase 'to extort money or property' from a person, as that phrase is used in the law just stated and as it applies to this case, means to obtain the money or property from him with his consent, but to induce that consent by fear, and to induce that fear by a threat of a kind like that just specified.

"The difference between actual extortion and attempt to extort obviously lies in the results obtained; and if one uses a threat such as I have specified with the intent and for the purpose that I have specified, he is guilty of attempt to extort, although he fails to induce any fear in the mind of the other person or fails to obtain any money or property as a result of the attempt.

"A threat to accuse another of a crime as a means to extort money is just as unlawful, if the person threatened is guilty of such a crime, as if he or she were not guilty of such a crime."

[8] Defendant assigns error in the giving of the third paragraph of the foregoing instruction and argues it is not a correct nor a full definition of "attempt." He also suggests it probably led the jury "to convict on evidence of mere preparation or intention, and not an 'attempt.'" There was no error. The court defined an "attempt" to commit a crime, specifically told the jury it is necessary to distinguish between mere preparation and the actual commencement of the criminal act, and that mere preparation is not sufficient to constitute an "attempt."<sup>1</sup> The instruction criti-

may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress



cized is a particular instruction on the law of an "attempt to extort." It does not purport to define or to set forth the elements comprising an "attempt." These elements were covered in separate instructions. The instruction given was proper. *People v. Lavine*, 115 Cal.App. 289, 300, 1 P.2d 496; *People v. Robinson*, 130 Cal.App. 664, 668, 20 P.2d 369; *People v. Goldstein*, 84 Cal. App.2d 581, 587, 191 P.2d 102.

[9] The court refused to give an instruction requested by defendant with respect to the elements of an attempt to commit a crime, the concluding paragraph of which read: "If you find that the defendant did not receive the \$250.00, you must acquit the defendant." The paragraph quoted is obviously an erroneous statement of the law. *People v. Goldstein*, 84 Cal. App.2d 581, 586, 587, 191 P.2d 102. Defendant was charged with an attempt to extort, not extortion.

[10] The court refused to give an instruction requested by defendant which read: "You are instructed that in every crime there must exist a union, or joint operation, of action and intent." There was no error. The subject matter was fully covered.<sup>2</sup> Further, the offense of attempt to commit extortion requires a specific intent and the general instruction proffered would have tended to mislead and confuse the jury. See *People v. Womble*, 67 Cal. App.2d 885, 890, 155 P.2d 838.

[11] Defendant complains of the refusal of the court to give an instruction he requested which read: "If you believe that Betty Cole arranged to bring about the arrest of the defendant solely because she was angry at him, you must acquit the defendant." There was no evidence that Bette Cole "arranged to bring about the arrest of the defendant" because she was angry at him. The defense was that defend-

ant had never seen nor had any dealings with her before the night of the arrest. It would have been error to have given the instruction which had no application to the facts of the case. *People v. Eggers*, 30 Cal.2d 676, 687-688, 185 P.2d 1.

The cause was fairly tried and the jury fully and correctly instructed. There is no merit in the appeal.

As no appeal lies from a verdict, defendant's appeal therefrom is dismissed.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and WOOD, J., concur.



109 Cal.App.2d 809

**DASTAGIR v. DASTAGIR.**

Civ. 18501.

District Court of Appeal, Second District,  
Division 1, California.

March 19, 1952.

Rehearing Denied April 7, 1952.

Hearing Denied May 15, 1952.

Paternity suit instituted by mother on behalf of infant daughter. The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment on a verdict in favor of defendant and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that instruction permitting jury to find that mother of child had had sexual intercourse with men other than defendant at or about the time of conception, though there was no evidence thereof, was erroneous and prejudicial.

Judgment reversed and a new trial ordered.

of which would be completed unless interrupted by some circumstance not intended in the original design."

2. "In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without

which such a crime may not be committed.

"Thus in the crime of attempted extortion a necessary element is the existence in the mind of the perpetrator of the specific intent to obtain money by means which under the law would constitute extortion, and unless such intent so exists that crime is not committed."

**1. Bastards** ⇨54

Illicit relations with any one other than putative father may not be inferred in paternity suit, unless evidence is introduced showing disposition of mother to have such relations and an opportunity to do so.

**2. Bastards** ⇨59

Any evidence offered in paternity suit to show directly or by inference that mother of child had had sexual relations with some man other than defendant prior to time at which child must have been conceived in due course of nature was irrelevant and immaterial and questioning mother in detail, either on cross-examination or when called as a witness by defendant in behalf of his own case, for the purpose of implying such misconduct was improper. Code Civ.Proc. § 2055.

**3. Bastards** ⇨69

Where no objection was made to questions improperly asked mother of child called as a witness by defendant in paternity suit for the purpose of implying misconduct with other men at a time too remote to be of any materiality or relevancy to issues in the case, trial court on its own motion should have struck out such questions and reprimanded counsel for asking them. Code Civ.Proc. §§ 2044, 2055, 2066.

**4. Bastards** ⇨69

Trial judge is not a mere umpire, but has a duty to see that a fair trial is accorded the parties on the merits and must exclude on his own motion matters that tend only to prejudice jurors and prevent consideration of case upon its merits alone. Code Civ.Proc. §§ 2044, 2066.

**5. Evidence** ⇨317(4)**Witnesses** ⇨198(2)

Where mother of child testified in paternity suit that at conference with defendant and his attorney, defendant's attorney had handed her a prenuptial agreement to be submitted to her attorney, though defendant denied that any such agreement had been authorized by him or drawn by his attorney, questions asked mother's attorney as to conversation with defendant's attorney concerning agreement were not objectionable as calling for hear-

say or privileged testimony, since any statements made to mother's attorney by defendant's attorney in the course and scope of his employment were statements of defendant.

**6. Bastards** ⇨55

Where defendant testified in paternity suit that he had never been engaged to mother of child and had never had sexual intercourse with her and that no prenuptial agreement had been drawn by attorney or authorized by defendant, excluded evidence as to conversation between attorney for mother and defendant's attorney concerning agreement was highly material to plaintiff.

**7. Principal and Agent** ⇨131

Where defendant testified in paternity suit that his brother was authorized to act for him in handling all his business affairs, such as writing of personal letters, telegrams, cablegrams and telephone messages, what brother had done within the scope of such authority was binding upon and admissible against defendant despite his lack of personal knowledge of the facts.

**8. Bastards** ⇨71, 92

Instructing jury in paternity suit to find for defendant, if they found that both defendant and some other man or men had had sexual intercourse with mother of child at or about the time of conception and were unable to tell which was the father of child, was erroneous and prejudicial in absence of any evidence from which even an inference could be drawn that mother had ever had illicit relations with any man other than defendant.

---

Goldman & Chaitkin, Jacob Chaitkin, Pasadena, for appellant.

Freston & Files and Eugene D. Williams, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is a paternity suit instituted by the mother on behalf of her infant daughter to have it adjudged that the defendant was the father and under a duty to support the child. The jury returned a nine-to-three verdict in favor of the defendant.

The basic question presented to us on the record is whether the plaintiff did or did not have a fair trial.

In view of the serious contentions made by plaintiff, as appellant, it should here be stated that neither counsel for the appellant nor for the respondent was retained or participated in any of the proceedings had in the court below. Moreover, it likewise should be stated that the trial judge was placed in a most difficult and unenviable position by the conduct of counsel on both sides who tried the case before him with a jury. Time and again not only were immaterial and irrelevant questions propounded by counsel for the defense, but highly improper questions as well, and all without the slightest objection by counsel for the plaintiff. Not only that, but he was constantly irked by counsel for both sides. If under the circumstances he failed on his own initiative to order the questions not to be answered as he had a right to do, and as we think he should have done, his attitude is understandable. Again it must be recognized that we are viewing the completed case in retrospect and not as the evidence went in piecemeal before the trial judge.

The mother in behalf of the infant contends that a fair trial was not had below in that (1) counsel for the defendant falsely insinuated in questions put to her that she was guilty of sexual relations with other men which he had no reason to believe and that therefore the questions were propounded by him solely to prejudice the jury; (2) certain instructions given were erroneous and highly prejudicial; (3) certain rulings made were prejudicially erroneous. We shall hereafter refer to the mother as the "plaintiff" and to the infant as the "infant plaintiff."

It is undisputed that the mother, an English actress at the time, unmarried and aged 20, and the defendant, a film actor, known in motion picture circles as "Sabu, the Elephant Boy," aged 23, first met in London in January, 1947, upon a film production set where a motion picture was being "shot" in which the defendant had a part as an actor and the plaintiff was employed as a "stand-in" for an actress.

The very next month they began having numerous dates together, and shortly thereafter when his back was injured on the set she visited him in his flat as often as two or three times a week. She purchased food for him, assisted in preparing his meals, sent his laundry out, and engaged in other related activities. The plaintiff contends, and testified, that the two began having sexual relations as early as in February, 1947, and that this continued until the defendant left for the United States in May, and, that the relations were again resumed in August of the same year when plaintiff came to the United States and lived at defendant's house occupied at the time by him, his brother, his brother's wife, and a man and wife who were guests in the house for only two weeks after her arrival. (We shall hereafter refer to this couple as Mr. and Mrs. X.) She further testified that the sexual relations continued until late in the ensuing January when she left to visit her ill mother in England. On the other hand, defendant testified that he never *at any time* had sexual relations with the plaintiff.

It should here be stated that the plaintiff testified she became pregnant twice as a result of her relations with the defendant: The first time as a result of their relations in England—a pregnancy which she lost; the second time as a result of their relations in the United States as a result of which the infant plaintiff was born to her in Ireland on September 12, 1948.

It is undisputed that in June, 1947, a close girl friend of plaintiff, who had met the defendant while he was in England, wrote a letter to him wherein she stated that plaintiff was pregnant and inquired of defendant Sabu what should be done. Shortly after the letter was mailed the defendant also received a long distance call from the plaintiff in London to the same effect. As a result of the letter and the telephone call a cablegram was dispatched by defendant, or by his brother, to plaintiff which requested that she come to defendant's home in Northridge, California, as soon as possible. Plaintiff testified that before she could arrange her affairs, procure a visa and make a plane reser-



vation she lost her child and so advised the defendant by letter in July. This the defendant denies. But nevertheless it is undisputed that after the middle of August plaintiff arrived in New York by plane where she was met by defendant's brother Sheik and Mr. X, who as mentioned above with his wife was a guest in Sabu's house in Northridge. On the night she came by plane these men procured a room for her in a hotel in New York where they had been staying for a couple of days awaiting her arrival. The next day the trip to Northridge was begun in an auto which the men had driven from Northridge to New York. The party of three made the trip from New York to Northridge in three or four days staying overnight in motels along the way. During plaintiff's stay in defendant's home from August, 1947, until late in January, 1948, the defendant took the plaintiff to various places where they stayed overnight and sometimes as long as a week or more in hotels.

The defendant having testified he had never had sexual relations with the plaintiff explained the transmittal of the cable by saying that he feared the publicity that might ensue and that he and his brother concluded it would be advisable to send for the plaintiff. Just why they concluded that less publicity would ensue if she had her baby in England rather than the United States in the locality of defendant's home is not disclosed by the record. That the defendant never wished to marry her, never proposed to her is his testimony.

Plaintiff testified that in January, 1948, she told defendant Sabu that she feared she was pregnant (it should here be observed that if the child was born on September 12, 1948, as plaintiff testified it was, in the normal course of nature, it was conceived on or about December 12, 1947, while plaintiff was residing in defendant's home); that he thereupon suggested she take a trip of a few weeks to see her ill mother in England and then return, as her visa had three months to run; that she went to England on January 29, 1948, and after she arrived there she wrote numerous letters to the defendant and in these letters repeatedly told him she was pregnant and

requested that he provide her with funds so she could return to him. She also testified to repeated endeavors on her part to reach him by telephone. The defendant flatly contradicted this testimony except he admitted receiving an undated letter from her, which he tendered enclosed in an envelope postmarked in England with the date March 8, 1948. The plaintiff contended that the undated letter (advising she had lost her child) was written and sent in July, 1947, and was not the letter she had enclosed in the envelope dated March 8, 1948.

[1] Upon the trial had in October, 1950, there was no testimony whatever showing illicit relations between the plaintiff and any man other than defendant, and her reputation for chastity theretofore was not attacked. She denied having any illicit relations with anyone other than the defendant. The only incident remotely touching on the point to which defendant is able to point was the testimony of a woman friend—a neighbor of his—who testified that as she was leaving a New Year's party at defendant Sabu's house, at which a host of guests were present, she observed the plaintiff and Mr. X standing in a lighted area about fifty feet from the side entrance of the house with their arms about one another. The incident was of no materiality as illicit relations are neither proved, nor permitted to be inferred, unless evidence is introduced, and there was none, which shows (1) a disposition to have such relations on the part of the party charged and (2) an opportunity to gratify them. *Mensing v. Croter*, 209 Cal. 318, 320, 287 P. 336, 280 P. 1026; *Berry v. Chaplin*, 74 Cal.App.2d 652, 662, 169 P.2d 442.

We come then to a consideration of the errors alleged. First, it is contended that numerous questions propounded by counsel for the defendant to plaintiff when she was called to the stand by defendant under Code of Civil Procedure, sec. 2055, and upon her cross-examination of her testimony on direct, as well as that of her witnesses, were highly improper and prejudicial in that the questions were asked to besmire the reputation of the plaintiff

and her witnesses and to attribute to them misdeeds which counsel, in reality, had no reason to suppose were ever committed and which he could not and did not endeavor to prove by impeaching witnesses. Typical of such questions were the three following, addressed to the plaintiff when she was called by defendant under Code of Civil Procedure, sec. 2055:

"Now, referring to the time that you made this trip across the United States with Mr. X and Sheik: The second night of that trip across the country you stayed in a motel and you slept in the same room with Mr. X and Mr. Sheik, did you not? A. I did not.

"Q. You didn't; the three of you in one room? A. No, sir.

"Q. I will ask you if it isn't a fact that you stopped at a motel, that Mr. X got out of the car, went into the motel and came back and said, 'They only have one room, but they will put a cot in the room. Brenda can go in the bath room, change her clothes and go to bed and then we can each do that and go to bed'; and that after you had changed your clothes, put on your night gown and robe that Mr. X went in and changed his clothes, put on his pajamas and robe; that Sheik did the same thing; that Sheik went to bed, and that Mr. X and you sat up playing cards, and that Mr. X brought out a bottle of whisky, and you offered Sheik a drink and Sheik went, took a sleeping tablet and went to sleep; and you and Mr. X were up playing cards; is that true or is it not true? A. It is not true."

[2] These questions detailing not only the time, the place and the persons present, but assuming as a fact various acts by her at the time, of which there was no evidence, were plainly calculated to suggest to the jury that the cross-examiner was possessed of explicit information as to the acts suggested by his questions. The questions were entirely improper from every standpoint. To be sure the initial question purported to lay a foundation for impeaching the testimony of the witness by witnesses he presumably had available, but even so the facts implied, if true, could not be shown by extrinsic evidence by wit-

nesses and were not entitled to be shown by cross-examination as the facts were immaterial to any issue in the case. On this point we repeat what we said in *People v. McDaniel*, 59 Cal.App.2d 672, 140 P.2d 88, 90, speaking through Mr. Justice Doran as follows: "The argument that defendant's counsel 'opened the gates' is unavailing. An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' 27 Cal.Jur. p. 74. 'It is a settled rule that cross-examination as to matters irrelevant to the issue may and should be excluded—even though, in some cases, testimony relative thereto was elicited upon direct examination—and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules.' 27 Cal. Jur. p. 106." (See also, 1 Wigmore on Evidence (3rd ed. 1940), sec. 15.)

Moreover, the questions were not asked upon cross-examination of her direct testimony given in behalf of her own case, but by direct questions put to her by counsel for the defendant when he called her in behalf of his own case under the provisions of Code of Civil Procedure, sec. 2055. But that aside, the questions would have been improper upon a cross-examination of plaintiff's direct testimony even if she had there testified, as she did, that she had never had illicit relations with any man other than the defendant. The short reason why she nevertheless could not thus have been cross-examined as to her alleged acts at the motel, is that such acts, if they occurred, were too remote to be of any

materiality or relevancy to the issues in the case. The only question at issue was whether the defendant was or was not the father of the child born September 12, 1948. Any evidence offered to show directly or by inference that the plaintiff had sexual relations with some man other than the defendant prior to the date the child must have been conceived in due course of nature was therefore irrelevant and immaterial to prove or disprove the issue. Such evidence submitted to a jury might well inculcate a belief that the defendant was telling the truth, and not the plaintiff, and that therefore the defendant was not the father of the child. The plaintiff was entitled to have the credibility of her testimony judged by proper and not improper testimony or inferences resulting therefrom.

The cross-examiner necessarily knew he could not prove the fact by Mr. X as the latter testified at the trial that he never had had intercourse with plaintiff. On cross-examination he was not asked a single question along the line asked of plaintiff by the three questions set forth above. We know then as a fact that the cross-examiner had at most only a single person he could call to the stand to impeach the plaintiff, if he were permitted to do so, and if in fact such person would so testify, and that was Sheik, the brother of Sabu. If in fact Sheik would have so testified, if permitted, then the question arises why Sheik did not relate the facts to Sabu the moment he reached the house occupied by him and his wife along with Sabu. Surely there was no need and no reason for not warning Sabu or for imposing on Sabu a character which Sabu tells us he did not love, never intended to marry, and one to whom he says he never proposed.

[3,4] While counsel for the plaintiff made no objection to the questions, as plainly he should have done, we are yet of the view that the trial judge on his own motion should have struck out the questions and reprimanded counsel for asking them. The trial judge is not a mere umpire. On the contrary he is under a duty to see that a fair trial is accorded the parties on the

merits which means excluding on his own motion matters that tend only to prejudice the jurors and take them away from a consideration of the case upon its merits and its merits alone. In speaking to the point the Supreme Court in *People v. Durrant*, 116 Cal. 179, 211, 48 P. 75, 83 said: "Indeed, it is the duty of a court, and one not often enough performed, to expedite business by curtailing cross-examinations upon immaterial and irrelevant matters."

It seems to us exceedingly plain from the questions of defendant which we have quoted above, and many others in the record, that his counsel elected to try the case on the basis of "when you have no case intimate misconduct on the part of the witnesses and *try them*—not the case." This advice which was given by a notorious English barrister in the days of Dickens who pilloried him in his novels is not to be indulged in today. Our courts have time and again flayed the practice. McFarland, J., in *People v. Wells*, 100 Cal. 459, 462, 34 P. 1078, 1079, commenting on repeated questions asked of the defendant as a witness and concerning prior misconduct of various sorts, said: "\* \* \* If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. \* \* \* where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the *mere asking* of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict." (6 Wigmore on Evidence (3rd ed. 1940), sec. 1808(2), p. 278.)

Marshall, J., in *Buel v. State*, 104 Wis. 132, 80 N.W. 78, 83, said: "It would be a clear abuse of judicial discretion to permit such questions where the indications



are plain that the purpose is not to bring out the truth in regard to the witness' life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness, regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him. \* \* \* A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say 'implied' because the asking of the direct questions in the manner in which they were asked, implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions was not and could not have been removed entirely from the minds of the jurors. \* \* \* The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors." (3 Wigmore on Evidence (3rd ed. 1940), sec. 983, pp. 558-559.)

Cooley, J., in *Gale v. People*, 26 Mich. 157, 161 (commenting on the repeated putting of questions as to the defendant's past misconduct) had this to say: " \* \* A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it and there is no other evidence." (6 Wigmore on Evidence (3rd ed. 1940), sec. 1808(2), p. 277.)

Marston, J., in *Scripps v. Reilly*, 38 Mich. 10, 15, said: " \* \* \* Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be so far as possible kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how,

will have more or less influence upon him when he retires to deliberate upon the verdict to be given; and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the Court not to permit such incompetent matters to influence him or have any bearing in the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. \* \* \* [Rules of exclusion] would be but slight protection if counsel or witnesses could be permitted to make a statement, but not under oath, of incompetent testimony, or counsel state the same fully to the jury in their argument or *otherwise* \* \* \* " (Italics supplied.) (6 Wigmore on Evidence (3rd ed. 1940), sec. 1808(1), p. 275.)

In *McDonald v. Price*, 80 Cal.App.2d 150, 181 P.2d 115, 116, it is said: "While a wide latitude should be given in cross-examinations, counsel in putting questions to the witness should not be allowed to assume facts not in evidence and state as positive assertions facts which if true would be detrimental to the opposing party's case and of such a nature as to inflame and prejudice the minds of the jurors. This is especially true where, as in the present case, there is no proof of the facts asserted. \* \* \* The inherent vice of the matter lies in the attempt to bring before the jury in a round about way facts which could not be proved and which from all appearances may have been entirely false."

Not only is the power and the duty of the court sustained by the decisions, but in this state it is supported and commanded by statute. "The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be; but subject to this rule, the parties may put such pertinent and legal questions as they see fit." (Code Civ. Proc., sec. 2044.) "It is the right of a witness to be protected from irrelevant,

improper, or insulting questions, and from harsh or insulting demeanor". (Code Civ. Proc., sec. 2066.) Unless the court promptly strikes out an improper question and rebukes counsel for asking it the damage is done. If opposing counsel objects and his objection is sustained the jury may well speculate on what the answer would have been. If no objection is made the witness' denial still leaves the damaging implication or inference of the question in the record. In such circumstances for opposing counsel to object is generally more damaging than to permit it to be answered without an objection. "The court is no longer confined, if such ever was the rule, to the role of sitting as a mere arbitrator between opposing counsel. It is the function of the court to see that errors or extraneous matters are not brought into the case, which might have the effect of clouding the issue or confusing the jury. Where improper questions are asked the court is acting within the proper scope of its duty in striking out the offending question whether or not objections had been previously made thereto." *People v. Yuen*, 32 Cal.App.2d 151, 160, 89 P.2d 438, 442, 90 P.2d 291.

For the purpose of intimating that plaintiff had been *guilty of misconduct* with other men the defendant was permitted to show by his own witnesses or by cross-examination (1) that on the night of plaintiff's arrival in New York that Sheik and one Wall left the hotel where plaintiff was staying to go to dinner unaccompanied by Mr. X; (2) that Mr. and Mrs. X, the plaintiff, and the defendant attended the Del Mar races together; that Mrs. X left several days before the others due to an argument with Mr. X over plaintiff (the implication was denied by both Mr. and Mrs. X); that at Del Mar plaintiff and Mr. X placed bets with bookmakers and charged the bets to defendant; that defendant told plaintiff he did not want her to have anything to do with a Mr. Y "because he was a henchman of Mickey Cohen." These are but a few of a host of like questions. Plainly all these questions were objectionable and answers thereto inadmissible. *People v. Crandall*, 125 Cal. 129, 135, 57 P. 785.

[5, 6] In an endeavor to contradict the testimony of Sabu that she was never engaged to be married to the defendant, plaintiff sought to show the contents of a prenuptial agreement. She was permitted to testify that in September or October, 1947, she accompanied Sabu to the office of Mr. Michael Luddy (a well-known lawyer in Los Angeles) who she testified was Sabu's attorney at the time; that Mr. Luddy gave her a list of attorneys from whom she was directed to choose one to represent her; that she chose Frank Belcher (likewise a well-known lawyer in Los Angeles) and went to see him some days later; that he told her not to sign the agreement; that she did not recall the contents of the document; that she gave it back to Sabu and never saw it again. As counsel for Sabu denied there was such a document, plaintiff called Mr. Belcher to the stand. He was permitted to testify that plaintiff brought him an unsigned written document; that he read it; that he recalled the substance of its contents and advised her not to sign it. When he was asked if he had a conversation with Michael Luddy concerning the document defendant objected that the question called for hearsay and that it was privileged. The objection was erroneously sustained. The hearsay rule was not involved, as there was testimony in the record not only that Mr. Luddy was the attorney for Sabu, but that at a conference between Sabu, Luddy and the plaintiff Mr. Luddy handed a typewritten document to plaintiff to be taken by her to Mr. Belcher. This sufficiently disclosed the agency of Mr. Luddy to act for Sabu in any negotiations which might ensue between Mr. Luddy and Mr. Belcher. Accordingly any declarations or statements made by Mr. Luddy to Mr. Belcher, in the course and scope of his employment, were those of Sabu under the doctrine that "he who acts through another acts himself." In short, what Mr. Luddy said to Mr. Belcher was Sabu speaking. (4 Wigmore on Evidence (3rd ed. 1940), sec. 1078, p. 119.) Necessarily the doctrine of privilege was not involved as what Mr. Luddy said concerning the agreement presumably was

limited to matters pertaining to the agreement with respect to which he was the agent-negotiator for Sabu. Moreover, the fact that Sabu had testified that there was no conference as testified to by plaintiff and that no agreement was drawn by Luddy, or authorized by Sabu to be drawn by Mr. Luddy, was completely immaterial. The foundation for all the other questions put to Mr. Belcher was in the record and the objection thereto was not well taken. Hence, he should have been permitted to answer them. The evidence sought to be elicited was highly material in that it questioned the veracity of Sabu on material points in his own testimony, i. e., (1) that he was never engaged to plaintiff, and (2) that he never had had sexual intercourse with her. At all events the testimony was admissible to remove the unfair prejudice resulting from Sabu's testimony on the points mentioned. (1 Wigmore on Evidence (3rd ed. 1940), sec. 15, p. 307.)

[7] For the purpose of the new trial we think we should here add that Sabu testified that Sheik was authorized to act for him in handling all his business affairs, such as writing of personal letters, telegrams, cablegrams and telephone messages. Accordingly, what Sheik did within the scope of this wide authority was binding upon and admissible against Sabu despite any lack of personal knowledge of the facts on his part.

There was as we have said no evidence in the case that the plaintiff had ever had illicit relations with any man other than with the defendant and none from which the jury would be permitted to draw such an inference. Such an inference could only have been drawn if there had been evidence, and there was none, of (1) a disposition on the part of plaintiff to have sexual relations with some particular man and (2) an opportunity to gratify them. Notwithstanding this want of evidence the court instructed the jury it could find either way on the fact. The instruction reads in part as follows: "In determining whether or not it has been proven that the defendant is the father of the child, you may take into consideration whether or not the plaintiff had sexual intercourse with any other

person or persons at or about the probable time when, according to the laws of nature, the child was begotten. You may also take into consideration whether or not the plaintiff had an association with some other person or persons and an opportunity to have sexual intercourse with such other person or persons, at or about the probable time when, according to the laws of nature, the child was begotten.

"If you should find from the evidence that at, near, or about the time the child, according to the usual laws of nature, was begotten, both the defendant and some man or men other than defendant had sexual intercourse with the plaintiff and you are unable to tell which of them is the father of the child, then your verdict must be in favor of the defendant.

\* \* \* \* \*

"If you find from the evidence that it is just as probable that some one other than the defendant herein is the father of the child of plaintiff, or if the evidence leaves it for your conjecture, or is evenly balanced, plaintiff has not met her burden of proof and, in such case, you must find for the defendant.

"In considering the question of whether the defendant is the father of said child or some person other than the defendant is or may be the father of said child, you are not limited in your consideration to direct evidence, but you may also consider indirect or circumstantial evidence."

[8] The instruction was palpably erroneous and prejudicial. *Graves v. Gambrell*, 184 Miss. 61, 185 So. 238. If the jury believed the testimony of the defendant and not that of the plaintiff it could have found that the defendant was not the father of the child, but it had no evidence before it upon which it could have found that some other person was the father of the child and as a consequence find that defendant was not the father.

For the reasons stated the judgment is reversed and a new trial ordered.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.



109 Cal.App.2d 867

PEOPLE v. HAYWOOD.  
Cr. 911.District Court of Appeal, Fourth District,  
California.

March 21, 1952.

An accused was convicted in the Superior Court of San Bernardino County, Archie D. Mitchell, J., of kidnapping, robbery and forcible rape, and he appealed. The District Court of Appeal, Mussell, J., held that failure of court to instruct on question of alibi although defendant was entitled to such instruction under evidence was not reversible error since evidence to sustain conviction was so overwhelming that instruction as to alibi defense would not have changed guilty verdict returned.

Judgment affirmed.

## 1. Criminal Law §775(2)

In prosecution for kidnapping, robbery and forcible rape, defendant was entitled to an instruction on question of alibi under evidence even though evidence relative thereto might not have been of character to inspire belief.

## 2. Criminal Law §1186(4)

Where evidence to sustain conviction for kidnapping, robbery and forcible rape was so overwhelming that instruction as to alibi defense would not have changed guilty verdict returned, failure of court to instruct on question of alibi although defendant was entitled to such instruction under evidence was not reversible error. Const. art. 6, § 4½.

---

Miller & Sinclair, Loren Miller and Harold J. Sinclair, all of Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with, and by a jury found guilty of the crimes of Kidnaping, Robbery and forcibly raping one Lola Sickler. He was sentenced to the State's

prison on each of the three counts contained in the Information and appeals from the judgment. Defendant admits that the evidence was amply sufficient to support the verdict and the judgment. His contentions on appeal are that the court committed prejudicial error in (1) Failing to instruct the jury on the question of alibi; and (2) Failing to instruct the jury as to the testimony of accomplices.

The record shows that the defendant offered an instruction on the question of his alibi. This instruction was not given by the trial court and the principal question for our determination is whether the failure to give such an instruction constituted prejudicial error.

## Facts

On November 13, 1949, in the evening, the prosecutrix left a cafe, operated by defendant's mother, on Highland Avenue, in the county of San Bernardino, and, accompanied by her dog, drove westerly in an Oldsmobile coupe. After proceeding "quite a distance", she stopped her car, parked it on the shoulder of the highway, let her dog out, and was sitting on the fender of her car drinking a bottle of beer when another automobile drove up and stopped across the highway. Three colored men got out of this car, came over to the prosecutrix' car and one of them told her she was under arrest; that she had no right to drink beer on the public highway and that she would have to go with them. The prosecutrix told them that she would follow in her car and reached to turn on the ignition, when one of the men struck her on the side of the head and stunned her. She was jerked out of her car, struck on the head again and forcibly put in the back seat of the other car, where all three of the men, in turn, forcibly raped her. She "passed out" and when she regained consciousness, she heard one of the men say "What shall I do with her" and another one said "shoot her if you want to, to get rid of her." She passed out again and when she recovered consciousness, she was lying in a ditch. Her clothing was torn, her back hurt and she could hardly move because of the pain,

her chest and head ached, her face and head were bleeding and her lips were cut on the inside. She succeeded in getting to her car, which was nearby, and found that the contents of her purse had been taken, including one \$20 bill, three \$1 bills, a social security card and driver's license. Her wristwatch and a cross on a gold chain were missing. The prosecutrix then drove to her home in San Bernardino and the police were called. She was then taken to a hospital and examined by a physician, who found bruises on her body and evidence of recent sexual intercourse.

The prosecutrix was unable to positively identify the defendant as one of the men who assaulted and robbed her and could not determine how long she was in the car to which she had been taken. However, she was able to identify this car as a four-door sedan, dark in color.

Defendant was arrested on November 15th by a deputy sheriff, taken to the sheriff's office in Fontana and there told that he was being arrested for what had occurred on the previous Sunday night. Defendant at this time said he wanted to tell all that had happened; that he always found when he told the truth, it was best. Defendant then, in the presence of a shorthand reporter and another deputy sheriff freely and voluntarily stated that "it started in front of his mother's service station when a lady came by in a car"; that he and two men named Craig and Berry, followed the car west on Highland Avenue and when they approached it, Craig and Berry got out and told the lady that they were cops; that she was drunk and that they were going to "take her down"; that she told them she didn't do anything wrong but if they wanted her to go with them, she would drive her car; that they refused and told her to get out and get in their car; that Craig and Berry went to her car to get her out and called him to assist them but he would not help them because he was scared and shaking; that they finally put her in Craig's car and she told them to get her dog and purse; that he got the dog and purse, put them in the car and proceeded to drive and that they then attacked her;

that two of them would hold her while one would attack her and the other two would hold her until all three of them had attacked her; that he had sexual intercourse with her and that she was screaming and crying; that a patrol car came to the scene; that he jumped out of his car and ran; that Craig took the woman away and dumped her out. No force or violence was used on the defendant or promises made to induce him to make the foregoing statement. The arresting officer's statement as to the conversation with defendant was corroborated by the testimony of another deputy sheriff and by the testimony of the shorthand reporter who took down the entire statement in shorthand at the time.

A deputy sheriff patrolling the area where the prosecutrix left her car found it parked on the shoulder of the road at approximately 11:30 P.M. on November 13, 1949, and about 30 minutes later, he observed Craig's black Buick sedan in the vicinity.

Melvin Craig, who was named in the defendant's statement to the officers, testified that he had known the defendant since 1947; that during the evening of November 13th, he was driving his Buick sedan, accompanied by one Dean Berry; that before dark they pulled into a gas station where they encountered the defendant; that the car of the prosecutrix went by and defendant told him to stop it; that they did and got out of their car masquerading as policemen; that defendant asked the lady if she had been drinking and she said "Yes"; that Craig then said they were sorry but that they would have to take her in; that she indicated that she would follow them but he said she would have to go in his car; that defendant and Berry put her in his car; that she asked for her dog and purse and that defendant went back and got them; that defendant told him to pull off the highway a couple of blocks away; that the three men had sexual intercourse with the complaining witness and then saw the sheriff's patrol car; that he and the defendant jumped out and went to his house; that he asked appellant how much money he got and defendant replied "I got \$2".

On rebuttal, the prosecution called the other accomplice, Dean Berry, who had known the defendant for three or four years, and his testimony was substantially the same as that of Craig.

At the trial the defendant took the stand in his own behalf and testified that on November 13th he went to work at his mother's restaurant at 8:00 o'clock in the morning. He stated that he left the restaurant at 11:30 in the evening, when Craig and Berry came to the station to get gasoline; that he drove east about one-half mile with Craig and Berry and then got out of their car; that he was taken to Riverside by a friend and there stayed until the day of his arrest. He testified that after he was taken to the Sheriff's office, he was told that if he would "cop out" to rape it could be easier on him; that he was hit on the head with a rubber hose; that he still had the "printing" on his head from it and that he had x-rays taken. He stated that he was knocked out and the next thing he remembered he was in the county jail. He testified to a fight with Craig and Berry in 1949 and said that after that time he did not associate with them. In addition to his own testimony, defendant introduced several other witnesses in an attempt to establish that he was at his mother's place of business during the entire day and evening of November 13, 1949. One of these witnesses, Harry Hoover, an electrician, testified that he was working at the restaurant owned by appellant's mother from 1:00 o'clock until shortly before 11:00 on November 13th; that he saw the defendant several times during the afternoon and defendant was there when he left. He stated that he could not remember at what specific times during the day he saw the defendant but that he did see him at frequent intervals during the afternoon and evening. Another witness, who was employed by defendant's mother to operate the service station adjoining the restaurant, stated that he saw Craig at 11:30 Sunday night when he drove up and that there was another boy with him. He testified that the defendant was with him at 11:30 when he went to wait on a customer. A waitress, who

worked at the cafe on November 13th, stated that she worked from 11:00 o'clock in the morning until 11:30 that night and that the defendant was there "during working time."

On rebuttal both Craig and Berry denied that they had ever had a fight with the defendant. The arresting officer testified that no one struck the appellant and denied any conversation with the defendant in which he stated to the defendant that it would go easier with him if he could "cop out" to a plea.

[1] It is evident from the testimony produced in an attempt to prove an alibi that the defendant was entitled to an instruction on the subject, even though the evidence adduced may not have been of a character to inspire belief. *People v. Carmen*, 36 Cal.2d 768, 773, 228 P.2d 281. However, it does not necessarily follow that the judgment must be reversed because of the failure to give an instruction on the defense of alibi. If, under the circumstances shown by the record, it can be justifiably held that the defendant would have been convicted had the error not occurred, the judgment will not be reversed. *People v. Kane*, 27 Cal.2d 693, 702, 166 P.2d 285. As was said in *People v. Curtis*, 36 Cal.App. 2d 306, 327-328, 98 P.2d 228, 238: "With the record in the condition in which we find it, we must look into the effect of the error of the trial court in connection with the disposition of the appeal in the light of the provisions of section 4½ of article VI of our state Constitution, which forbids us to set aside any judgment or grant a new trial unless, after an examination of the entire cause, including the evidence, this court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The phrase 'miscarriage of justice', used as descriptive of that condition of a cause, has no hard and fast definition. It seems to us that where the record discloses the commission of errors at the trial the appellate court must first find that upon the record it is seriously doubtful that without such errors the defendant would have been convicted before a reversal of the judgment is justified. *People v.*



Adams, 76 Cal.App. 178, 186, 244 P. 106. As was said in *People v. Black*, 73 Cal.App. 13, 38, 238 P. 374, 385: 'It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say "whether appellant would or would not have been convicted but for the errors of the court."' *People v. Degnen* [70 Cal.App. 567], 234 P. 129.' \* \* \* We have read the instructions given, together with the evidence, and have no hesitancy in saying that under the evidence but one verdict could be reached, and that was the one returned by the jury. Such being the case, we are without power to set it aside."

In *People v. Dail*, 22 Cal.2d 642, 659, 140 P.2d 828, 837, it is said: "In considering the effect of article VI, section 4½ of the Constitution, 'We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence.' *People v. O'Bryan*, 165 Cal. 55, 66, 130 P. 1042, 1046; see, also, *People v. Roe*, 189 Cal. 548, 561, 209 P. 560. As stated in *Tupman v. Haberkern*, 208 Cal. 256, 263, 280 P. 970, 973, 'Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section [4½] was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies.'"

[2] The sufficiency of the evidence in the instant case to sustain a conviction is not questioned. Indeed, it is so overwhelming that an instruction as to the alibi defense would not have changed the verdict returned. The jury was fully instructed as to the doctrine of reasonable doubt, the interpretation of the evidence to be adopted, and that "the testimony in this case if its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt,

law justice and humanity alike demand that the jury shall adopt the former, and find the accused not guilty." If the jury believed that there was any merit to defendant's evidence of alibi, it would have acquitted him under the instructions given by the court. Manifestly, if the jury believed that the defendant did not leave his mother's cafe and restaurant on the evening of November 13th, or if they had any reasonable doubt on the question, they could not possibly have concluded beyond a reasonable doubt that he committed the offenses charged.

We have read the instructions given, together with the testimony, and have concluded that under the evidence but one verdict could be reached, and that was the one returned by the jury.

In his opening brief the defendant contends that it was prejudicial error for the court to fail to instruct the jury on accomplices and the necessity for corroboration. At the time this brief was filed it appeared from the clerk's transcript that instructions on this subject had not been given by the trial judge. However, the record was subsequently augmented by order of court directing the reporter to file the instructions actually given and it appears from this supplemental record that the court gave full, fair and complete instructions on accomplices, the manner in which their testimony should be reviewed by the jury and the necessity of corroboration. The contention that the court failed to instruct the jury as to the testimony of accomplices is entirely without merit.

We are of the opinion that the failure of the trial court to give the offered instruction or other instructions on the defense of alibi under the circumstances shown by the record did not result in a miscarriage of justice and that the error did not affect the substantial rights of the defendant.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



**KESTERSON LUMBER CORP. v. FRIES-  
LEBEN ESTATE CO.\***

Civ. 7925.

District Court of Appeal, Third District,  
California.

March 20, 1952.

Hearing Granted May 15, 1952.

Action by Kesterson Lumber Corporation against Friesleben Estate Company, to recover purchase price paid under contract for purchase of land. The Superior Court, Butte County, Harry Deirup, J., entered judgment for defendant and the plaintiff appealed. The Court of Appeals, Van Dyke, J., held that where contract for the sale of ranch provided that purchaser could sell livestock and crops without any liability to seller for any proceeds of such resale, restoration of benefits could not be implied as a condition to purchaser's right of action for restitution of part payment made on the purchase price.

Judgment reversed.

**1. Vendor and Purchaser ⇨87**

Where vendor entered into contract for sale of ranch wherein purchaser was to be entitled to immediate possession and exclusive use and benefit of the ranch and could resell all livestock and crops excepting farm machinery without any liability to account to vendor for any proceeds of such resale, but in the event an action pending against the vendor concerning the ranch was not determined in 18 months the vendor agreed to repay purchaser the part payment made on the purchase price, purchaser having chosen to terminate the contract according to its terms did not have to account to vendor for benefits received from use and occupancy of the land or from proceeds of livestock or other personal property sales. Code Civ.Proc. § 1856.

**2. Vendor and Purchaser ⇨339**

Where contract for sale of ranch provided purchaser could sell livestock and crops without liability to account to vendor for proceeds of such resale, but in event an action pending against the vendor concerning the property was not determined within a certain time the vendor agreed to repay purchaser the part payment made on

\* Subsequent opinion 251 P.2d 945.

the purchase price, restoration of benefits could not be read into the contract as a condition to the purchaser's action for restitution of the part payment upon purchaser's choosing to terminate the contract.

**3. Contracts ⇨220**

A condition cannot be read into a contract as to which parties might well be deemed to have remained intentionally silent.

**4. Contracts ⇨168**

There can be no implied covenant where subject is completely covered by the contract.

**5. Evidence ⇨448**

In purchaser's suit to recover part payment made on purchase price under contract for sale and purchase of ranch, which contract was signed by the parties and was neither ambiguous nor uncertain, oral testimony, admitted as an aid in interpretation of such a contract was erroneously received.

---

Rogers & Clark, San Francisco, Raymond A. Leonard, Oroville, Ware & Ware, Chico, for appellant.

Clewe, Martin & Blade, Oroville, Rich, Weis, Carlin & Fuidge, Marysville, Winston Churchill Black, San Francisco, Manwell & Manwell, Marysville, for respondent.

VAN DYKE, Justice.

Prior to May 29, 1944, respondent, Friesleben Estate Company, a corporation, hereinafter called Friesleben, was the owner of a ranch embracing approximately 1700 acres in Butte County which for long had been devoted to livestock raising and farming. On that date it entered into a contract of purchase and sale of the land, livestock, equipment and crops with appellant, Kesterson Lumber Corporation, a corporation, hereinafter called Kesterson. Under date of June 16, 1944, but in fact executed on July 22d of that year, Friesleben and Kesterson entered into a contract supplemental and amendatory to the May 29th contract covering the same subject matter. It was out of the conflicting con-



tentions as to the proper interpretation of this latter contract that this litigation arose. Evidence was taken by the trial court of the facts and circumstances, including the negotiations of the parties, preceding and attending the execution of the contract, and of the conduct of the parties thereafter in respect to it. We shall assume, arguendo, the admissibility of this testimony. Where there is a conflict, directly or inferentially, we shall state that testimony favorably to the judgment which was rendered in favor of Friesleben and from which Kesterson appeals. The Friesleben ranch had not been farmed to profit for some time and was encumbered to the extent of \$80,000 secured by a deed of trust and crop and chattel mortgage held by a bank. This creditor was presenting its demands that the security situation be bettered. Foreclosure was a possibility. Friesleben's stock was mainly held by Ella Friesleben, an elderly woman, who owned  $\frac{5}{8}$ ths thereof and who depended upon these assets for her living. She was personally indebted to the same bank to the extent of some \$20,000 to secure payment of which she had pledged this stock. She was further indebted to relatives for another sum of about \$20,000 for which her stock had also been hypothecated by way of a second lien. Friesleben was indebted to various creditors on open account mainly for money due for work and material used in ranching operations up to the time these contracts were made. The ranch operations would require further expenditures which it was thought Friesleben could not make. The whole financial situation was precarious. The interested parties had decided to sell the corporate property.

Just prior to executing the May 29th contract, Mrs. Friesleben, with her attorney, met with Irving E. Kesterson, vice-president of Kesterson, and his attorney, to discuss a sale to Kesterson. There was some mention of a prior contract for the sale of the same property having been made with one Christenson, but Mrs. Friesleben, who was president of Friesleben, assured all present, including her counsel, that no such contract was in existence and that the corporation was free to deal with

Kesterson. The contract of May 29th was executed. It was in the form of a deposit receipt commonly used in real estate transactions. It acknowledged a deposit of \$50,000 by Kesterson on account of a purchase price of \$225,000 for all the property. It provided that 45 days would be given the purchaser to examine title and consummate the purchase and that if title was defective and could not be perfected by Friesleben within 90 days after notice of defect, Kesterson could either accept the title in its then condition or obtain return of the deposit, whereupon the agreement should "cease and terminate without further liability of either party." Shortly after the execution of this contract Christenson sued Friesleben demanding specific performance of a prior contract he alleged existed between himself and Friesleben for the purchase and sale of the same property. Friesleben and Kesterson met again after the filing of the Christenson suit and negotiated further concerning their contractual affairs as complicated by the Christenson action. Copies of the Christenson complaint were gone over by the parties and the merits of the action were discussed. Both seller and buyer wanted to go ahead with the Kesterson agreement. The financial situation of Friesleben was talked over. Kesterson, already owning a number of ranches, wanted the Friesleben ranch as a home ranch. It was willing to cooperate in the defense of the Christenson suit. Friesleben stated it could not operate the ranch itself because of the contract, could not sell crops and was willing to go ahead with the Kesterson deal as far as possible in view of the Christenson suit. Kesterson said that if it operated the ranch it had no desire to take any money from Mrs. Friesleben but wanted to be free of any liability that would arise by its taking over the property; that it wanted the ranch as a model or key ranch and had plans for extensive improvements; but if by reason of the Christenson suit it eventually did not get the property it wanted Friesleben to stand some of the capital expense with a liability limit of \$10,000. It was mutually stated that the best proposition was to do everything that could be done to turn the

property over to Kesterson and let it run it as though it was the owner—turn everything over of record. Friesleben wanted to defeat Christenson and in the meantime to go through with the Kesterson deal as far as it could. These negotiations resulted in a preliminary proposed agreement and the attorneys for the parties were instructed to prepare a written agreement to embody their understandings. This was done during the interval between June 20th and July 22d and the second contract, the interpretation of which is here involved, was then executed as of June 16th.

We think it necessary to an understanding of the issues as to the proper interpretation of this contract that in the main part it be quoted in *hæc verba*. We shall italicize certain parts around which the controversy centers. After reciting the situation of the parties, the existence of the May 29th contract, the pendency of the Christenson suit, the claim of Friesleben that the suit was without foundation, and Friesleben's representation to Kesterson accordingly, the contract continued:

"1. Seller agrees *forthwith to deliver to the Purchaser the Bill of Sale and Chattel Mortgage Search* covering the personal property described in said agreement dated May 29, 1944, and contemporaneously therewith the Purchaser agrees to pay to or for the account of the Seller as part payment of the purchase price of \$225,000.00 stipulated in said agreement dated May 29, 1944, the sum of \$50,000.00 upon the understanding that the whole of said sum of \$50,000.00 shall be applied in the reduction of the indebtedness owing from the Seller to" the creditor Bank.

"2. Seller also agrees *forthwith to deliver to Purchaser the immediate possession of all of said property*, real and personal, described in said agreement dated May 29, 1944, *with the same force and effect as though said agreement dated May 29, 1944 had been consummated in accordance with its terms*, and in this connection the Seller hereby agrees to indemnify and save harmless the Purchaser of and from any and all claims and demands which may be asserted against the Purchaser by said Arnold E. Christensen, the plaintiff in said action, and

all persons claiming through or under him and all persons whomsoever, *to the end that the Purchaser shall be entitled to the exclusive use and benefit of said property and the income, rents, issues and profits thereof, free of charge, from and after the date of this agreement*, as though all of said property had been actually conveyed to the Purchaser free and clear of all liens and encumbrances whatsoever, except current taxes not delinquent. Taxes, rents, insurance premiums and operating expenses shall be prorated as of June 16, 1944."

Friesleben agreed to quiet title to all of the property as soon as it could either by defending the Christenson suit or bringing an action to quiet title, or both, and the parties then agreed that: "If judgment shall be so rendered against the Seller, then the Seller shall forthwith cause to be paid over into escrow, at the main office of Bank of America N. T. & S. A., in San Francisco, California, for the benefit of the Seller and the Purchaser, any and all sums payable to the Seller by said plaintiff, all of which sums are hereby presently specifically assigned to said Bank, as such escrow holder, and out of which sums Purchaser shall be entitled to immediate reimbursement for said sum of \$50,000.00 hereinabove referred to, plus any sums, up to but not exceeding \$10,000.00, expended by Purchaser for capital improvements on said property, and plus any sums expended by Purchaser in settling or defending any claims or demands from which Seller has agreed to indemnify Purchaser as above provided; and the remaining balance shall be paid over to Seller."

Pending the outcome of the action, Friesleben agreed to deliver a proper grant deed in escrow with instructions to deliver it to Kesterson whenever policy of title insurance in the full amount of the purchase price could be issued and Kesterson agreed on receiving written notice that the policy was ready for issuance to pay the balance of the purchase price, that is, \$175,000, within 30 days. The contract then continued: "5. *In the event that said action is not finally determined within eighteen (18) months from the date hereof, then and in that event the Seller agrees on demand to repay to the Purchaser said sum of \$50,-*

000.00 and other expenditures hereinabove referred to, unless the Purchaser at its option extends said eighteen (18) months' period. Pending said eighteen (18) months' period, or any extension thereof, the Seller shall be permitted to increase its indebtedness to said bank secured by the Deed of Trust above referred to in the aggregate amount of \$10,000.00, to be used for Seller's corporate purposes, but shall not be permitted otherwise to encumber the title to said property. At any time after the expiration of said eighteen (18) months' period that Seller shall deliver to Purchaser the written legal opinion of any two of the following, Theo. J. Roche, A. Crawford Greene or Herbert C. Clark, attorneys now practicing law in San Francisco, California, to the effect that further efforts to clear the title to said real property, either by defending said action numbered 9028, or by prosecuting a suit to quiet title, or otherwise, would be without success, then the delivery of such opinion shall have the same effect as though said eighteen (18) months' period had expired without extension."

It was agreed that when the sum of \$50,000 had been paid in reduction of the bank's indebtedness that Friesleben should cause the bank to release the crop and chattel mortgage. A short form of agreement was provided for between the parties which could be recorded, describing the real property and incorporating the June 16th contract by reference and Friesleben agreed to furnish an interim title insurance policy insuring Kesterson in the amount of \$50,000, that the short form agreement was "a first lien on said real property", subject only to taxes, the bank's deed of trust and the Christenson suit. Kesterson stipulated that otherwise the title was then acceptable to him. It was then stipulated as follows:

"7. Purchaser agrees not to resell any ranch equipment now located on said real property pending the outcome of said action numbered 9028; *but Purchaser may resell all livestock and crops located thereon, as Purchaser's own property, without any liability to account to seller for any proceeds of such resale.*

"8. Except as modified hereby, said agreement dated May 29, 1944, shall be and remain in full force and effect."

After the contract was executed, the \$50,000 was paid and the bill of sale was delivered. Kesterson went into possession, completed the production and harvesting of the crops of that season, farmed the land for the following year and during the 18 months' period sold all of the livestock and all of the crops it obtained. Its total receipts amounted to about \$112,000; its total expenses to about \$60,000. The trial court found that the excess of receipts over expenditures was \$52,327.12 and that the farm equipment retained by Kesterson under a claim of ownership was of the value of \$3,500. It compelled Kesterson to account for all receipts, charged it with the net sum of \$55,827.12, as demanded by Friesleben's counter-pleadings and cross-complaint, and set off against this sum the \$50,000 demanded by Kesterson in its complaint. Judgment was rendered against Kesterson for the sum of \$5,827.12, together with interest from December 17, 1945, the date that Kesterson demanded the return of its \$50,000.

Kesterson throughout claimed that by the plain terms of the June 16th contract it became the absolute owner of the personal property, had the absolute right to the occupancy and use of the real property free of charge during the period it should so occupy and use the same, and was therefore entitled to judgment as prayed for by it for the sum of \$50,000, which it contends Friesleben unconditionally agreed to repay if it failed to clear title within 18 months. Friesleben on the other hand contended throughout that although it was obligated to return the \$50,000 when Kesterson made its demand therefor it was also at that same time entitled to have Kesterson account for all of the benefits it had received which included the net receipts from the use and occupancy of the land, the value of the retained farm equipment and the proceeds of the livestock and other personal property sales. This construction was in practical effect adopted by the court and is reflected in the judgment.



In addition to what has been said as to the situation and motivations of the parties, it appears that Friesleben desired to consummate its sale to Kesterson because of certain advantages which would accrue to it by so doing, over and above the benefits it would receive from the contract which Christenson claimed to have executed with it. In the main these advantages were as follows: First, the gross price to be paid by Kesterson was \$10,000 more than that to be paid by Christenson. Next the Christenson contract segregated the values of the property, putting a value of \$150,000 on the real property, \$44,000 upon the growing crops of that year and \$21,000 on the livestock and farming equipment. Consummation of this contract it was believed by Friesleben would entail heavy payments of income taxes by reason of the excessive value attributed to the growing crops. Next the Kesterson contract, being a cash deal, the clearing of the title from the bank's lien would be a simple matter, whereas the Christenson contract would compel Friesleben to clear the title when only \$25,000 had been paid in, from which a real estate commission was to be subtracted, thus rendering it difficult, if not impossible, for Friesleben to comply with the demands of the Christenson agreement. Friesleben considered that it could defeat the Christenson suit, statements having been made by its representatives to the effect that the action was in the nature of a nuisance suit which would easily and promptly be disposed of and it appears that, based upon factual representations made to it concerning the action by Friesleben, Kesterson was of like opinion. But of course both parties must be held to have realized the uncertainties that attend litigation and this is clearly evidenced by the engagements they undertook when they decided to go forward notwithstanding the Christenson suit; and both parties apparently realized that whatever they did by way of consummation of the agreement between them would be under the shadow of the Christenson claims. It is clear that they sought by their contract to carefully and adequately provide their respective obligations and their respective rights in view of the varying situations that

might arise. They agreed upon what should be done if in the end Christenson prevailed. They agreed upon what should be done if in the end Christenson was defeated or his claims otherwise disposed of. They certainly attempted to declare what should be done if Friesleben failed to get Christenson out of the way within 18 months; or if, after that time had been extended, it should conclude it could not be successful and had received the stipulated legal advice to that effect; but the parties disagree as to what those provisions meant.

The complaint of Kesterson was simple. Attaching a copy of the June 16th agreement to the complaint by way of exhibit, Kesterson alleged the execution thereof; that the Christenson suit was still pending and undetermined upon the 17th of December, 1945, 18 months after June 16, 1944; that on that day plaintiff demanded that defendant pay it the sum of \$50,000; that the demand was refused; and that the whole sum was due, owing and unpaid. It added a second count to the complaint wherein it sued for money had and received. Friesleben answered, denying only that by the contract it had agreed "unconditionally to repay said sum of \$50,000.00" under the conditions set up in the complaint. It denied generally the allegations of the common count. Affirmatively it pleaded that the contract was invalid in that the repayment of the \$50,000 and the retention by Kesterson of all the personal property would amount to a forfeiture of the personal property; and that Kesterson had rescinded the contract by demanding repayment of the \$50,000. The court found against Friesleben as to these two affirmative defenses. Friesleben further affirmatively pleaded that the contract as executed did not contain various provisions orally agreed upon and intended to be included therein. Speaking generally, these allegations may be designated as allegations of fraud and mistake whereby the contract executed was not the contract agreed upon. Again speaking generally, it may be said that the trial court found against these allegations save as they contained conclusions as to the proper construction of the agreement as written. The contract then re-

maintained to be interpreted and enforced according to its terms.

The trial court found the execution of the written agreements; that Kesterson paid the sum of \$50,000 as agreed upon; that it was applied to Friesleben's indebtedness to the bank; that pursuant to the permission contained in the contract Friesleben thereafter borrowed \$10,000 from the bank and expended the sum for its corporate purposes; that Friesleben executed and delivered to Kesterson a bill of sale covering all the personal property, obtained the release of the crop and chattel mortgage held by the bank and delivered to Kesterson possession of all the real and personal property; that it deposited in escrow the grant deed as provided for with the agreed instructions. The court then made the following findings: That the parties agreed to Kesterson's immediate possession of the real and personal property "as though it was the owner" but agreed that the sale would not actually be completed until the Christenson claim was eliminated (this finding is supported since it is apparent that title had to be made good before that part of the contract involving the purchase and sale of the land could be completed; and this could not be done except by elimination of the Christenson claim on the land); that the sale proposed was a sale of the real and personal property together in that there would be no sale unless the Christenson claim was eliminated as to all of the property (this finding is not supported by the express terms of the contract nor is it touched upon directly or inferentially by the testimony. The instrument declares the parties are completing the contract as far as they can and nothing prevented them from transferring presently to Kesterson everything agreed to be transferred save only the land); that the sale of the personal property was to be dependent upon that of the real property (the instrument does not say so); "that it was not the intention of the parties that Kesterson could demand the repayment of the sum of \$50,000.00 without restoring the benefits received by it from the said contract" (the contract contains no such express statement; contrarywise, it sets up the conditions precedent to

the obligation of Friesleben to repay that sum, i. e., elapse of 18 months without clear title being accomplished and is silent as to, and therefore excludes, the added condition of restoration). The court found that Kesterson took over possession of all the property and retained the exclusive control and possession of it up to December 17, 1945, during which time it harvested and sold the crops of 1944, planted, harvested and sold the crops of 1945, disposed of all the personal property except the farm equipment and then notified Friesleben that because the Christenson action had not been determined within the 18 months' period elapsed, it demanded repayment of the \$50,000, and was surrendering the possession of the real property; that it did surrender the property except that it retained the farm equipment and "the proceeds from all of said remaining personal property." The court found that Friesleben had retained the \$50,000 but "subject to an accounting by Kesterson from the benefits received by him from said contract." (What has been just said is applicable to this quoted finding.) The court found that though the Christenson suit had not been disposed of but was still pending yet Friesleben had diligently contested the same and was continuing to contest it when the notice was given and the real property was surrendered; that the parties had not intended by their contract to covenant that Kesterson should have no liability whatever to account in any way to Friesleben for said crops or personal property or any of the proceeds thereof; that Friesleben had not become indebted to Kesterson for the \$50,000 and that nothing was owing by it to Kesterson; that it had not agreed "unconditionally" to repay the \$50,000 on demand on the expiration of 18 months "without Kesterson returning or accounting for the personal property received by it, and without it accounting to Friesleben for its operation of said real property"; and that by the contract the parties had agreed "that Kesterson would not demand back said \$50,000.00 without accounting for the personal property received by it and for the use of said real estate."

[1] Disregarding the testimony of Mr. Kesterson, Mr. Rogers and Mr. Wolf, who testified generally that during the negotiations preceding the execution of the contract Kesterson insisted that in return for the financing requested by Friesleben and the additional time granted to it in which to clear title that he should have the use of the Friesleben ranch and the outright ownership of the crops and other personalty without any liability to account to Friesleben therefor irrespective of how the Christenson suit might turn out, we find that no testimony directly or inferentially supporting the foregoing findings was given. To be sure, the Friesleben attorney who joined in the drafting of the instrument stated that nothing was said by Mr. Kesterson or Mr. Rogers, his attorney, or by anyone "that if the Christenson suit was won by Christenson the personal property and equipment would be the personal property of Mr. Kesterson." This is a denial of the testimony of Mr. Kesterson, Mr. Rogers and Mr. Wolf to the contrary, but it does not support a finding that the parties agreed that in the event that Christenson won his suit Kesterson would have to return or account for the personal property and the use of the land or that the title to the personal property was not intended to pass to Kesterson or that he was not to receive the free use of the land. We must assume that Kesterson said he did not want to make money out of Mrs. Friesleben by reason of the operation of the ranch, although he says he did not say that, but such a general statement affords no support for any of the findings now being discussed. We must assume against his denial that he further said that he would not take advantage of Mrs. Friesleben. This likewise does not support the findings, for no man can be accused of taking advantage of another who stays all the time within the bounds of his contractual engagements with that other. On the contrary, Mrs. Friesleben, when shown the bill of sale she executed for Friesleben, said "That is my signature. Mr. Kesterson took over all the inventory, everything that was growing on the ranch." Mr. Brereton, secretary for Friesleben, said that when he signed the contract he read and understood the provision that Kester-

son was not to account to Friesleben for any of the proceeds from the crops and livestock; and when his attention was directed to that part of the agreement that there should be forthwith delivered to Kesterson the bill of sale and chattel mortgage search covering the personal property described in the agreement of May 29th that he understood therefrom that "the bill of sale to the personal property and the crops was to be delivered outright to Kesterson upon his paying the \$50,000"; and when his attention was called to the provisions of the contract as to Kesterson being "entitled to the exclusive use and benefit of said property and the income, rent, issues and profits thereof, free of charge", and he was asked, "Am I not correct in stating you understood from that, Mr. Brereton, rent free?" he answered "Yes". If we ignore the foregoing testimony, still the only result is that the findings of the court now under discussion are left to depend for their validity upon a construction of the terms of the contract as written and they can find no support therein.

When we remember the situation in which these parties found themselves upon the filing of the Christenson suit; when we consider the object and purpose of the June 16th contract which was intended to fix their rights and obligations in respect of their going forward under the shadow of the Christenson claims; when we consider further that attorneys having acknowledged skill and experience represented the two parties, and that after more than a month, during which time the proposed writing was drafted and redrafted, discussed and re-discussed, these attorneys produced the solemn integration which the parties thereafter executed, we think it must be concluded Kesterson has the better of the argument as to what was done by and under this contract. We are unable to interpret express provisions that Kesterson could, with the exception of the farm equipment, "resell" the personal property covered by the unconditional bill of sale it received therefor, without any liability to account to Friesleben, as meaning that it must account; or to interpret provisions that it might use the real property and receive the rents, issues and profits thereof for its own ex-



clusive benefit free of charge as meaning that the fruits of its husbandry must thereafter be paid over to Friesleben. It is not competent under the guise of interpretation to insert what has been omitted or omit what has been inserted. (C.C.P. Sec. 1856.)

The court in its memorandum opinions declared that what the agreement said was that Kesterson should have the use of the ranch and personal property "as though" they had actually been conveyed, which implied that all of the property was still under contract of sale and purchase and that the contract meant nothing more than that Kesterson should have the right to use the land and personal property "without interference". There is more to the same effect, but it adds up to interpretation by the court which in reality makes the positive declarations we have noted little more than sham and pretense spoken to enable Kesterson to deal with the rest of the world freely and without interference in respect of crops and livestock and use of the property; and that though the contract declared that the crops and livestock might be resold, yet the provisions should be read that it could be resold "*as though they were* Purchaser's own property", though not in fact its own, the emphasized words being added by the court. The court stated that the contract did not unequivocally declare that the crops, livestock and farm equipment did belong to Christenson and that "because of its failure to do so and because of the use of terms that indicate the right to deal with the property as an owner rather than terms that would indicate ownership, the contract implies that Kesterson should return not only the possession of the real property but the personal property and crops as well, or their equivalent, as a condition for demanding the repayment of the \$50,000." The court concluded that Kesterson "having chosen to come into Court to terminate the contract and compel Friesleben to account for the \$50,000, he is under obligations to account for the benefits received by him." The court further concluded that by this agreement the parties deliberately limited the remedies of Kesterson to the sole remedy of restitution burdened with the implied condition of re-

storage. Of course the contract does not say so expressly and no one has claimed that it does.

We can attach no significance to the fact that the contract does not state that if Friesleben failed to clear title within 18 months and Kesterson demanded return of the \$50,000 it should also redeliver possession of the realty. We think the parties assumed that so ordinary and usual a condition was clearly implied and well understood. It was competent for the parties to allow Kesterson to put an end to the time Friesleben should have to clear title and so to end its obligation to stand ready to pay out; it was equally competent for the parties to allow Friesleben to put an end to its obligation to fight the Christenson suit. Both matters were provided for, as to Kesterson by an optional time limit, and as to Friesleben by permitting it to end its further obligations with respect to the litigation by submitting the opinion of the named attorneys that further litigation would be unsuccessful. When Kesterson elected not to extend the stipulated period, just as would have been the case had Friesleben submitted the opinion as to ultimate success, the contract was at an end; and the contract unequivocally provided that Friesleben should then repay the \$50,000. This interpretation is fortified by the provisions of the contract as to what would happen if the litigation were pursued to the ultimate end and Friesleben should lose. It would then be obliged to convey the realty to Christenson and Christenson would be obligated to pay for it. Friesleben agreed that in that event the Christenson payment would go into escrow for the mutual benefit of the parties and the exact distribution was agreed upon, which was the return of the \$50,000 to Kesterson, the payment to it of any capital expenses up to \$10,000 and the reimbursement of Kesterson for losses it might have suffered and for which the contract indemnified it. Only the balance would be given to Friesleben. These provisions were not burdened with any expressed conditions that before it could enjoy the benefits thereof Kesterson must account for its use of the real property and its disposition of the personal property.

[2-4] The trial court declared in its opinion that by this contract the parties had agreed that restitution was the sole remedy given to Kesterson if Friesleben should fail to defeat Christenson within the 18 months' period; and that since they had agreed upon restitution as such sole remedy they had likewise agreed that this right of restitution should be conditioned upon restoration. We cannot assent. It is of course true that the remedy of restitution as commonly enforced involves restoration of benefits by the party claiming restitution and to that extent it approximates the remedy of rescission. (Restatement of the Law of Contracts, Sec. 349, Comment on Subsection (1).) It is of course competent for the parties by contract to confine the remedy for breach to restitution as the sole remedy. But this contract contains no express provisions limiting Kesterson's remedy to restitution and to imply such is to go against the plain provisions of the instrument to the contrary. "A condition cannot be read into a contract as to which the parties might well be deemed to have remained intentionally silent. *Foley v. Euless*, 214 Cal. 506, 511, 6 P.2d 956. With citation of that and other cases, the court in *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal.App. 2d 141, 149, 113 P.2d 878, 882, summarized the rules when covenants may be implied as follows: '(1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) *there can be no implied covenant where the subject is completely covered by the contract.*'" Emphasis ours. *Stockton Dry Goods Co. v. Girsh*, 36 Cal.2d 677, 681, 227 P.2d 1, 3.

For the theory of the trial court to be valid this contract must be construed as containing an implied agreement on the part of Kesterson that if the title was not

cleared in the 18 months' period and Kesterson should elect not to extend the time, then it might demand repayment to it of \$50,000, but only on the condition that it thereby became obligated to account to Friesleben. Reading this condition into the contract as executed by these parties violates all of the rules laid down by the cited authorities. Restoration cannot be implied where it must consist, if required, of charges for the use of land agreed to be free and of turning over of proceeds of sales of personal property for which the contract declared the party making the sales should not be liable to account.

[5] We have heretofore said that, arguing, we would assume the admissibility of oral testimony as an aid in the interpretation of the contract, but we think it apparent from what has been said that the document signed by the parties was a clear integration of their understandings and that the testimony was erroneously received. Even when that testimony is considered it does not add to or detract from the plain terms used. The document is neither ambiguous nor uncertain and there was no occasion for oral testimony.

The judgment as rendered must be reversed. However, there remains for disposition other issues presented by the case which have not been disposed of and in the disposition of which some relief may be given to Friesleben if the trial court shall find, interpreting the contract as we have interpreted it, Friesleben will suffer a forfeiture or a loss in the nature of forfeiture or Kesterson will be unjustly enriched by the enforcement of its terms. See Civil Code Sec. 3275; *Gonzalez v. Hirose*, 33 Cal.2d 213, 200 P.2d 793; *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367; *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13, and *Freedman v. Rector*, 37 Cal.2d 16, 230 P.2d 629. Whether or not enforcement of the contract according to its terms as interpreted by this court here would result in such forfeiture, or loss in the nature of forfeiture, or unjust enrichment, are matters which obviously were not passed upon by the trial court; for, interpreting the contract as the trial court did, it could not be said that through enforcement any such loss would be

suffered by Friesleben or any unjust enrichment to Kesterson could result. While the court, as noted, found against the plea of forfeiture advanced by Friesleben in its pleadings, it is apparent that this finding was based upon the court's interpretation of the contract. If, however, the contract be considered as we have interpreted it, then a very different picture is presented and findings favorable to Friesleben's plea would find support in the record as it now stands. The trial court's finding on this plea of Friesleben's cannot, therefore, justly be treated as a finding of fact adverse to the plea.

The judgment is reversed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.



109 Cal.App.2d 765

CLARK v. DESCHAMPS.

Civ. 14856.

District Court of Appeal, First District,  
Division 1, California.

March 17, 1952.

Rehearing Denied April 16, 1952.

Hearing Denied May 12, 1952.

Action by Don Clark, doing business as the Independent Cab Company, against Robert Deschamps for judgment declaring whether plaintiff is entitled to enjoin defendant from enforcing certain judgment rendered in prior action. The Superior Court for the City and County of San Francisco, Preston Devine, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that when precise question before court had been decided in former appeal to which plaintiff was party, plaintiff was estopped from again litigating such question.

Judgment affirmed.

#### 1. New Trial ⚡119

Orders granting new trial, when entered after court's jurisdiction to grant new trial had expired, were void.

1. Clark and the Independent Cab Company, for convenience, will hereafter be referred to as "Clark," or "appellant."

241 P.2d—43 1/2

#### 2. Appeal and Error ⚡1099(1), 1195(1)

Where parties contending on appeal that order setting aside order granting new trial was invalid had been parties to appeal by another party from order reinstating order granting new trial on which same question was litigated, parties were estopped from again litigating question, in any subsequent proceeding.

#### 3. Judgment ⚡518

A "collateral attack" on judgment is attempt to impeach same by matters dehors the record in action other than that in which it was rendered.

See publication Words and Phrases, for other judicial constructions and definitions of "Collateral Attack".

#### 4. Appeal and Error ⚡1097(1)

Where it was determined on prior appeal that order setting aside order granting new trial was valid, such decision became law of case, and attempted execution on judgment was not collateral attack on any existing order.

#### 5. New Trial ⚡121

Parties cannot by stipulation confer power on court to retry case after time for granting new trial has expired.

Hoge, Pelton & Gunther, San Francisco, Reginald Watt, San Francisco, of counsel, for appellant.

Belli, Ashe & Pinney, San Francisco, for respondent.

PETERS, Presiding Justice.

This case has had a long and confused history. One phase of it has already been before this court, Deschamps v. Independent Cab Co., 94 Cal.App.2d 127, 210 P.2d 299, 897—which see for a supplementary statement of facts. The present appeal is by Clark, doing business as The Independent Cab Company<sup>1</sup>, from a judgment in a declaratory relief action determining that Clark is not entitled to enjoin Deschamps from enforcing a certain judgment rendered in a prior action against Clark,



and that a valid new trial had not been granted in that prior action.

Deschamps was riding as a passenger in a cab driven by Stein and operated by Clark when the cab collided with an automobile being driven by Vallerga. Deschamps brought an action against Clark, Stein and Vallerga. The jury awarded Deschamps \$15,000 against Clark and Stein, but found in favor of Vallerga. Deschamps and Clark seasonably filed notices of intention to move for a new trial on all of the statutory grounds. Neither of these motions was set for hearing, no affidavits or briefs were filed, no hearing was had, and the motions were never submitted. The statutory time within which the court could pass on proper motions for a new trial expired August 16, 1948. On July 7, 1948, the court entered its order purporting to grant a new trial as to all parties "on the grounds of insufficiency of evidence to justify verdict, and upon all other legal grounds." Vallerga thereafter moved to set aside the new trial as to him. This motion was supported by proper affidavit averring that no points and authorities or affidavits were filed or served in support of the motions for a new trial, no notice given of any hearing, no hearing was had, and also averring that the motions had never been submitted. Deschamps filed a similar motion. On August 9th the trial court entered its order granting the motions of Deschamps and Vallerga to set aside its order granting a new trial as to all parties. Thus the original judgment was reinstated.

[1] On August 18, 1948, two days after the trial court's jurisdiction to grant a new trial had expired, Deschamps and Clark again filed motions for a new trial, and, on the same day, the trial court entered its minute order granting both motions. A formal order so providing was entered August 24, 1948. These orders, having been entered after the court's jurisdiction had expired, were void. Thereafter, Deschamps moved for an order to determine and fix validity of the orders granting and denying motions for a new trial, and later Deschamps and Clark moved to set

aside the order of August 9th and to reinstate the original order of July 7th. Vallerga appeared and objected to the jurisdiction of the court. On December 9, 1948, by minute order, and on December 14th by formal order, the trial court purported to set aside its order of August 9, 1948, and to reinstate its original order of July 7, 1948. Vallerga appealed from the December orders. This is the appeal that was decided in *Deschamps v. Independent Cab Co.*, 94 Cal.App.2d 127, 210 P.2d 299, 897. In that case, this court reversed the December orders. The effect of this decision was to leave standing and effective the order of August 9, 1948, which order had set aside the prior order of July 7, 1948, granting a new trial to all parties. Thus, the original judgment was reinstated.

The decision on the prior appeal was rendered October 14, 1949, and the remittitur issued December 14, 1949. Thereafter, on January 10, 1950, the attorneys for Deschamps and Clark entered into a stipulation for a new trial to be had in March, 1950. This stipulation was signed by the trial judge and filed on January 12, 1950. Thereafter, Deschamps took the position that such stipulation was void in that no valid new trial had been granted to any party, and that his original judgment against Clark was enforceable. He threatened to levy execution on that judgment. Thereupon, on January 30, 1950, Clark instituted this action to enjoin Deschamps from executing on the judgment, and to secure a declaration that, as to him, a new trial had been granted.

This relief was denied by the trial court. It found the facts as above set forth and concluded that the original judgment secured by Deschamps against Clark was "still valid, subsisting and enforceable"; that the order granting a new trial to all parties dated July 7, 1948, was nullified by the valid order of August 9, 1948; that the motions for a new trial were denied by operation of law on August 16, 1948; that the court was without power to make the December orders; and that the stipulation entered into in January, 1950, did not confer jurisdiction upon the court to retry the case. Clark appeals.

The basic contention of appellant is that because Deschamps did not appeal from the December orders, which purported to reinstate the order of July 7, 1948, granting a new trial to all parties, he is bound by those orders, unless the July 7th order was void on its face. It is urged that the July 7th order was valid on its face, and that between appellant and Deschamps, it granted a new trial to Clark. It is pointed out that Deschamps was one of the parties that secured the December orders, and it is contended that Deschamps, therefore, cannot collaterally attack such orders. These arguments are without merit.

[2] The prior decision in *Deschamps v. Independent Cab Co.*, 94 Cal.App.2d 127, 210 P.2d 299, 897, is decisive on this appeal. That case held that the order of July 7, 1948, purporting to grant a new trial as to all parties was invalid, that the December orders were void, and that the order of August 9th, setting aside the order granting the new trial was valid. While it is true that Vallerger alone appealed from the December orders, and that Deschamps did not appeal, it is equally clear that both Clark and Deschamps were parties to that appeal, and both made appearances therein. Under such circumstances, all the parties to that appeal are estopped from again litigating the issues there decided. *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 74 P. 2d 252; *Estate of Baird*, 193 Cal. 225, 223 P. 974; *People's Lumber Co. v. Gillard*, 5 Cal.App. 435, 90 P. 556.

In the original opinion filed on the prior appeal, the July 7th order was held to be void because (1) no motions for a new trial had been made in that only notices of intention to move had been filed; (2) no briefs or affidavits were filed; (3) no hearing was had, and no notice of hearing given, and (4) the motions were never submitted. On a petition for rehearing, this court eliminated ground one above mentioned, stating that its prior holding that no motion had been made was incorrect, but also stating that this in no way affected the holding that the July 7th order

was invalid. In its opinion correcting the prior opinion and denying the petition for rehearing, this court stated, 94 Cal.App. 2d at page 135, 210 P.2d 897: "This incorrect statement [that no motion had been made], does not affect the correctness of our decision. The motions [for a new trial] were never submitted, nor was any opportunity given the parties to be heard on them, either orally or otherwise. Moreover, as pointed out in our opinion, the order is invalid upon another ground. No affidavits had been filed as required by law, and yet the court purported to grant the new trial upon 'all other legal grounds' in addition to the ground of insufficiency of the evidence. This the court had no right to do. Hence its action on August 9 in setting aside the July 9 [should be July 7] order was not only proper but necessary." A petition for hearing in the Supreme Court, two justices dissenting, was denied. This decision is binding between the parties here involved. It should be pointed out that in our opinion on the prior appeal we pointed out that the invalidity of the July 7th order appeared from a mere examination of the judgment roll. 94 Cal.App.2d at page 133, 210 P.2d 299.

[3,4] Appellant claims that Deschamps is collaterally attacking the July 7th and December orders. Just how Deschamps is claimed to be doing this does not appear. All Deschamps is doing is threatening to execute on the original judgment. That is not a collateral attack. A collateral attack is "an attempt to impeach a judgment by matters *dehors* the record in an action other than that in which it was rendered." *Nielsen v. Emerson*, 119 Cal. App. 214, 217, 6 P.2d 281, 282; see, also *Rico v. Nasser Bros. Realty Co.*, 58 Cal. App.2d 878, 882, 137 P.2d 861. By seeking to execute upon the judgment Deschamps is not attacking any existing order because, under the law of the case as established in the prior appeal, the only subsisting and valid order is that of August 9th, setting aside the July 7th order.

[5] Appellant mentions, but does not particularly rely upon, the stipulation of

January, 1950, entered into by the parties, by which they agree that a new trial should be had in March, 1950. Of course, if the court had no power to grant a new trial, the parties could not, by stipulation, confer power on the court to retry the case. *Gillespie v. Andrews*, 78 Cal.App. 595, 248 P. 715; *Emery v. Pacific Employers Ins. Co.*, 8 Cal.2d 663, 67 P.2d 1046; *Morrow, v. Morrow*, 40 Cal.App.2d 474, 105 P.2d 129.

As already pointed out, we held, in our prior opinion, that the order of August 9th was valid, that the July 7th and December orders were invalid, and that such invalidity appeared on the face of the record. That decision, right or wrong, established the law of the case as between the parties here involved.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



109 Cal.App.2d 759

### MILIAS v. WHEELER HOSPITAL

Civ. 14840.

District Court of Appeal, First District,  
Division 1, California.

March 17, 1952.

Action by Catherine Milias, a minor, by Mitchell Milias, her guardian ad litem, for her injuries and by Mitchell Milias for medical expenses against Wheeler Hospital. The cause of action by Mitchell Milias for medical expenses was, by consent, dismissed. The Superior Court, County of Santa Clara, Franklin G. West, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeals, Peters, P. J., held that whether the injuries occurred to the plaintiff as the result of defendant's negligence and whether the defendant was in control of the plaintiff when the injuries occurred were questions for the jury and that the instructions to the jury correctly stated the law.

Judgment affirmed.

#### 1. Hospitals ⇨8

Where scarring which occurred to patient's leg was allegedly caused by warm compress treatment applied to infected area of leg by nurses who were employed by defendant hospital, doctrine of *res ipsa loquitur* applied.

#### 2. Negligence ⇨121(2)

To authorize application of doctrine of "*res ipsa loquitur*", accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

#### 3. Hospitals ⇨8

In action for scarring which occurred to patient's leg while patient was in defendant's hospital receiving treatment for an infection in her leg, burden was on plaintiff to make out a case from which the jury, on the basis of experience, might draw the conclusion that negligence was the most likely explanation and plaintiff in making out a case could be aided by certain inferences such as that involved in the doctrine of *res ipsa loquitur*.

#### 4. Evidence ⇨54

To be entitled to inference the plaintiff must prove by preponderance of evidence, the facts that give rise to the inference.

#### 5. Trial ⇨142

If facts which give rise to inference are uncontradicted, then the court instructs that the inference arises, but if facts which give rise to the inference are in dispute, then, before the inference can arise, the jury, not the court, must pass on this disputed question of fact.

#### 6. Hospitals ⇨8

In patient's action against hospital based on scarring which allegedly occurred on patient's leg because of warm compress treatment applied to infected area of leg by nurses, whether scarring occurred as result of negligence on part of employees



of hospital or whether it occurred as a normal and natural result of the necessary treatment or of osteomyelitis and blood poisoning and whether the hospital was in control of the patient when the burn occurred were questions for the jury.

#### 7. Hospitals ⇐8

In patient's action against hospital based on scarring which allegedly occurred on patient's leg because of warm compress treatment applied to affected area of leg by employees of hospital, instructions on *res ipsa loquitur* were proper.

---

James F. Boccardo, San Jose, Lewis J. Yapp, San Jose, of counsel, for appellants.

Bell, Anderson, Ropers & Majeski, Redwood City, for respondent.

PETERS, Presiding Justice.

This is an action brought through her guardian *ad litem* by Catherine Milias, a minor for her injuries, and by her father for his medical expense, all alleged to have been caused or incurred as a result of the negligence of the defendant, the Wheeler Hospital. The hospital is the sole defendant. At the trial the cause of action by the father was, by consent, dismissed. The jury brought in a verdict in favor of the hospital. From the judgment entered on that verdict the plaintiff appeals. Her principal contention is that the instructions on *res ipsa loquitur* were erroneous.

The facts are as follows: In February of 1948 Catherine was about eight and a half years of age. On Lincoln's birthday she bruised the calf of her right leg while riding her bicycle. By February 14th the leg was quite painful and she was put to bed by her parents. On the 15th the leg was worse, and on the 16th her father requested Dr. Melkonian to call at the house to see the child. The doctor was told that a short time before the bicycle incident the child had had an infected thumb, which had caused a high fever, nausea, and a swelling of the right leg. He discovered that the thumb was still inflamed. He ascertained that the right leg was swollen, tender and

red, that the child's heart was beating very rapidly, and that she had a temperature of 104.8. He knew that the child was desperately ill, diagnosed the condition as osteomyelitis, believed her chances of recovery were slim, and advised immediate hospitalization. The child was taken to Wheeler Hospital, where she was admitted in a semicomatose condition at 11 a. m. on February 16th. Her temperature was then 105.8. Within half an hour it had risen to 106.4. Laboratory tests confirmed the provisional diagnosis, and also showed that the blood stream had become infected with both staphylococcus and streptococcus germs. Either is serious, but when they appear together the condition is extremely dangerous. Dr. Josephson, who operated on the child on the 17th, believed that, unless she quickly responded to treatment, she would die within a few hours, and it was his belief then that she would probably die.

When Catherine was brought to the hospital Dr. Melkonian prescribed that penicillin and "force fluids" be administered, and that "continuous warm" magnesium sulphate or epsom salt compresses be applied to the right leg, together with a heating pad. The medical evidence is to the effect that for this type of bone and blood poisoning the prescribed treatment was the best that could have been given, and no contention is made to the contrary.

The treatments prescribed by Dr. Melkonian were administered first by nurse Seifkin and then by nurse Thrasher, both employees of the hospital. Seifkin testified that when Catherine was admitted to the hospital the skin of the infected leg was clear except for a red spot above the knee, which Mrs. Milias told her had been caused by the use of a hot water bottle. Seifkin started the warm compress treatment about 2 p. m. and went off duty at 3 p. m., and was replaced by nurse Thrasher. The latter observed that the heating pad was on "low," continued it there, and continued the warm compresses until she went off duty at 11 p. m.

Dr. Melkonian saw his patient many times that day, the last time about 10:30

p. m. On each visit he observed the leg and saw no blistering. He ordered the warm compresses continued. On the morning of the 17th he observed a blister on the calf of the leg, and ordered the compresses discontinued. He testified that each time he saw the leg, compresses, and heating pad, the conditions he saw were in accord with his orders; that he was not concerned with a possible burn, but with saving the child's life; that the burn of which the child complains was simply an unexpected result of the necessary treatment; that the compresses were essential to save the child's life; and that the burn was as much the result of the child's general condition as anything else.

When nurse Thrasher went off duty at 11 p. m. on February 16th, she was replaced by nurse Pyle, who was employed by Mr. Milias, and who was not an employee of the hospital. Her testimony was not too clear. She testified that when she came on duty, Catherine's condition was very poor. Her leg was red and swollen, and under the moist dressing was one large blister and several smaller ones. She stated that she called these blisters to the attention of some unidentified nurse, and she did enter, on the patient's medical report, a statement about the blisters. On direct examination she could not remember whether the heating pad was being used when she came on duty, and on cross-examination stated that it was not then being used. But she testified that the dressings on the leg were then "hot." She stated that she could not remember whether she continued the hot compresses, but she was positive that she carried out the doctor's orders, and the order sheet called for compresses. She also testified that she may have discontinued the compresses after she discovered the blisters.

These various measures were successful in bringing the poisoned condition to a head, and in limiting its diffusion. Dr. Josephson, an orthopedic surgeon, drained the infected area on the 17th, and removed a cup and a half of pus. He found the soft tissue of the leg extensively infected. He testified that all concerned were engaged in an all-out effort to save Catherine's

life, and that heat on the leg was necessary in this effort. He also testified that frequently in cases of osteomyelitis, scar tissue of the type on Catherine's leg develops. In a letter to counsel he had stated that when he observed the patient she had a badly swollen leg, that there was a red area "evidently of thermal origin" on the calf; that the compresses had brought the condition to a head, and thus limited the area of infection; that it was too bad that the patient was in such a condition that she did not feel the overhot applications; and that no great amount of tissue was destroyed by the burn. He testified that the infection from which Catherine suffered would affect the amount of heat that she could take, and that even a compress of 100 degrees Fahrenheit might cause a reaction to a massively infected area.

A plastic surgeon, Dr. Brock, first testified that the condition could have been caused by a thermal agent externally applied, and that Catherine had a third degree burn, but also testified that the scarring could have been caused by the osteomyelitis.

All of the testimony is to the effect that at all times the electric heating pad was on "low" temperature.

Catherine made a complete recovery, after some twenty-three days in the hospital. She has full use of her legs, and has no limp. The scars are not obvious if she wears hose.

The trial court instructed on the doctrine of *res ipsa loquitur* but did so in such a way as to leave to the determination of the jury whether or not it would apply the doctrine. It is asserted by appellant that this was error and that the trial court should have instructed, as a matter of law, that the doctrine was applicable.

[1,2] There can be no doubt that factually the case is one where the doctrine may be applicable. *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; *Engelking v. Carlson*, 13 Cal.2d 216, 88 P.2d 695; *Huffman v. Lindquist*, 37 Cal.2d 465, 234 P.2d 34; *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 47 P.2d 737; *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436; *Dierman v. Providence Hospital*, 31

Cal.2d 290, 188 P.2d 12. The elements of the doctrine are thus summarized in *Ybarra v. Spangard*, supra, 25 Cal.2d at page 489, 154 P.2d at page 689: "The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. [Citing cases.]"

The trial court first instructed as to the elements of the doctrine. No complaint is made of that instruction. Then the court gave the following instruction: "Under the circumstances just mentioned the defendant will not be held blameless except upon a showing, either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented."

Appellant urges that by reason of the phrase "Under the circumstances just mentioned" the application of the doctrine was left to the discretion of the jury. She offered an instruction, which was refused, to the effect "You are instructed that the accident in this case is of such a character that it speaks for itself. Under such circumstances the defendant will not be held blameless except upon a showing" etc., and contends that such instruction should have been given. The thought expressed by appellant is that if instructions on *res ipsa*

*loquitur* are given, it must be assumed that all the elements which bring the doctrine into operation are present, and that it should not be left to the jury to apply the doctrine or refuse to do so.

Appellant also complains of an instruction that starts off "If, and only in the event you should find that there was an accidental occurrence as claimed by plaintiff \* \* \* then from the happening of the accident involved there arises an inference" etc. Appellant contends that her offered and rejected instruction to the effect that "From the mere happening of the accident involved in this case, as established by the evidence, there arises an inference" etc. should have been given.

[3-5] Undoubtedly the challenged instructions left to the jury the question of whether or not, under the facts, the doctrine should be applied. Such instructions correctly stated the law. The burden is on the plaintiff to make out a case from which the jury, on the basis of experience, may draw the conclusion that negligence is the most likely explanation. In doing this, the plaintiff may be aided by certain inferences such as that involved in the doctrine of *res ipsa loquitur*. But such inferences are based on common experience. To be entitled to the inference the plaintiff must prove, by a preponderance of evidence, the facts that give rise to it. If such facts are uncontradicted, then, of course, the court instructs that the inference arises. But if, as here, the facts that give rise to the inference are in dispute, then, before the inference can arise, the jury, and not the court, must pass on this disputed question of fact.

[6] One of the basic facts that the plaintiff must prove before the doctrine is applicable is that the occurrence is one that ordinarily does not happen unless there was negligence. On this issue plaintiff produced enough evidence which, if believed, would give rise to the doctrine. But there was substantial evidence that, without negligence, scarring such as here occurred was a normal and natural result of the necessary treatment or of the



osteomyelitis and blood poisoning, or that her condition was such that she was unable to stand the warmth necessary to save her life. In other words, if this evidence was believed, no "accident" at all occurred. If the jury believed this evidence, the inference would not arise. There was also the question of whether the hospital, the sole defendant, was in control of the patient when the burn occurred, that is, whether the hospital nurses or nurse Pyle, hired by Mr. Miliias, was in charge. These were jury questions. See generally, Prosser, *Res Ipsa Loquitur* in California, 37 Cal. L.Rev. 183, 194; *Moore v. Belt*, 34 Cal.2d 525, 212 P.2d 509; *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886; *Nelson v. Parker*, 104 Cal.App. 770, 286 P. 1078; *Welch v. Sears, Roebuck & Co.*, 96 Cal. App.2d 553, 215 P.2d 796; *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94.

[7] If appellant were correct, the trial court could instruct on *res ipsa loquitur* only where it could be said, as a matter of law, that all the conditions giving rise to the doctrine are present. That is not and should not be the law. There are many cases, such as the instant one, where the existence or non-existence of the conditions giving rise to the doctrine are questions of fact which must be decided by the jury before the doctrine is applicable at all. The challenged instructions correctly stated the law.

The appellant also challenges the sufficiency of the evidence to support the verdict. The summary of the evidence already given demonstrates that there was convincing and substantial evidence to support the implied finding that negligence was not present in this case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

SOUTHWESTERN INV. CORP. v. CITY  
OF LOS ANGELES.

L. A. 19306.

Supreme Court of California, in Bank.

March 21, 1952.

Rehearing Denied April 17, 1952.

Southwestern Investment Corporation filed in District Court of Appeal a notice of motion to recall a remittitur and reinstate a cause which had been decided by the Superior Court, Los Angeles County, Caryl M. Sheldon, J., in favor of defendant City of Los Angeles and affirmed by said District Court of Appeal. The motion was granted, 235 P.2d 388, on ground of court's misapprehension of facts when it rendered prior decision. The City of Los Angeles, filed in the Supreme Court a petition for hearing and a petition for writ of prohibition. The Supreme Court, Shenk, J., held that recall of remittitur could not be used, to secure an additional rehearing on the merits and thereby to obtain a modification of judgment or a different judgment.

Motion to recall remittitur retransferred to District Court of Appeal with directions to deny motion; petition for writ of prohibition denied.

Carter, J., dissented.

## 1. Appeal and Error ⇨1218

A remittitur may be recalled on reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which will justify granting of order, and grounds of recall are fraud, mistake, or inadvertence, but not correction of judicial error. Rules on Appeal, rule 25(d).

## 2. Appeal and Error ⇨1218

Fact that plaintiff in action to impose resulting trust on land held by city had spent three and one-half years after affirmation of judgment for city appealing to city council, newspapers, organizations and citizens for relief did not excuse timely filing of petition for recall of remittitur since time spent in the unsuccessful pursuit of non-judicial redress does not excuse failure to pursue judicial course when law requires that that course be initiated promptly.

## 3. Appeal and Error ⇨1218

An appellate court has no appellate jurisdiction of its own judgment and has no

power to recall a remittitur for the purpose of reconsidering or modifying its judgments on the merits.

## 4. Appeal and Error ⇨1218

Elements of fraud or imposition or mistake of fact or inadvertence which are necessary to the recall of a remittitur are not present when court renders judgment advisedly upon the case as presented by the parties.

## 5. Appeal and Error ⇨1218

Elements of mistake or inadvertence, when used as basis for recall of a remittitur, are not supported by declaration that on presentation of same facts and matters in issue the court now arrives at a different conclusion on the merits.

## 6. Appeal and Error ⇨1218

A motion to recall a remittitur is not justified as an opportunity to parties to relitigate their cause nor to appellate court to redetermine the merits.

## 7. Appeal and Error ⇨1218

On petition for recall of remittitur, allegations of inconsistencies in findings of trial court and supposed contradictions on face of opinion of District Court of Appeal, indicated that if District Court of Appeal were under misapprehension it was not produced by elements of fraud or imposition or mistaken assumption of fact which would entitle petitioner to recall, and petitioner would not be granted recall in order to get additional hearing on merits and thereby to obtain modification of judgment or different judgment.

---

Harold B. Cooper, El Monte, for appellant.

Ray L. Chesebro, City Atty., John L. Flynn, Asst. City Atty., and Weldon L. Weber, Deputy City Atty., all of Los Angeles, Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., and Harold Arman, all of Los Angeles, as amici curiae, for respondent.

SHENK, Justice.

On January 28, 1946, the District Court of Appeal, Second District, Division One,

affirmed a judgment adverse to the plaintiff, Southwestern Investment Corporation, in an action to establish a resulting trust by virtue of certain transactions had with the defendant, City of Los Angeles. 72 Cal. App.2d 689, 165 P.2d 497. A petition for rehearing was denied on February 14, 1946. A petition for hearing in this court was denied on March 28, 1946. The remittitur issued and was filed in the superior court on April 2, 1946.

On November 3, 1950, the plaintiff filed in the District Court of Appeal a notice of motion to recall the remittitur and reinstate the cause. The motion was grounded on misapprehension of the facts and on inadvertence caused by fraud or imposition on the court. The motion was granted on September 12, 1951, on the ground of the court's misapprehension of the facts when it rendered the prior decision. The defendant filed in this court a petition for hearing and a petition for the writ of prohibition. On November 8, 1951, the petition for hearing was granted.

The petition for hearing was granted because of a serious doubt arising as to whether the effect of the granting of the motion was in fact to cure an inadvertence or mistake of the court or was merely to correct judicial error. The sufficiency of the explanation to excuse the delay in making the motion was also considered to require investigation. The opinion on its face was deemed insufficient to justify the order and might create a dangerous precedent, as will appear from the following discussion.

As is quite usual in such cases, the moving party seeks a modification of the judgment. In this case the plaintiff seeks a modification by correction of the trial court's findings to accord with the asserted facts, and a reversal of the adverse judgment with possible directions to enter judgment in its favor.

[1]. That a remittitur may be recalled on the reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth the facts which will justify the granting of the order is now determined by Rule. Rule 25(d), Rules on Appeal; 36 Cal.2d

at p. 22. The question as to when the facts constitute grounds for the granting of the motion is resolved by the case law. Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error. *Rowland v. Kreyenhagen*, 24 Cal. 52, 59; *Trumpler v. Trumpler*, 123 Cal. 248, 252-253, 55 P. 1008; *Estate of Ross*, 189 Cal. 317, 318, 207 P. 1014; *Isenberg v. Sherman*, 214 Cal. 722, 725-726, 7 P.2d 1006; *In re Rothrock*, 14 Cal.2d 34, 38-39, 92 P.2d 634; *In re McGee*, 37 Cal.2d 6, 229 P.2d 780; *Haydel v. Morton*, 28 Cal. App.2d 383, 385, 82 P.2d 623; *Chaney v. L. A. County, etc., Retirement Board*, 61 Cal.App.2d 701, 703, 143 P.2d 707; *Ellenberger v. City of Oakland*, 76 Cal.App.2d 828, 830, 174 P.2d 461. In the McGee case it was pointed out that a decision is inadvertent if it is the result of oversight, neglect or accident, as distinguished from judicial error. In *Chinn Ott Wong v. Title Ins. & Trust Co.*, 91 Cal.App.2d 1, 204 P.2d 387, an order recalling the remittitur was vacated when on analysis it appeared that the purpose of the recall was merely to amend the judgment on appeal.

The salient facts, given in greater detail in 72 Cal.App.2d 689, 16 P.2d 497, which were before the court on the appeal are the following:

Henry G. Weyse formerly owned approximately 15 acres at Washington Boulevard and Alameda Street in Los Angeles which formed a depression about 400 feet wide known as the Diamond Pit. In May 1927 Weyse gave to the plaintiff corporation on a 50% royalty basis the exclusive leasehold right to use the pit for dumping purposes. On November 22, 1929, Weyse deeded to the city for a consideration of \$175,000 a 90 foot right of way (later amended to 90 feet and the necessary slopes) through the pit for the purpose of extending Washington Boulevard. Weyse granted a temporary easement around the southerly side of the pit for rerouting Washington Boulevard. Through various written negotiations had among the plaintiff, the city and the Board of Public Works, grant deeds to the remaining acre-



age passed through escrow from Weyse to the city; and quit claim deeds containing no reservations or exceptions were executed to the city by the plaintiff upon payment of \$8500. At some time during the transactions delinquent taxes and penalties to the extent of about \$32,000 were cancelled. See *City of Los Angeles v. Ford*, 12 Cal.2d 407, 84 P.2d 1042. The deeds, which provided for reversionary interests when the fill was completed, were accepted by the city on November 26, 1935. On December 18, 1935, the Board of Public Works wrote to the plaintiff giving consent to the use by the plaintiff of the southerly portion of the pit for dumping purposes. This consent was without authorization by the city, and on June 10, 1936, the city evicted (the plaintiff says "ejected") the plaintiff from the pit.

On December 18, 1938, the plaintiff commenced the action to impress a trust in the nature of a resulting trust on the defendant to protect the dumping rights which it alleged were retained by virtue of the transactions involved. The trial court's judgment determined that the city acquired a fee title and all rights of ownership and possession in and to the pit, and that the cause was barred by laches. The plaintiff appealed on a settled statement. In the decision on appeal the court noted that fraud was not an issue in the case, that the pleadings contained no allegations of mistake, and that the plaintiff did not seek cancellation or reformation of the instruments in question. The plaintiff sought to base its cause for impressing a trust of its dumping rights upon representations and negotiations occurring prior to the execution of the deeds executed by the plaintiff, which were had not with the city council but with members of the Board of Public Works and the City Engineer. The court pointed out facts indicating that the plaintiff was aware before executing the deeds that there could not be amendment of the escrow instructions to reserve its dumping rights without authorization by the city council. The court held that without reformation, the nature of the title acquired was determined by the clear and unambiguous language of the instruments

and not by the declarations of the parties in the negotiations or agreements otherwise; also that there was no instrument in the nature of a defeasance which could be considered a part of the transaction.

Answering the plaintiff's contention that the quitclaim deeds were delivered solely to enable the city to obtain a cancellation of the taxes, the court stated that there was no evidence to justify the conclusion or to rebut the presumption that official duty had been regularly performed. The court rejected the contention that the \$8500 consideration received by the plaintiff was grossly inadequate in the absence of the issues of fraud, mistake or any of the grounds for cancellation or reformation of the instruments. The finding of laches was not considered because of the adequacy of other grounds for determination of the issues on appeal. The court rejected as without merit additional contentions in criticism of the findings and conclusions and the failure to find on material issues. The judgment of affirmance followed.

[2] More than three and a half years elapsed after the filing of the remittitur before the plaintiff sought to have it recalled. An affidavit of its president was submitted on the motion, the major portion of which is devoted to an explanation of why the plaintiff did not make the move sooner. The averments show that in this interim the affiant was attempting to invoke other means of redress to regain the plaintiff's dumping rights, such as by persuasion upon the city council voluntarily to act in the matter, and by appealing to local newspapers, organizations and citizens for support of an equitable claim pursued before the Council. Preparation of voluminous notes and attempts to engage attorneys might excuse a reasonable delay. But time spent in the unsuccessful pursuit of non-judicial redress does not excuse the failure to pursue the judicial course when the law requires that that course be initiated promptly. Cf. *Ellenberger v. City of Oakland*, supra, 76 Cal.App.2d 828, 836, 174 P.2d 461. In the *Rothrock* case, supra, 14 Cal.2d 34, 92 P.2d 634, the motion to recall the remittitur was granted about three years after the judgment on appeal became

final, but the defendant had promptly and diligently invoked redress through the courts. There it appeared that the judgment of this court on the appeal was mistakenly based on the assumption that the defendant in the criminal prosecution had not made a motion for a new trial. The record showed otherwise and it became obvious that not to correct the court's mistake by amending the judgment would result in a gross injustice.

Unlike the Rothrock case the present situation does not involve the mistaken assumption of a procedural fact upon which the judgment of the court depended. Here the judgment of affirmance was based on the holding that the trial court correctly determined that the executed instruments were clear and unambiguous and conveyed the entire title and possessory rights without any reservations or exceptions and under circumstances which did not admit of a resulting trust. On the motion to recall the remittitur the plaintiff sought to establish that the court decided the cause "under a misapprehension of the true facts." In the petition the plaintiff alleges inconsistencies in the findings of the trial court and supposed contradictions on the face of the opinion of the District Court of Appeal. It is unnecessary to take up seriatim the finding by finding and paragraph by paragraph method adopted by the plaintiff. The plaintiff's exposition indicates that if any so-called misapprehension existed in the mind of the court, it was not produced by any fraud or imposition nor based on the mistaken assumption of the existence or non-existence of a fact of record or otherwise. There is no inconsistency between the finding that in 1927 the plaintiff obtained the exclusive possessory rights in the Diamond Pit and the conclusion that ultimately the city had those possessory rights by virtue of the quit-claim deeds from the plaintiff. In view of the trial court's finding and the appellate court's holding of evidentiary insufficiency, the plaintiff's insistence that these instruments were executed solely to permit the city to obtain cancellation of the tax liens is of no avail on this motion

[3] The documentary and other facts on which the plaintiff now relies were matters of record before the District Court of Appeal when it determined the points presented on the appeal. The asserted inconsistencies in the findings and contradictions in the opinion were presented to that court on a petition for rehearing and to this court on a petition for hearing. In sum and substance all that the plaintiff is now asking is that the District Court of Appeal reverse itself. But an appellate court has no appellate jurisdiction of its own judgment; and it has no power to recall the remittitur for the purpose of reconsidering or modifying its judgment on the merits.

[4-7] The decisions above cited establish that the extraordinary remedy by motion to recall the remittitur may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence. None of these is present when the court renders the judgment advisedly upon the case as presented by the parties. *Estate of Ross*, supra, 189 Cal. 317, 318, 207 P. 1014. Here the court's asserted misapprehension of the evidentiary facts is not a ground of recall. There is no fraud. There is no mistake or inadvertence, such as in the Rothrock case where the court failed to note the existence of a fact of record which materially affected the result as distinguished from the determination on the merits. Mistake or inadvertence is not supported by a declaration that on the presentation of the same facts and matters in issue the court now arrives at a different conclusion on the merits. A motion to recall the remittitur is not justified as an opportunity to the parties to relitigate their cause nor to the appellate court to redetermine the merits. The plaintiff used all the available opportunities for reconsideration of the cause. It may not now by the device of a motion to recall the remittitur secure an additional rehearing on the merits and thereby obtain a modification of the judgment or a different judgment. *Isenberg v. Sherman*, supra, 214 Cal. 722, 725, 7 P.2d 1006; see also *Chin Ott Wong v. Title*

Insurance & Guaranty Co., supra, 91 Cal. App.2d 1, 2, 204 P.2d 387.

It follows from the foregoing that the motion to recall the remittitur should be denied. But since the motion is to the District Court of Appeal, the correct disposition after petition for hearing granted is to return the proceeding to that court with appropriate direction. See *Heroux v. Atchison, T. & S. F. Ry. Co.*, 14 Cal.2d 285, 93 P.2d 805. This course renders unnecessary the consideration or disposition of the petition for the writ of prohibition except to deny it. Accordingly the petition for the writ of prohibition is denied and the motion to recall the remittitur is retransferred to the District Court of Appeal, Second Appellate District, Division One, with directions to deny the motion.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion correctly states the rule as announced by the decisions of this court and the District Courts of Appeal with respect to when a remittitur may be recalled, and it is in the application of the rule to the facts of the case at bar that I disagree with the majority. On the other hand, I agree with the views expressed in the opinion prepared by Mr. Presiding Justice White when this case was before the District Court of Appeal, Second Appellate District, Division One. 235 P.2d 388.

The line of cleavage between what constitutes mistake or inadvertence and judicial error is somewhat obscure and there would be little value in suggesting supposititious cases which would justify the application of the rule. There are, however, cases in the reports which seem to me to go farther than we would be required to go in the instant case to sustain the holding of the District Court of Appeal that the remittitur be recalled. In *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 30 P.2d 30, this court was faced with a problem arising out of prior decisions of the Dis-

trict Court of Appeal in the same case. In that case the District Court of Appeal had rendered an opinion reversing the judgment, *Crum v. Mt. Shasta Power Corp.*, 117 Cal.App. 586, 4 P.2d 564; *Albaugh v. Mt. Shasta Power Corp.*, 117 Cal.App. 612, 4 P.2d 574, and a petition for hearing was denied by this court. Thereafter a motion to recall the remittitur was made in the District Court of Appeal and denied by opinion, *Crum v. Mt. Shasta Power Corp.*, 124 Cal.App. 90, 12 P.2d 134; *Albaugh v. Mt. Shasta Power Corp.*, 124 Cal.App. 779, 12 P.2d 137, and a petition for hearing was denied by this court. The case was then retried and judgment was again recovered by plaintiff, which judgment was reviewed by this court by its decision reported in 220 Cal. 295, 30 P.2d 30. Because of misstatements of both fact and law contained in the opinions of the District Court of Appeal, this court was confronted with the problem of reconciling irreconcilable conflicts in the law as declared by the District Court of Appeal in that case. This court purported to reconcile these conflicts by a process of reasoning which in effect nullified the holding of the District Court of Appeal on the basic legal theory upon which its decisions were rendered. Although the decisions of the District Court of Appeal had become final and the rules of law therein announced had become the law of the case, this court was compelled to say that it could not accept the rules of law therein announced and decided the case in disregard of those rules.

Likewise, in the case of *Greenfield v. Mather*, 32 Cal.2d 23, 194 P.2d 1, this court was required to hold that two prior decisions of this court in a companion case, *Mather v. Mather*, 22 Cal.2d 713, 140 P.2d 808; *Id.*, 25 Cal.2d 582, 154 P.2d 684, were erroneously decided because of a misapprehension of the facts, and that even though the judgments in those two prior decisions had become final, they could not be followed by this court and were not *res adjudicata*.

I do not think it can be said that the mistakes made in both the *Crum* and *Mather* cases cannot be classified as judicial error. In the *Crum* case the District



Court of Appeal so garbled and misstated the facts that the rules of law which it applied could not be made applicable to the facts disclosed by the record, and when the case finally got before this court on the second appeal, and the true facts were stated, this court found it impossible to apply the rules of law which had been announced by the District Court of Appeal. There can be no doubt that the misstatement of the facts and the misapplication of the rules of law by the District Court of Appeal in that case amounted to judicial error. While this court had the opportunity to correct such error both on a petition for hearing after decision of the case on its merits, and on petition for hearing after denial of plaintiff's motion to recall the remittitur, it did not do so. So the responsibility for the judicial error involved in that case was cast upon this court as well as the District Court of Appeal. In the Mather case the error consisted of a misapprehension of the facts by this court. There can be no question but that such misapprehension was due to judicial inadvertence and amounted to judicial error.

I can see no distinction in recalling a remittitur to correct such error or overruling or refusing to follow a prior decision of this court or of a District Court of Appeal in the same case regardless of whether we term the prior adjudication as the law of the case, *res adjudicata*, or *stare decisis*. In other words, my theory is that if an appellate court makes a mistake in stating the facts of a case which results in a decision contrary to what should have been reached had the facts been correctly stated, it should have the power, and it is the duty of such court when the true facts are called to its attention, to recall the remittitur and render a decision in accordance with the correct state of facts. I believe this should be the rule regardless of whether the misstatement of fact in the prior decision is due to ignorance, caprice or fraud on the part of the court or the lawyers or litigants involved.

Fear that such a rule may have the effect of destroying the finality of judgments and injuriously affecting rights of

innocent third persons which may intervene between the erroneous decision and the recall of the remittitur, may be obviated by the recognition of the validity of any rights of innocent third parties which have intervened. Under this rule a court would not be faced with the unhappy dilemma of seeing justice thwarted because of its impotency to correct an error for which it alone is responsible.

I would permit the decision of the District Court of Appeal recalling the remittitur in this case to stand, to the end that it may reconsider and decide the case anew on its own merits.

Rehearing denied; CARTER, J., dissenting.



38 Cal.2d 571

**In re LINGENFELTER'S ESTATE**

**DE ARMOND v. TUCKER et al.**

Sac. 6131.

Supreme Court of California, in Bank.

March 14, 1952.

Rehearing Denied April 3, 1952.

Proceedings in the matter of the estate of Vivian Lingenfelter, deceased, in nature of will contest by Lenore DeArmond, opposed by Madge and E. F. Tucker, proponents of will. The Superior Court, Yuba County, Arthur Coats, J., entered judgment for Lenore DeArmond, and entered order denying motion for judgment notwithstanding the verdict, and Madge and E. F. Tucker appealed. The Supreme Court, Edmonds, J., held that evidence was insufficient to support jury's verdict that testatrix was without testamentary capacity at time of execution of will, and established that there had been no exercise of undue influence by proponents of will.

Judgment denying probate reversed.

Schauer and Carter, JJ., dissented.

Prior opinion 234 P.2d 125.

**1. Wills** Ⓒ53(2), 55(4)

Testimony concerning isolated acts, foibles, idiosyncracies, mental irregular-

ities or departures from normal which do not bear directly upon and influence testamentary act is not sufficient to set aside, on ground of incompetency, bequests of property in will, but actual mental condition of decedent at time of execution of will is question to be determined, and evidence tending to show unsoundness of mind either before or after execution of the will is important only in so far as it tends to show mental condition at time of execution of will.

## 2. Wills ⚡55(1)

In order for person who contests will on ground of incompetency of testator to overcome presumption of sanity, contestant must show affirmatively and by preponderance of evidence that testator was of unsound mind at time he executed will.

## 3. Wills ⚡55(1)

In will contest based on asserted incompetency of testatrix, wherein attorney who prepared will testified that testatrix was of sound mind at time of execution of will, and other witnesses testified as to isolated acts unrelated to testamentary capacity and on which they based their opinion that testatrix was of unsound mind, evidence was insufficient to sustain jury's verdict that testatrix was of unsound mind at time of execution of will.

## 4. Wills ⚡31

Mental derangement sufficient to invalidate will must either be insanity in such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion, and even in latter class of cases, it is not sufficient to merely establish that testator was victim of some hallucination or delusion; but evidence must establish that will itself was creature or product thereof.

## 5. Wills ⚡55(8)

Fact that testatrix committed suicide subsequent to execution of will, while relevant upon question of sanity and testamentary capacity, standing alone was insufficient to show insanity so complete as to destroy testamentary capacity.

## 6. Wills ⚡55(3)

In will contest based on asserted incompetency of testatrix, wherein there was testimony that testatrix was violently jealous of her husband and that her husband's teasing had occasionally set off rage, but there was no evidence connecting jealousy with testamentary disposition by testatrix, evidence was insufficient to establish insane delusion which influenced testatrix' will.

## 7. Wills ⚡31

Testamentary capacity does not depend upon testatrix' ability to reason logically or upon her freedom from prejudice, for belief may be illogical or preposterous, without being evidence of insanity.

## 8. Wills ⚡50

A testator is of sound and disposing mind and memory if, at time of making his will, he has sufficient mental capacity to be able to understand nature of act he is doing, to understand and recollect nature and situation of his property, and to remember and understand his relation to persons who have claims upon his bounty and whose interests are affected by provisions of instrument.

## 9. Wills ⚡55(1)

In will contest based on assertion of incompetency of testatrix, wherein it appeared that testatrix had set down her wishes in her own handwriting in form of holographic will, and that she had thereafter sought legal advice as to whether it was good will legally, and had executed formal will in accordance therewith at attorney's office, record established that testatrix comprehended nature of her testamentary act.

## 10. Wills ⚡55(9)

In will contest based on asserted incompetency of testatrix, record established that testatrix fully comprehended nature and situation of her property.

## 11. Wills ⚡52(2), 55(10)

The unnatural provisions of will are element supporting inference of undue influence when testament is attacked on that ground, and are of like value when it is claimed that testator was laboring under

hallucinations which had caused him to make an unreasonable or unjust discrimination against some of his heirs at law, but when mental incapacity is ground of attack, dispositive clauses of will are not, in and of themselves, evidence of mental incapacity which would overcome presumption of sanity and competence.

**12. Wills** ⇨55(10)

Mere fact that testatrix omitted to provide for her brothers in her will was not sufficient to overcome presumption of sanity and competence to make will.

**13. Wills** ⇨55(10)

Where beneficiaries named by testatrix in prior will and who were omitted from will subject to contest, were not related to testatrix and were not natural objects of her bounty, omission of such beneficiaries did not render contested will unnatural, and such omission was not evidence of mental incapacity, although act in such regard might be relevant upon issue of undue influence.

**14. Wills** ⇨163(2)

In absence of confidential relationship between testatrix and party who had purportedly exerted undue influence, no presumption of undue influence arose.

**15. Wills** ⇨166(2)

In will contest based on alleged duress and undue influence exercised by proponent and her husband, wherein testimony was introduced showing that testatrix had distrusted and disliked proponent, evidence was insufficient to establish confidential relationship.

**16. Wills** ⇨157

Consanguinity of itself does not create a fiduciary relationship between testator and one who had purportedly exercised undue influence in procuring execution of will.

**17. Wills** ⇨155(1)

The indicia of undue influence are that provisions of will were unnatural, that dispositions of will were at variance with intentions of decedent, as expressed before and after its execution, that relation existing between chief beneficiaries and decedent afforded to former opportunity to

control testamentary act, that decedent's mental and physical condition was such as to permit a subversion of his freedom of will, and that chief beneficiaries under will were active in procuring instrument to be executed.

**18. Wills** ⇨166(1)

In will contest based on alleged duress and undue influence exercised by proponent of will and her husband, even assuming other elements requisite to establish undue influence were present, evidence of activity by proponent and her husband in procuring execution of will was insufficient.

**19. Wills** ⇨166(4)

Mere fact that person charged in will contest with having exercised undue influence on testatrix accompanied testatrix to attorney's office when will was executed, in absence of any indication that testatrix went there at such person's instigation or request, or that testatrix was not acting entirely in accord with her own desire, could not give rise to inference that there had been active participation by such person in procuring execution of will.

**20. Wills** ⇨155(1)

To overturn will on ground of undue influence, it is necessary not only to show that there was activity on part of beneficiary, but also that the influence was such as, in effect, to destroy testator's free agency and substitute for his own, another person's will.

**21. Wills** ⇨155(1)

Mere opportunity to influence mind of testator even when coupled with interest or motive to do so, is not alone sufficient to show exercise of undue influence.

**22. Wills** ⇨166(1)

Courts must refuse to set aside solemnly executed will of deceased person upon ground of undue influence unless there be proof of pressure which overpowered mind and bore down volition of testator at very time will was executed.

---

Brobeck, Phleger & Harrison, San Francisco, Hewitt & McBride, Yuba City, and



Gregory Harrison, San Francisco, for appellants.

Robert W. Steel, Ray Manwell and Er-ling S. Norby, all of Marysville, for respondent.

EDMONDS, Justice.

Madge Tucker, sister of Homer Lingenfelter, proposed for probate the purported will of Vivian Lingenfelter, his deceased widow. The contest of Lenore DeArmond is based upon the asserted incompetency of the testatrix. It is also charged that the will was executed as the result of duress and undue influence exercised by the proponent and her husband. The appeal is from a judgment entered upon a verdict in favor of the contestant and from an order denying a motion for judgment notwithstanding the verdict.

Homer Lingenfelter was an attorney practicing in partnership with Arthur Powell. On the day Vivian executed the purported will, Homer was seriously ill. He died the following day. One week later, Vivian committed suicide.

Powell was called as a witness by both the proponent and the contestant. As Lenore's witness, he testified concerning the execution of the will. Vivian came to see him, he said, accompanied by Madge, who had been staying with her during Homer's illness. Powell was not in his office when the two women arrived. Upon his return shortly thereafter, he found Vivian and Madge waiting for him in his reception room. Powell asked about Homer and Vivian said that he looked better.

Vivian and Powell went into his private office and closed the door. Madge remained in the reception room. Vivian handed Powell a paper which purported to be her holographic will. He testified that she wanted to know "if it is a good will legally". That instrument, he said, made bequests to a number of friends and acquaintances. It also included a provision for the care of a pet cat. Powell read the document aloud. As he mentioned each of its provisions, Vivian made some comment, expressing in virtually every instance her reasons for the bequest.

According to Powell, by the document Vivian gave the residue of the estate to Madge and her husband. Powell testified that when he read that clause, Vivian said, "They are only my in laws but they have always helped Homer and myself when we have needed them most and they have done more for me than my own family ever has."

Powell testified that he called to her attention the omission of any provision for Homer. Her reply, he said, was that, because Homer was so very ill, "she didn't expect him to make it and in any event she didn't have much of anything of her own". The situation, as Powell explained it, was that "we had really written Homer off". Powell also testified that Vivian told him she omitted her brothers from her will because one had obtained her share of her mother's estate and the other was adequately cared for.

In other conversations related by Powell, he said that they discussed her property and Homer's separate property. He explained to her that she could will one-half of the community property of herself and Homer. "She understood if anything happened to one first the other would get" the marital home which was held in joint tenancy. She told Powell that she had no bank account of her own, only a joint account with Homer for household purposes. They also discussed Homer's life insurance. Powell admitted that he did not mention the value of the accounts receivable on the books of the law partnership.

In answer to a question whether he believed Vivian was capable of writing an introductory clause to a will such as that in the holographic instrument, Powell stated: "I believe she could on either of one or two conditions; one if Homer had helped her, or, two, if she was going by another will, but it was pretty letter perfect."

Vivian asked Powell to have the document she had written prepared as an attested will, naming Madge as executrix. Certain other minor changes were to be made, such as a more specific provision for care of the cat. Powell testified that he dictated a formal will, using the handwrit-

ten document and some notes which he had taken during the conversation as a memorandum. When testifying, Powell could not remember whether the purported holographic will had been dated. He also could not recall what he had done with that document or with his notes, although he had searched for them in his office after Lenore's attorney had asked him to preserve "all Lingenfelter wills".

While the formal will was being prepared, Vivian and Madge left the office and walked about town. Upon their return, Madge remained in the reception room while Vivian went into Powell's private office and executed the will. At that time, Powell told the jury, "very definitely" Vivian was of sound mind. The other attesting witness to the will testified to the same effect.

A number of witnesses described Vivian as being a highly emotional and unstable person. According to the evidence, she would become upset on the slightest provocation. When upset, she would "disintegrate emotionally". She would scream and yell, her eyes would become glassy, she would weep uncontrollably and be beyond the reach of reason. She could have her mind diverted from whatever was bothering her at the moment by talk of something else.

There is also testimony that Vivian was a person of very weak will, easily led and very susceptible to suggestions. She was almost completely dependent upon Homer and unable to manage for herself her own shopping and ordinary routine of life. She could not cope with any unusual situation, such as illness, which demanded extra energy or more responsibility, and had to have help to meet it.

Among other subjects which seemed to upset Vivian were relatives, politics, Franco, Stalin, and the stability of the economic system of the world and of the United States. When emotionally disturbed, she would become extremely excited and abusive of anyone who did not share her views. She was jealous of Homer, and during one tantrum of several days' duration she procured a gun. Her suspicions of Homer's infidelity were unwarranted.

Dr. Bone, who had treated Vivian as recently as one week prior to her execution of the will, testified that she was unwell from the time he first knew her. He said she was an advanced psychoneurotic and a borderline case between sanity and insanity in a medical sense. In his opinion, she could be of unsound mind under the stress of excitement, anger or fear. Dr. Kimmel, long Vivian's physician, testified that she was of sound mind, but psychoneurotic to the extent of being barely able to manage her household.

Mrs. Valetta Morton, who saw Vivian between the two visits to Powell's office, testified that her conversation at that time did not make sense. As stated by this witness: "Well, she was talking about Mr. Lingenfelter being in the hospital one minute. Then she asked me to feel her back and maybe her neck, and to explain she said she was like being in a board, just as stiff as a board, and she said 'I have this severe pain in my head at all times.' Then she would take her glasses, take them off and put them on and raise them up and pull them down, and her eyes looked very glassy." In Mrs. Morton's opinion, Vivian was of unsound mind at that time.

Mrs. Norby testified that when she saw Vivian a day or two after Homer's death Vivian was very upset. Vivian was perspiring, her hands were shaking, she was gray in the face and hesitant in talking. She cried and hung on to Mrs. Norby and talked "like anyone that is in grief". In the opinion of this witness, Vivian had always been of unsound mind and was in that condition at the time of the conversation related to the jury.

Another of Vivian's friends, Marie Countryman, told of attempts to talk with Vivian about the time of Homer's illness. She stated that while Homer was ill, she tried to call Vivian on the telephone. The call was answered by an unidentified woman, who said "that Vivian was reading or was not able to talk". After Homer died, the witness called at the Lingenfelter home but no one answered the door. She again telephoned and the person who answered asked her "to wait a while \* \* \* To wait, not to come out". A day or two

after Homer died, Mrs. Norby visited Vivian at her home. Also, the day after Homer died, Lenore talked to Vivian on the telephone.

According to several witnesses, Vivian often had stated that she considered Madge domineering and greedy. Vivian claimed that Madge had gotten the best of a deal with Homer in connection with their mother's estate. Two weeks before Homer's death, Vivian had said that she did not want Madge to come to her home because she was too domineering. There is testimony quoting Vivian as saying that the Tuckers consistently were conniving to get the Lingenfelter money. The record shows that Vivian expressed her dislike of Madge with screaming and yelling.

Over Madge's objection, evidence was admitted concerning Homer's statements in regard to her and Lenore. This testimony was to the effect that Homer considered the Tuckers to be "money minded", domineering and completely mercenary. As the witnesses related the conversations, he described relations between himself and Madge as a case of "dog eat dog", and said that Madge had "hogged their father's estate". Homer was very bitter because of Madge's treatment of their mother, whom he said she had killed. He especially hated Madge's husband, called him names, and said that he and Madge never would get a penny of his money.

For many years and at the time of his death, the contestant was Homer's secretary. Testimony on her behalf is to the effect that he was most appreciative of her services. The jury was told of conversations in which Homer had said that, when he was starting to practice law, she had worked at a very small salary; she deserved everything he could do to help her and Vivian felt the same way. Other statements attributed to Homer were that, because Lenore had never been paid enough for her services, by his and Vivian's wills she would be taken care of and education provided for her child. Several witnesses were permitted to testify, over objection, as to Homer's declarations of his testamentary provisions.

Lenore testified that in 1937 Vivian executed a will naming Homer as principal beneficiary. Under this will, the contingent beneficiaries were a college, Marie Countryman, and Lenore. The witness also stated that at the same time, Homer executed a will naming Vivian as principal beneficiary and Lenore as the sole contingent beneficiary. Another will of Vivian's made in 1946, was received in evidence. It named as contingent beneficiaries Lenore, Pauline Garewal and the college which was a beneficiary under the 1937 will.

According to the evidence, Vivian often had spoken to intimate acquaintances concerning the testamentary provisions she and Homer had made in their various wills. As stated by one witness, about two weeks before Homer died, Vivian said that her and Homer's wills were written just the way they wanted them. Over objections, his will, which named Lenore as contingent beneficiary and executrix, was admitted into evidence.

It appears that Madge had visited the Lingenfelters occasionally, and corresponded with Homer, but there is no evidence of constant association. On several occasions during Homer's illnesses, Madge came to the Lingenfelters' home at their request and helped in caring for Homer and running the household. By telegram, during Homer's last illness, Vivian asked Madge to come for that purpose. Madge arrived ten days before Homer's death and stayed with Vivian until shortly before the suicide.

Upon this and other evidence, the jury returned a verdict in favor of Lenore upon each of the two grounds of contest. Thereafter a motion for judgment notwithstanding the verdict was denied. The appeal is from the judgment entered on the verdict and also from the order denying the motion.

The proponent of the will asserts that the evidence is insufficient to sustain the jury's verdict either that Vivian was of unsound mind at the time she executed it or that it was procured by undue influence. Also, it is claimed that prejudicial error resulted from the admission into evidence of Homer's hearsay statements and the certificate showing Vivian's brother's commitment to



a hospital for mental diseases. Another point relied upon is that Vivian's hearsay statements were admitted in evidence to prove the truth of facts asserted in such statements. Rulings characterized as being prejudicially erroneous concern certain instructions which were given to the jury and the refusal of other instructions.

Lenore takes the position that the evidence fully supports the jury's verdict upon each ground of contest. She declares that the court correctly ruled upon the admission of evidence and the instructions.

More specifically, Lenore argues, from the evidence the jury had a right to believe that Vivian did not comprehend the nature of her testamentary act. The record fully supports the implied finding, it is said, that at the time Vivian executed the will she was not aware of the character and extent of her property nor did she have in mind the persons who were the natural objects of her bounty.

[1, 2] Accepting that construction of the evidence most favorable to Lenore, it shows no lack of testamentary capacity at the time of the execution of the will presented for probate. There is testimony concerning isolated acts, foibles, idiosyncrasies, mental irregularities or departures from the normal which do not bear directly upon and influence the testamentary act. But much more than that is required to set aside bequests of property. "The actual mental condition of the decedent at the time of the execution of the will is the question to be determined upon a contest based on his alleged incompetency, and evidence tending to show unsoundness of mind either before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. \* \* \* To overcome the presumption of sanity, the contestant must show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed his will." In re Estate of Smith, 200 Cal. 152, 158, 252 P. 325, 328.

The only testimony bearing upon Vivian's state of mind at the time of the execution of the will was that of Powell, the attorney who drew the will, and the other attesting

witness. Both declared that Vivian was of sound mind at the time of execution of the will. None of the evidence offered to support a contrary determination indicates a mental condition which deprived Vivian of testamentary capacity at the time the will was executed.

[3] The most that can be drawn from all of the accounts of her conduct is that she was ill, weak, highly nervous and excitable, and prone to violent outbursts of neurotic temper. The acts which led certain witnesses to express the opinion that she was of unsound mind had no bearing upon her testamentary capacity. Even Mrs. Morton's description of Vivian at a time shortly before the will was executed, shows no more than Vivian's nervousness and concern with the health of herself and her husband. It does not tend to prove mental degeneration denoting incapacity to understand the testamentary act. Mrs. Norby's testimony shows only Vivian's deep grief caused by the loss of her husband.

[4] "Every mental departure from the normal will not destroy a testamentary disposition, \* \* \*.

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." In re Estate of Perkins, 195 Cal. 699, 703-704, 235 P. 45, 47; In re Estate of Arnold, 16 Cal.2d 573, 585, 107 P.2d 25.

[5] "Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act." In re Es-

tate of Wright, 7 Cal.2d 348, 356, 60 P.2d 434, 438; In re Estate of Selb, 84 Cal.App. 2d 46, 49, 190 P.2d 277; In re Estate of Arnold, supra, 16 Cal.2d at page 586, 107 P.2d 25. The fact that Vivian committed suicide is relevant upon the question of sanity, but standing alone it is insufficient to show an insanity so complete as to destroy testamentary capacity. In re Estate of Finkler, 3 Cal.2d 584, 595, 46 P.2d 149; In re Estate of Rich, 79 Cal.App.2d 22, 30, 179 P.2d 373.

[6] Likewise there is no evidence that Vivian suffered from an insane delusion which influenced her will. Unquestionably she was extremely jealous of, and very much in love with, Homer. According to some witnesses, Homer's teasing occasionally had set Vivian off on one of her rages. At other times, coincidental circumstances aroused her jealousy. But this jealousy has not been connected with Vivian's testamentary disposition in any way. Moreover, her jealousy was not a delusion, for it was based upon conduct which had a tendency to create her momentary beliefs. In re Estate of Alegria, 87 Cal.App.2d 645, 655, 197 P.2d 571.

[7] Vivian's other prejudices also fail to establish any delusion. None of them in any way bears upon her testamentary disposition. "Care must be taken to differentiate between mere unreasonable opinions and mental derangements. Testamentary capacity does not depend upon the testatrix' ability to reason logically or upon her freedom from prejudice. A belief may be illogical or preposterous, but it is not therefore evidence of insanity." In re Estate of Perkins, supra, 195 Cal. at page 708, 235 P. at page 49.

[8] "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." In re Estate of Smith, supra; In re Estate of Arnold, supra, 16 Cal.2d at

page 586, 107 P.2d 25, 32; In re Estate of Sexton, 199 Cal. 759, 768, 251 P. 778.

[9] A complete answer to the charge that Vivian did not comprehend the nature of her testamentary act is the uncontradicted evidence showing that she knew exactly what she was doing. She set down her wishes in her own handwriting in the form of a holographic will. Then she sought legal advice as to whether it was a "good will legally". She discussed the provisions of the will with her attorney, explaining the reason for each of them. After she had executed her formal will and left Powell's office, she returned, and asked him to destroy her other will. Nothing in her previous or later conduct indicates that, at any time, she did not fully understand the consequences of her bequests.

[10] The record is also without contradiction that Vivian fully comprehended the nature and situation of her property. The only testimony in this regard is that of Powell. It shows that, for a woman unaccustomed to business dealings, she had a surprisingly good grasp of her property interests. She understood that, outside of the assests of the law partnership, very little would pass under her will while Homer lived. She took into consideration the insurance involved. She understood the nature of the joint tenancy in the house. She mentioned that she had no bank account of her own, only a joint account with Homer for household purposes.

Lenore argues that Vivian was not aware of the character and extent of her property because she did not take into consideration the accounts receivable of the law firm. Conceding this fact, it does not show any failure to understand the nature of her property. In their conversations, as recounted by Powell, she said "Homer had told her he was drawn up pretty well to take care of his doctor bills and expenses and I mentioned I had been drawing up pretty well also because I was building a home, and the general understanding was that there wasn't too much in the partnership account."

Powell testified: "Personally, I forgot to mention anything about the accounts re-

ceivable and didn't consider them or anything like that, and I had no reason to go ahead and estimate them because they weren't due." Apparently Powell was exceedingly generous in his inclusion in Homer's estate of accounts receivable which were not earned until a considerable period of time following Homer's death. That Vivian failed to estimate with detailed accuracy the value of accounts receivable which were largely unearned at the time does not show that she lacked understanding of her interest in the partnership to the extent of the community property involved. The very discussion of the standing of the partners' drawing accounts indicates that she considered the partnership interest in making her will.

[11, 12] Lenore also points to the omission from the will of provision for Homer and for Vivian's brothers as proof that Vivian did not have in mind the persons who were the natural objects of her bounty. However, as was said in *Re Estate of Nolan*, 25 Cal.App.2d 738, 741, 78 P.2d 456, 458, the "unnatural" provisions of a will are "an element supporting an *inference* of undue influence when the testament is attacked on that ground, and (are) of like value when it is claimed that the testator was laboring under hallucinations which had caused him to make an unreasonable or unjust discrimination against some of his heirs at law. But, when mental incapacity is the ground of attack, the dispositive clauses of the will are not, in and of themselves, *evidence* of mental incapacity which would overcome the presumption of sanity and competence."

When Vivian discussed the provisions of her proposed will with Powell, she told him that she made no provision for Homer because she did not expect him to live long. Powell mentioned her brothers. Vivian answered, "You know how I feel about Waldo after he got my share of my mother's estate." As to Earl, she said that he was taken care of. As Powell knew, Earl was an incompetent in a Veterans' Administration hospital.

Lenore points to the testimony of Anne Norby as proof that Vivian did not have in mind the natural objects of her bounty.

Concerning a conversation with Vivian a day or two after Homer's death, Mrs. Norby said that she asked whether Vivian had notified her brothers. According to Mrs. Norby, "she just looked at me and said, 'I don't know where they are.' She added that she hadn't heard from one for seven years". Such testimony does not show that Vivian did not have her brothers in mind. At most, it explains in part her failure to provide for them and indicates that there was an estrangement of long standing.

[13] Lenore further argues that the will was "unnatural" because it omitted beneficiaries who had been included in earlier wills. These beneficiaries were not related to Vivian, and were not the "natural objects of her bounty" in the generally accepted sense of the term. That Vivian changed her will, as she had a right to do, is not evidence of mental incapacity, although her act in that regard may be relevant upon the issue of undue influence. At most, this change is "an additional circumstance entitled to some weight in connection with the other facts shown." In *re Estate of Strachan*, 166 Cal. 162, 166, 135 P. 296, 297.

[14-16] Upon the issue of undue influence, it is argued that Vivian's condition was such as to permit a subversion of her freedom of will, that Madge had an opportunity to control the testamentary act and was active in procuring the execution of the will, that the provisions of the will are unnatural and at variance with pre-existing testamentary intentions, and that the Tuckers benefited unduly by the provisions of the will. Again accepting as true all of the evidence most favorable to Lenore's position, there was no confidential relationship between Vivian and Madge. Lenore does not claim that there was such relationship, and, in view of the testimony which Lenore introduced showing Vivian's distrust and dislike of Madge, Lenore could not well claim that a confidential relationship existed. In *re Estate of Llewellyn*, 83 Cal.App.2d 534, 562, 189 P.2d 822, 191 P.2d 419. Consanguinity of itself does not create a fiduciary relationship. In *re Estate of Llewellyn*, *supra*. A like rule must apply to affinity. Lacking



any confidential relationship, there is no presumption of undue influence.

[17] The indicia of undue influence have been stated as follow: "(1) The provisions of the will were unnatural. \* \* \* (2) The dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed." In re Estate of Yale, 214 Cal. 115, 122, 4 P.2d 153, 155. These, coupled with a confidential relationship between at least one of the chief beneficiaries and the testator, altogether were held "sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury." In re Estate of Yale, supra, 214 Cal. at page 123, 4 P.2d at page 156.

In Re Estate of Graves, 202 Cal. 258, 262, 259 P. 935, 936, it was said that the following facts, among others, are recognized as indicative of undue influence: "The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination."

[18] Conceding that the provisions of Vivian's will were unnatural, that its dispositions were at variance with Vivian's pre-existing testamentary intentions, that

Madge had an opportunity to subvert Vivian's will and that Vivian's condition was such as to permit of a subversion of her freedom of will, and that Madge and her husband benefited by the provisions of the will, there still is no proof of undue influence. Evidence of activity by Madge in procuring execution of the will is entirely lacking.

[19] Active participation in procuring the execution of the will cannot be inferred from the fact that Madge accompanied Vivian to Powell's office, in the absence of any indication that Vivian went there at Madge's instigation or request, or that Vivian was not acting entirely in accord with her own desire. In re Estate of Mör cel, 162 Cal. 188, 197, 121 P. 733; In re Estate of Easton, 140 Cal.App. 367, 376, 35 P.2d 614. Lenore suggests that the purported holographic will which Vivian took to Powell had been dictated by Madge. In that connection she points to Powell's opinion that its legal sufficiency was beyond Vivian's capacity and assumes that the will was written after Homer was admitted to the hospital. The inference that the holographic will was composed during the period that Madge was staying with Vivian has no support whatever in the evidence. There is no showing of when the holographic will was composed or dated.

Lenore also points to testimony that Vivian's friends were requested by Madge not to visit her or to talk to her on the telephone as evidence of Madge's activity in procuring the will. The most that can be inferred from the testimony is that Madge attempted to protect Vivian from visitors during a period when she was under stress. Vivian did have visitors, and did talk to callers on the telephone. Once, Madge suggested to a caller that she should "wait a while" before visiting. At one time, a visitor found no one at home, or a telephone call was unanswered. There is no testimony that any friend was flatly denied permission to see or talk to Vivian.

[20,21] To overturn a will on the ground of undue influence, not only must there be evidence of activity on the part of the beneficiary, it also "is necessary to show that the influence was such as, in

effect, to destroy the testator's free agency and substitute for his own another person's will. \* \* \* Evidence must be produced that pressure was brought to bear directly upon the testamentary act. \* \* \* mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient." In re Estate of Arnold, *supra*, 16 Cal.2d at page 577, 107 P.2d at page 27.

[22] "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'" In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876; In re Estate of Carithers, 156 Cal. 422, 428, 105 P. 127. No such showing is made by the evidence in this case.

The ruling denying the motion for judgment notwithstanding the verdict being a nonappealable order, the purported appeal therefrom is dismissed. In re Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692; In re Estate of Frank, 102 Cal.App.2d 126, 132, 226 P.2d 767; Prob.Code § 1240. The judgment denying probate of the proposed will is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. In my view the evidence is not as a matter of law insufficient to sustain the verdict. The jury were not, as it seems to me the majority opinion indicates, bound to accept as true the evidence favoring the proponent. Disregarding the evidence favoring the proponent, insofar as there is impeachment or conflict, and construing all of the evidence and drawing all permissible inferences in favor of the contestant, I think the jury were justified in believing that the will as offered was not the free, voluntary and rational act of a competent testatrix. The majority opinion, I think, impliedly accepts as true all evidence favoring the proponent and unduly limits the inferences which may

(and should properly) be drawn in favor of supporting the verdict.

For instance, the testimony that Vivian was a highly emotional and unstable person who on the slightest provocation would become upset, "disintegrate emotionally," scream and yell, and be beyond the reach of reason; that she was of very weak will, easily led and very susceptible to suggestions; that she was an advanced psychoneurotic and borderline case between sanity and insanity in a medical sense, and could be of unsound mind under the stress of excitement, anger or fear; that on the same day as, and at a time between, the two visits to Powell's office her conversation did not make sense, her eyes looked glassy, and in the witness' opinion she was of unsound mind; that in another witness' opinion Vivian was of unsound mind and was in that condition a day or two after Homer's death; that Vivian often had stated and indicated her dislike for the Tuckers, and had said the Tuckers were conniving to get the Lingenfelter money; that she had been dependent upon her husband, Homer, not only in matters of business but in the ordinary routine of life; that she could not cope with any unusual situation, such as illness; that at the time of execution of the disputed will Homer was, and was known by Vivian to be, in his last illness; coupled with the facts that Madge Tucker had been staying with Vivian during Homer's illness, that she prevented friends from contacting Vivian during the critical period, that she accompanied Vivian on both of the visits to Powell's office, and that the provisions of the will here involved were contrary to those of prior wills made by Vivian and Homer and contrary to their oft expressed plans and contrary to a statement by Vivian made only two weeks before Homer's death (and four days prior to Madge's arrival and opportunity for continuing influence) that their wills were just as they wanted them, all considered together, in my view supports permissible inferences that Vivian was not fully competent to make a valid will, was susceptible to influence and was unduly influenced by Madge, and that the will in question was

not Vivian's free, voluntary and rational act. If, as the medical expert testified, she could be of unsound mind under the stress of excitement or fear, it would be logical that such condition obtained during the days of Homer's last illness; surely the stress of that period (which culminated in her making the disputed will and committing suicide) was more than the "slight provocation" which ordinarily caused her to "disintegrate emotionally" and be "beyond the reach of reason."

Because under the circumstances of this case no useful purpose would be served by discussing in this dissent issues of law not relied upon in the majority opinion I do not consider them.

Upon the issues discussed in the majority opinion I would resolve the conflict in favor of sustaining the verdict and affirm the judgment.

CARTER, Justice (dissenting).

I dissent.

I agree with Mr. Justice SCHAUER that the evidence produced at the trial of this case is sufficient to sustain the findings of the jury that decedent was of unsound mind at the time the will in question was executed and that the execution of the will was the result of the undue influence of appellants.

It should be remembered that in this case we have not only the verdict of the jury holding the will invalid on both the above mentioned grounds but we have the rulings of the trial judge denying, first, a motion for a nonsuit; second, a motion for a directed verdict; third, a motion for judgment notwithstanding the verdict; and fourth, a motion for a new trial. We also have the unanimous opinion of the District Court of Appeal holding that the evidence is sufficient to support the finding of unsoundness of mind but that the evidence is insufficient as a matter of law to support the finding of undue influence. See *In re Estate of Lingenfelter*, Cal.App. 1951, 234 P.2d 125. Now a majority of this court holds that the evidence is insufficient as a matter of law to sustain the finding of either unsoundness of mind or of undue influence. In so holding the ma-

jority of this court has, in my opinion, gone farther in this case than in any other reported decision in usurping the function of the triers of fact, and have in effect placed itself in the position of the trier of fact in weighing the evidence and passing upon the credibility of the witnesses.

A statute of this state expressly provides that: "Any issue of fact involving \* \* \* the due execution and attestation of the will, or any other question substantially affecting the validity of the will, *must be tried by a jury*, unless a jury is waived \* \* \*." (Emphasis added.) (Probate Code, § 371.) The force and effect of this statute was recently emphasized by a unanimous decision of this court in the case of *Swift v. Superior Court*, 241 P.2d 217. But of what value is the right to have an issue of fact tried by a jury if a majority of this court is to usurp the function of the jury in weighing the evidence and passing upon the credibility of the witnesses as this court has done in this case? The answer is obvious. The effect of the majority decision in this case makes the above cited statute a dead letter, and emphasizes the oft repeated statement by critics of our judicial system that the result in any case depends not upon the law as declared by the Legislature or prior decisions of the courts, but upon the philosophy or point of view of the majority who compose the court of last resort. In other words, we have a government of men and not of law.

I have heretofore stated that the majority decision in this case goes farther in disregarding the determination of the fact finding body than any other decision because it not only nullifies the determination of the jury that Vivian Lingenfelter was of unsound mind when she executed the will in question and was acting under the undue influence of the appellants, but it also disregards the rulings of the trial judge sustaining those findings and the holding of the District Court of Appeal as to the sufficiency of the evidence to support the finding of unsoundness of mind.

Without attempting to review all of the decisions of this court and the District Court of Appeal which have refused to



sustain the findings of juries that will be executed by testators were invalid because of their unsoundness of mind or were procured by undue influence, my review of these decisions discloses that in almost every case where this court has refused to accept the determination of the jury in cases such as this, either the trial court had granted a motion for judgment notwithstanding the verdict or the District Court of Appeal had reversed a judgment based upon a jury verdict vacating and setting aside the will. In *Re Estate of Arnold*, 16 Cal.2d 573, 107 P.2d 25, the trial court had granted a motion for judgment notwithstanding the verdict, the District Court of Appeal affirmed and this court likewise affirmed by a divided court. The same is true of *In re Estate of Finkler*, 3 Cal.2d 584, 46 P.2d 149; *In re Estate of Llewellyn*, 83 Cal.App.2d 534, 189 P.2d 822, 191 P.2d 419; *In re Estate of Russell*, 80 Cal.App.2d 711, 182 P.2d 318; *In re Estate of Agnew*, 65 Cal.App.2d 553, 151 P.2d 126 and *In re Estate of Hopkins*, 136 Cal.App. 590, 29 P.2d 249, this court denied petitions for a hearing after a unanimous decision by the District Court of Appeal reversing the judgment in each of said cases. In *Re Estate of Wright*, 7 Cal.2d 348, 60 P.2d 434, this court by a bare majority of four justices reversed a judgment holding a will invalid on the sole ground of testamentary incapacity where the trial court denied a motion for judgment notwithstanding the verdict which determined that the deceased was of unsound mind at the time the will was executed. All of the foregoing cases hold that the evidence upon which the verdict was based was insufficient to show either unsoundness of mind or undue influence, although, to my mind, the conclusion reached by this court in each of said cases was based upon reasoning in conflict with the general rule that in cases where a trial by jury is a matter of right, all questions as to the weight of evidence and credibility of witnesses are within the sole province of the jury. There can be no doubt that the trend of decision both by this court and the District Courts of Appeal in will contest cases has been in direct

conflict with the last mentioned settled rule which is generally applied in cases other than those involving a will contest. Yet, we find in nearly every decision of this court and the District Courts of Appeal in will contest cases the statement that the appellate courts of this state are bound by the conflict of evidence rule and that questions as to the weight of the evidence and credibility of the witnesses are for the determination of the trier of fact. I think that any unbiased mind after reviewing these decisions will agree with me that in the decisions above referred to the conflict of evidence rule has not been applied and that this court and the District Courts of Appeal in deciding those cases have simply given lip service to that rule and then disregarded it in reaching its conclusion. Such is the situation in the case at bar.

In *re Estate of Teel*, 25 Cal.2d 520, 154 P.2d 384, marks a clear departure from the rule followed in the cases hereinabove cited and similar cases. In the last cited case this court said, 25 Cal.2d at page 525, 154 P.2d at page 387: "Proponent on the other hand produced an array of witnesses who testified as to the soundness of decedent's mind and contradicted other evidence offered by contestant. Attorneys with whom decedent consulted during 1940 regarding the disposition of her property including Mr. Ricks, the draftsman of the will, and other persons acquainted with her, testified that her mind was sound. Evidence is pointed to which it is asserted explains the instances of decedent's conduct above referred to. The value or credibility of those explanations were for the trier of fact. Reference is made to evidence that she handled her first husband's business affairs for many years, he being blind, and that she was a careful and cautious business woman. To review those conflicts is not the function of this court. *The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case.* In *re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; *In re Estate of Miller*, 16 Cal.App.2d 154, 60 P.2d 498; In

re Estate of Ramey, 62 Cal.App. 413, 217 P. 135; In re Estate of Gill, 14 Cal.App. 2d 526, 58 P.2d 734; In re Estate of Doolittle, 153 Cal. 29, 94 P. 240; In re Estate of Snowball, 157 Cal. 301, 107 P. 598; In re Estate of Cashion, 27 Cal.App.2d 689, 81 P.2d 628; In re Estate of Allan, 15 Cal. App.2d 272, 59 P.2d 425; In re Estate of Caspar, 172 Cal. 147, 155 P. 631; In re Estate of Arnold, 147 Cal. 583, 82 P. 252; In re Estate of Webster, 43 Cal.App.2d 6, 110 P.2d 81, 111 P.2d 355; In re Estate of Ross, 199 Cal. 641, 250 P. 676; In re Estate of Johnson, 200 Cal. 299, 252 P. 1049; In re Estate of Barr, 69 Cal.App. 16, 230 P. 181; In re Estate of Russell, 189 Cal. 759, 210 P. 249. An excellent statement of the rule appears in Re Estate of Bristol, *supra*. Although the issue was whether a codicil had been destroyed by the testator, the general rule is stated at page 223 of 23 Cal.2d, at page 690 of 143 P.2d:

"The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. \* \* \* The rule as to our province is: "In reviewing the evidence \* \* \* all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary \* \* \* principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Italics added.*) \* \* \* The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in

the definition is "substantial"; it is a door which can lead as readily to abuse as to practical or enlightened justice.'

"A somewhat different theory was expressed in Re Estate of Casarotti, 184 Cal. 73, 78, 192 P. 1085, 1087, where this court said: 'The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may, in the light of all the facts, be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence.' This statement was quoted in Re Estate of McDonough, 200 Cal. 57, 251 P. 916. The last quoted excerpt cannot be considered as an accurate statement of the law inasmuch as it is contrary to the foregoing declaration in Re Estate of Bristol, *supra*, which has been announced so frequently that it must be considered as controlling. Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." I submit that the majority opinion in the case at bar is in direct conflict with the foregoing declaration by this court.

As Mr. Justice SCHAUER has made a correct summation of the evidence in his dissenting opinion in this case I shall not attempt to do so, but wish to add my unqualified concurrence with his statement that the evidence disclosed by the record is amply sufficient to sustain the findings of the jury as to the invalidity of the will.

I would, therefore, affirm the judgment denying probate of the will here involved.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

110 Cal.App.2d 57

**SYKES v. CITY OF LOS ANGELES.**

Civ. 18595.

District Court of Appeal, Second District,  
Division 1, California.

March 26, 1952.

Hearing Denied May 22, 1952.

Clara Sykes brought action against the City of Los Angeles, a municipal corporation, to recover for injuries sustained by plaintiff when she tripped and fell because of defect in sidewalk. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., entered a judgment for plaintiff, and defendant appealed. The District Court of Appeals, White, P. J., held that whether plaintiff was contributorily negligent was for jury.

Judgment affirmed.

**1. Appeal and Error** ⇨1067

Refusal of trial court to give requested instructions was not prejudicial error, where subject was adequately covered by other instructions given.

**2. Trial** ⇨295(1)

Instructions should not be considered singly, but in their entirety.

**3. Automobiles** ⇨216**Municipal Corporations** ⇨821(25)

The rule that to look and fail to see what is in plain sight is to look without a reasonable degree of care, is properly applicable when a person looks but fails to see a substantial object such as an automobile, but it is not applicable, as a matter of law, in action by pedestrian against city for injuries sustained by pedestrian when she tripped and fell because one of the slabs in sidewalk was tipped so that one edge of slab was above normal sidewalk level.

**4. Municipal Corporations** ⇨806(1)

A pedestrian traveling in or crossing a public street has duty to use ordinary care for his own personal safety and to reasonably exercise the faculties with which he is endowed.

**5. Municipal Corporations** ⇨821(25)

In action by pedestrian against city to recover for injuries sustained when pedestrian tripped and fell because one of the slabs in sidewalk was tipped so that it extended above level of sidewalk, whether pe-

destrian was contributorily negligent in failing to see defect in sidewalk was for jury, though defect was visible for a distance of 50 to 75 feet, and though pedestrian had been over the sidewalk on other occasions.

---

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, W. L. Weber, Deputy City Attys., Los Angeles, for appellant.

Obegi & High, Jess F. High, Van Nuys, for respondent.

WHITE, Presiding Justice.

This appeal is prosecuted by the City of Los Angeles from a judgment against it entered upon the verdict of a jury in an action for damages for personal injuries sustained by plaintiff as the result of a fall on a defective public sidewalk. Appellant city contends that the evidence shows without conflict that plaintiff was guilty of contributory negligence; that the sole proximate cause of her injuries was plaintiff's negligence; that plaintiff had knowledge of the defect in the sidewalk, and under the evidence was not entitled to the benefit of the plea of "momentary forgetfulness" to excuse her negligence; and that the court erred in refusing to give two proffered instructions on the subject of the care required of plaintiff.

Taking up first the question of the refusal of instructions, the city requested an instruction to the effect that while a pedestrian using a sidewalk is not required to keep his eyes fastened constantly on the ground before him, he must exercise ordinary prudence in observing where he is going so as to avoid any peril which ordinary prudence and reasonable use of his eyes would disclose, and a second instruction to the effect that it was plaintiff's duty "to use her sense of sight as an ordinarily reasonable and prudent person would have used it, and to walk in a reasonable manner commensurate with conditions which should have been revealed to her by the ordinary use of her sense of sight".

[1] The failure to give the requested instructions was not prejudicial error. The



subject was adequately covered by other instructions. For example the court instructed the jury as follows:

"General human experience justifies the inference that when one looks in the direction of an object which is clearly visible, that person sees the object. When there is evidence to the effect that one did look but did not see that which was in plain sight, and did not see that which could have been seen, in the exercise of ordinary care, it follows that there is an irreconcilable conflict in such evidence or that the person was negligently inattentive."

"If you find from the evidence that the plaintiff had knowledge of the existence of the defect prior to her accident then you may consider such fact of prior knowledge on the part of the plaintiff in determining whether the plaintiff exercised ordinary care in walking along the sidewalk, and in determining whether the plaintiff was contributorily negligent at the time and place of her accident."

"Contributory negligence as used in these instructions means the want of ordinary care on the part of plaintiff and is not different from negligence, and like negligence must contribute proximately to cause the accident, but it matters not how slight nor in what degree it contributes thereto, provided it is a direct or proximate contributing cause, and therefore if plaintiff was guilty of any negligence, no matter how slight or in what degree, which contributed proximately to cause the accident, plaintiff cannot recover."

[2] It is the rule that instructions should not be considered singly, but in their entirety, and from an examination of the instructions given in the case now engaging our attention we have no hesitancy in saying that the jury was clearly, understandingly and unerringly advised of the law applicable to each and all of the issues framed by the pleadings or raised by the evidence.

Stating the facts in the light most favorable to plaintiff and respondent (facts or evidence relied on by appellant will be mentioned in considering appellant's contentions on appeal), it appears that on the date of the accident to plaintiff and for some time prior thereto, a portion of the side-

walk on the south side of Ventura Boulevard between Sherman Oaks Avenue and Sepulveda Boulevard, had become cracked, and a slab of the walk was tilted in such a way that the south edge of the slab was approximately six inches above the normal sidewalk level, the height of the raised area diminishing in a northerly direction, the extreme northern edge being one-half inch, more or less, above the normal sidewalk level. People other than plaintiff, using the sidewalk, had stumbled at this location.

On September 15, 1949, about 3 p. m., plaintiff, 63 years of age, in company with a friend, was walking along the sidewalk in an easterly direction. She was walking on the south side of the walk, her friend on the north side. They were, according to plaintiff, "just walking along", engaged in conversation. The toe of plaintiff's right foot struck the raised portion of the sidewalk, and she fell, sustaining serious injuries. She testified that she had passed this spot on the sidewalk on previous occasions, knew that there was a defect, but had not noticed the high raised portion of the slab, but only the small irregularity at the north edge.

In support of its contention that the proximate cause of the accident was plaintiff's negligence alone, or that her negligence contributed thereto, the city points out that the condition of the walk was observable from 50 to 75 feet away; that the day was clear; that plaintiff had observed the defect on previous occasions; that there was nothing to distract plaintiff's attention, but that she was occupied in talking to a friend prior to and at the time she fell. "The only substantial conflict" it is urged "is found in plaintiff's testimony as to whether she looked at the sidewalk, occasionally, as she walked along. If she did not look at all, or if she looked but did not see the large obstruction directly in her path, on a clear day, plaintiff was not acting as would a reasonably prudent person under the same or similar circumstances. The facts indicate that she did not look at all, because on twelve previous trips up that same sidewalk she had not fallen, nor even stumbled."

[3] Appellant, therefore, would have applied to this cause the rule that to look

and fail to see what is in plain sight is to look without a reasonable degree of care, *Chase v. Thomas*, 7 Cal.App.2d 440, 46 P. 2d 200. However, the fact that the defect in the sidewalk was visible for a distance of 50 to 75 feet does not compel a conclusion that the plaintiff was negligent in failing to see it. The rule contended for by appellant is of course properly applicable when a person looks but fails to see a substantial object such as an automobile, but it cannot be held that it was negligence as a matter of law for the plaintiff to fail to observe the sidewalk defect hereinbefore described. As observed by respondent, "There is a world of difference between a car or a truck and a raised sidewalk approximately three to four inches, which would be the depth of the portion where plaintiff fell." Whether a reasonably prudent person, situated as was the plaintiff herein, should have observed the raised slab of the sidewalk was unquestionably a problem for the jury.

[4] It is true, as pointed out by appellant, that it is the duty of a pedestrian traveling in or crossing a public street to use ordinary care for his personal safety and to reasonably exercise the faculties with which he is endowed by his Creator for self-protection, *Dunn v. Wagner*, 22 Cal.App.2d 51, 54, 70 P.2d 498. Further, in *Whiting v. National City*, 9 Cal.2d 163, 69 P.2d 990, 991, it was held that "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist" (and must be anticipated by the pedestrian).

But we are not here concerned with a minor defect. The slab of sidewalk on which plaintiff fell was raised six inches at one side of the walk and three to four inches at the point where she stumbled. At the same time, the fact that such defect was visible for 50 to 75 feet is not conclusive that the plaintiff was bound to observe it in the exercise of ordinary care. On the contrary, it could as well be reasonably argued that a pedestrian who looks down a vista of sidewalk for a hundred feet or so and perceives no obstruction might well be held to have exercised the care of an

ordinary prudent person if he continues in his path without further particular observation of the walk. So here, plaintiff may have paid no further attention to the condition of the walk after observing it from a point where the defect was not readily perceptible, and yet it is not for an appellate court to hold as a matter of law that she was guilty of negligence. The unmistakable trend of the decisions, and rightly so, is that the cases in which it may be held that the plaintiff was guilty of contributory negligence as a matter of law are rare. As was said in *Kirk v. Los Angeles Ry. Corp.*, 26 Cal.2d 833, 838, 161 P.2d 673, 675, 164 A.L.R. 1 (quoting from *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826): "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

[5] Appellant's contention that respondent was not entitled to the benefit of the plea of "momentary forgetfulness" is answered by what was said in the case of *Rosella v. Paxinos*, 110 Cal.App. 299, 302, 294 P. 39, 40, and quoted with approval by the Supreme Court in *Gibson v. County of Mendocino*, 16 Cal.2d 80, 89, 105 P.2d 105, "\* \* \* forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence, unless it shows want of ordinary care, the question being one for the jury. (Citing cases.) \* \* \*" As in the case last referred to, under all the circumstances present in the instant case, the question whether the conduct of respondent in walking with and talking to her friend amounted to contributory negligence was for the determination of the triers of fact, and it can-

not be said as a matter of law that respondent's conduct as reflected in the record constituted contributory negligence.

From the foregoing it follows that the judgment should be, and it is, affirmed.

DORAN and DRAPEAU, JJ., concur.



110 Cal.App.2d 153

PEOPLE v. SHANNON et al.

Cr. 4696.

District Court of Appeal, Second District,  
Division 3, California.

March 28, 1952.

Rehearing Denied April 10, 1952.

Defendants were convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of burglary and motion for new trial was denied, and they appealed. The District Court of Appeal, Shinn, P. J., held that when supplemental reporter's transcript had been determined by trial court as correct record of proceedings had for waiver of trial, such would be accepted as full, true and correct record of proceedings had, and judgment as to the defendant concerning whom it did not appear therein, that there had been waiver of jury trial, would be reversed.

Judgments and order denying motion for new trial as to one defendant reversed, and affirmed as to other defendant.

### 1. Criminal Law §1110(1)

Conflicts between reporter's transcript and clerk's minutes should be corrected, if possible, in trial court, and not on appeal.

### 2. Criminal Law §1111(5)

Where conflict existed in reporter's transcript and clerk's minutes as to whether defendants had waived trial by jury, and trial court determined that supplemental reporter's transcript was correct record of proceedings had for waiver of jury trial, reporter's transcript would be accepted as full, true and correct record of proceedings had.

### 3. Criminal Law §1130(2)

Assignment of error on appeal from burglary conviction that evidence was insufficient to justify verdict was entirely insufficient to warrant consideration when point was treated on about one-half page of typewriting in appellants' opening brief and did not attempt to state evidence.

Morris Lavine, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

Moe Marty Shannon, Joseph George Shannon and Theresa N. Tezze were charged by information with three offenses of burglary. After pleas of not guilty were entered they came on for trial. In a trial to the court witnesses were sworn and testified on behalf of the People. Defendants offered and the court admitted evidence in their behalf. Defendants were acquitted as to counts two and three of the information and found guilty as to count one. Defendants moved for a new trial, which motion was denied. Sentence was imposed. Moe Marty Shannon and Theresa N. Tezze appeal from the judgments.

The clerk's minutes read: "Trial by jury is waived by each defendant, his counsel and the district attorney." The reporter's transcript, duly certified by the reporter as a full, true and correct copy of the proceedings had and testimony taken, and certified by the trial judge, is before us as part of the record on appeal. It reads in part as follows: "The Court: Very well, you may proceed. Let's see, I don't believe there has been a waiver of a jury trial. Mr. Safier: The defendants waive a jury. Mr. Howard: People join in the stipulation. The Court: So ordered."

Appellants in their opening brief advance the contention that they had not waived trial by jury, urging that the reporter's transcript should prevail over the clerk's minutes, and that the latter were in error.



The attorney general filed a motion for augmentation of the record, attached to which was a supplemental transcript, certified by the reporter and certifying that due to oversight there was an omission in the original transcript and that the same should read: "Mr. Safer: The defendants waive a jury. Is that correct? Moe Shannon: Yes. Mr. Howard: People join in the stipulation." The words added are: "Is that correct? Moe Shannon: Yes." Attached to the reporter's certificate is a copy of the stenotype notes relating to the matter. The motion of the attorney general was granted and the certificate of the reporter received as part of the record. We then had before us the reporter's transcript showing that only one defendant waived trial by jury and the clerk's minutes showing that all the defendants waived. Upon the court's own motion an order was made directing the trial court to correct its records to speak the truth with respect to the conflict between the reporter's transcript and the clerk's minutes. Subsequently there was filed a supplemental reporter's transcript showing corrections as above stated and waiver of jury trial by Moe Shannon, and no waiver by Joseph George Shannon or Theresa N. Tezze. This transcript was approved by the trial judge. It does not appear that any correction has been made in the clerk's minutes.

[1,2] It has happened before that the reporter's transcript and the clerk's minutes were in conflict as to the waiver of trial by jury. *People v. Washington*, 95 Cal. App.2d 454, 213 P.2d 70. Such a conflict presents a difficult question for a reviewing court. One record or the other is erroneous. The error should be corrected in the trial court, since it has the exclusive power to make such corrections. In the present case, if the trial court decided the clerk's minutes were correct, correction of the reporter's transcript should have been ordered to make it conform to the clerk's minutes. If the minutes were found to be incorrect, they should have been corrected by court order. Although this was not done, it does appear that the trial court satisfied itself on the point and determined that the supplemental reporter's transcript

is a correct record of the proceedings had for the waiver of jury trial. Under these circumstances the reporter's transcript, settled by the trial judge, must be accepted as a full, true and correct record of the proceedings had. We hold, therefore, that a jury trial was properly waived by Moe Marty Shannon and his counsel, but was not waived by appellant Theresa N. Tezze. The judgment as to appellant Tezze must be reversed. *People v. Washington*, supra.

[3] Appellant Shannon makes the point that the evidence was insufficient to justify the verdict. The presentation of this point on about one-half page of typewriting in appellants' opening brief, which does not attempt to state the evidence, is entirely insufficient to warrant consideration. *Goldring v. Goldring*, 94 Cal.App.2d 643, 645, 211 P.2d 342.

The judgments and order denying motion for new trial as to appellant Tezze are reversed, and as to appellant Shannon are affirmed.

WOOD and VALLÉE, JJ., concur.



**SUTTER BUTTE CANAL CO. v. INDUSTRIAL ACC. COMMISSION et al. \***  
Civ. 8144.

District Court of Appeal, Third District,  
California.

March 25, 1952.

Hearing Granted May 22, 1952.

Mary Baggett and others, claimants, brought compensation proceedings to recover compensation for death of deceased employee, opposed by the Sutter Butte Canal Company, a corporation, employer. The Industrial Accident Commission awarded the claimants normal death benefit and also additional compensation on ground that death of employee was result of the serious and wilful misconduct of the employer, and to review the award granting additional

\* Subsequent opinion 251 P.2d 975.

compensation, the employer brought certiorari. The District Court of Appeal, Van Dyke, J., held that evidence sustained award of additional compensation.

Award affirmed.

**1. Workmen's Compensation ⇨1939**

Question whether an injury has occurred by serious and wilful misconduct of an employer within meaning of provision of the Labor Code that amount of workmen's compensation recoverable shall be increased one-half where employee is injured by reason of the serious and wilful misconduct of employer, is essentially one of fact, so that determination of the Industrial Accident Commission will not be disturbed on review if it has any evidentiary support. Labor Code, § 4553.

**2. Workmen's Compensation ⇨1693**

Fact that Industrial Accident Commission made a trip to see dam from which employee fell and drowned and viewed conditions existing there, did not give rise to presumption that what commission saw constituted independent evidence to support finding of serious and wilful misconduct on part of employer so as to entitle widow and minor children of deceased employee to additional compensation under the Labor Code, where there was no showing that same conditions prevailed at dam, so far as the head of water was concerned, at time commission viewed the dam as at time of accident. Labor Code, § 4553.

**3. Workmen's Compensation ⇨939**

"Serious and wilful misconduct" within meaning of Labor Code provisions that amount of workmen's compensation recoverable shall be increased one-half where employee is injured by reason of "serious and wilful misconduct" of employer, is conduct which employer knew or should have known, was likely to result in serious injury or which evinced reckless disregard for safety of employee. Labor Code, § 4553.

See publication Words and Phrases, for other judicial constructions and definitions of "Serious and Wilful Misconduct".

**4. Workmen's Compensation ⇨1674**

In order to show "serious and wilful misconduct" within meaning of provisions

of Labor Code that amount of workmen's compensation otherwise recoverable shall be increased one-half where employee is injured by reason of the "serious and wilful misconduct" of employer, it is not necessary for evidence to show positively that employer was notified of unsafe condition of his premises, but it is sufficient if it appears that circumstances surrounding act of commission or omission are such as evince a reckless disregard for safety of others and a willingness to inflict the injury complained of. Labor Code, § 4553.

**5. Workmen's Compensation ⇨1674**

Evidence sustained finding of Industrial Accident Commission that death of employee, who fell from dam and drowned while engaged in removing flash boards from top of dam while water was flowing over dam, was result of the "serious and wilful misconduct" of the employer so as to justify increase of workmen's compensation one-half. Labor Code, § 4553.

Millington & Millington, Gridley, for appellant.

Edmund J. Thomas, Jr., and Robert Ball, Deputies, and W. T. Dunbar, State Compensation Ins. Fund, all of San Francisco, Rich, Carlin & Fuidge, Marysville, for respondent, Industrial Acc. Commission.

VAN DYKE, Justice.

Certiorari to review an award of the Industrial Accident Commission granting to the widow and dependent minor children of William E. Baggett, deceased, an award based upon serious and wilful misconduct of decedent's employer, Sutter Butte Canal Co.

Decedent was employed as a laborer by the petitioner, Sutter Butte Canal Co., which for more than 30 years has maintained across the Feather River a diversion dam for the purpose of raising the elevation of water in the river so as to discharge it into a diversion canal from which it was distributed to water users. This diversion dam was approximately 8 feet high and about 4 feet wide on top. Along the median line of the crest from shore to shore there was installed a row of steel sockets 4 feet

apart, into which could be inserted steel uprights against which, and fastened to which, flash boards could be placed so as to raise the level of the river above the crest of the dam. Each year when the flow of the water in the river had subsided to the point where it would no longer flow into the company's irrigation canals in sufficient volume, these flash boards were installed. The posts extended 30 inches above the top of the dam, and the flash boards were rested against and fastened to these posts, being partly held in place by the pressure of the water above the dam. The boards were 2 x 12's, 16 feet long, and were placed two boards high. In the fall of each year, when the irrigation season had ended, the flash boards were removed. This system had been in use for more than 30 years. On September 14, 1950, Baggett, together with two other laborers and a foreman, was sent to remove the flash boards, Baggett and one other doing the work of lifting the boards out of place and carrying them to the side where they were handled by the third laborer. At the time they went to work water was flowing over the top of the flash boards to a depth of about six inches, thus giving approximately a 30 inch head over the dam when the boards were removed. When one of the top flash boards had been pried up from its position Baggett and the other laborer working with him lifted it shoulder high and started to carry it off. In so doing Baggett necessarily stepped into the current of water flowing through the place where the removed board had been, and at this point he fell and slid over the dam. The down side of the dam had a slope of 45 degrees into the water which was pooled below, and Baggett descended into this pool. He then proceeded to swim down stream and towards the bank, and when he had swum about 100 feet and was still about 15 feet from the bank he sank and drowned.

On application of the widow and minor children respondent Commission awarded the normal death benefit of \$7,500, and this award is not an issue in this proceeding.

On February 5, 1951, the widow and minor children filed with respondent Commission an application for additional compensation under Labor Code section 4553, alleging that the fatal injury had resulted

from the serious and wilful misconduct of the employer. The section thus invoked reads as follows:

"The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following:

\* \* \* \* \*

"(c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

"But such increase of award shall in no event exceed three thousand seven hundred fifty dollars (\$3,750)."

After hearings had been held, respondent Commission awarded the maximum amount to the applicants, and after petitioner herein had exhausted its remedies before the respondent Commission it petitioned this court for a writ of review, which was issued. It is the contention of petitioner that the evidence does not justify the findings of fact made by the Commission and that the findings of fact do not support the award.

The laborer who worked with Baggett testified that at the time the flash board was removed and was being carried away there was "not a great deal of rush water" at the place where they were working, but that a man could walk through it; that the crest of the dam was not especially slick, although there were spots of moss; that during about seven years' employment by petitioner he had never heard of any employee having previously gone over the dam. The other laborer testified that the surface of the dam was not slippery, that the current of the water was "not still" but also that there was "not too much" rush of water; that when the flash board was pulled up there was "some heavy rush of water," and that in the two years of his employment by petitioner he had never heard of anyone slipping off the dam. A sub-foreman in charge of the working crew testified that he had been employed by petitioner since 1924, had done the job of removing the flash boards before on many occasions, and that he had never known of anyone having slipped off the dam.

A. H. Gifford, a construction engineer for the petitioner who had worked for it for 32 years, said that in all the time he had



worked for petitioner there had never been a man go off the dam, and that he had never heard of anyone going off even before he started work. He testified that the State Compensation Insurance Fund had for many years sent their safety engineers over the entire system of the petitioner, including the diversion dam, and though they had at times recommended safety appliances on other parts of the system, which recommendations had been followed, they had at no time recommended that anything be done to secure greater safety in the manner of installing and removing the flash boards. He stated that no life line or life jackets were furnished to the men for the work on the dam, and that no one was stationed downstream in a boat, but he added that Baggett had said: "I don't want anything on. When I get out of this I don't want no obstructions. When I get in the water I want to swim."

Respondent Commission found that Baggett's death was proximately caused by the serious and wilful misconduct of the employer "in that said employer wilfully and knowingly failed and neglected to provide a safe place of employment, and failed and neglected to use safety devices and safeguards to render said place of employment safe, and failed and neglected to use safety devices and safeguards to render the employment and said place of employment safe."

[1] It is well established that "the question of whether an injury has occurred by the serious and wilful misconduct of an employer is essentially one of fact, so that the Commission's determination will not be disturbed on review if it has any evidentiary support". *Chick v. Industrial Accident Commission*, 107 Cal.App.2d 292, 237 P.2d 8, 11; *Bethlehem Steel Co. v. Industrial Accident Commission*, 23 Cal.2d 659, 665, 145 P.2d 583; *Parkhurst v. Industrial Accident Commission*, 20 Cal.2d 826, 831, 129 P.2d 113.

[2] Preliminarily, we may say the respondent contends that since the panel of the Commission made a trip to the scene of the injury and viewed the conditions existing there, what they saw constituted in-

dependent evidence "which must be presumed to support the finding of serious and wilful misconduct." Citing *In re Estate of Sullivan*, 86 Cal.App.2d 890, 895, 195 P.2d 894, and *Camicia v. Camicia*, 65 Cal.App.2d 487, 150 P.2d 814. We can attach no importance to this visit of the panel since it appears that it was made on September 28, 1951, approximately eleven months after the date of the death of Baggett, and there is no showing whatever that the conditions prevailing at the dam site, so far as the head of water be concerned, were in anywise similar to those prevailing at the time of the accident. As far as the dam, the physical measurements thereof, and the method of installing and taking out flash boards are concerned, there is no dispute in the record, and nothing could be seen in addition to what is by the record disclosed, save only the passage of water over the dam, as it would be affected by varying head; and there is neither affirmative showing nor argumentative claim that the panel in respect of head saw the situation that existed at the time of the accident. Under such circumstances the rules stated in the cited authorities have no application, and this matter must be determined by the record alone.

[3,4] It was said in *Vega Aircraft v. Industrial Accident Commission*, 27 Cal.2d 529, 533-534, 165 P.2d 665, 667: "Serious and wilful misconduct is conduct which the employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for the safety of the employee." The misconduct on the part of the employee must be serious *and* wilful. (Labor Code, sec. 4553.) "'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 188, 193 P. 105, 108, 16 A.L.R. 611. As to the knowledge which is thus required, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but it

is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as evince a reckless disregard for the safety of others and a willingness to inflict the injury complained of. *Henry J. Kaiser Co. v. Industrial Accident Commission*, 81 Cal.App.2d 818, 826-827, 185 P.2d 353; *E. Clemens Horst Co. v. Industrial Accident Commission*, supra, 184 Cal. at page 189, 193 P. 105.

"The test whether an act is *wilful* misconduct as used in section 4553 is not that the employer knew that the act would, and intended that it should, harm an employee, but rather that the employer or his managing official representative knew or *should have known* that the performance of the act or its omission *was likely* to cause harm to an employee. *Parkhurst v. Industrial Acc. Com.*, 20 Cal.2d 826, 129 P.2d 113; *Bethlehem Steel Co. v. Industrial Acc. Com.*, supra; *Vega Aircraft v. Industrial Acc. Com.*, supra.

"A given condition may be the result of facts constituting mere negligence, whereas under different circumstances it may be regarded as arising from wilful misconduct." *Henry J. Kaiser Co. v. Industrial Accident Commission*, supra, 81 Cal.App. 2d at page 827, 185 P.2d at page 358.

When the foregoing rules and definitions of serious and wilful misconduct, as those words are used in the Labor Code, are applied to the facts presented by the record here (and we may say there is no material conflict found in that record), we are presented with a situation where the issue of serious and wilful misconduct or not is extremely close.

At first glance it seems that there is definite danger that an employee required to carry one end of a 2' x 12' x 16' board that has been immersed in water for months, while walking along a concrete crest of a dam through water as deep as was the water through which Baggett started to walk, might well slip and be washed off the dam. And, of course, once that happened and the employee had been carried down the downstream slope of the dam and into the deep water below, his life would be definitely in danger, since even if he ar-

rived at the downstream pool uninjured, he would have a very considerable distance to swim in order to reach the shore. Opposed to this is the employer's experience of more than 30 years during which time this same operation was performed in the same way and no one had lost his footing. In judging whether or not a situation is dangerous, experience must be considered. Was respondent Commission justified in finding that the employer knew or should have known that removing the flash boards in the way in which it had been, and was being, done was jeopardizing the safety of the men; that the act of the employer in requiring the men to work under those conditions evinced a reckless disregard for their safety and even a willingness to inflict injury upon them? Or, as it has been otherwise stated, can it be held the employer knew or should have known that the performance of the required act by the employees was likely to cause harm to them? When we turn attention to the varying ways in which the meaning of serious and wilful misconduct has been defined, it is to be noted that the language used slants towards the probability of injury and a disregard of consequences. It is interesting to note that the respondent Commission, in its opposition to the peremptory writ sought herein, suggests that the employer might have furnished life lines, but does not suggest how those life lines could have been used; suggests a row boat at the foot of the dam, and suggests that life jackets might have been used, although it appears doubtful, from what he said, that Baggett would have used one.

[5] Despite the closeness of the issue presented here, we think it must be held that this record presents a situation where the trier of fact had within its hands the ultimate disposition of the cause, and that this court would not be justified in determining on review that the conclusion respondent Commission arrived at was not supported by the evidence. Even the long continuance of the method of removing the boards may militate against as well as for the petitioner; for if that method was unsafe, then its long use would support a finding of the very sort of heedlessness

which marks serious and wilful misconduct, as those terms have been defined. What inferences were in fact to be drawn from the facts presented was, we think, to be decided by the respondent Commission, and the inferences that were drawn cannot be said to lack support. The award is affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.



110 Cal.App.2d 77

**CAGLE v. BAKERSFIELD MEDICAL GROUP et al.**

Civ. 4368.

District Court of Appeal, Fourth District,  
California.

March 26, 1952.

Hearing Denied May 22, 1952.

Leona Cagle brought action against the Bakersfield Medical Group, a copartnership, and others, to recover for injuries sustained by plaintiff in fall on asphalt tile floor of reception hall in medical offices of defendants, on ground that floor was too heavily waxed. The Superior Court of Kern County, Warren Stockton, J., entered a judgment for plaintiff, and defendants appealed. The District Court of Appeal, Griffin, J., held that question whether defendants were negligent was for jury.

Judgment affirmed.

**1. Negligence ☞44**

Fact that medical partnership employed janitor to wax asphalt tile floor of reception hall in medical offices for partnership, did not materially alter rule that keeper of a public place of business is bound to keep premises and passageways in safe condition and must use ordinary care to avoid accidents or injury to those properly entering on premises.

**2. Negligence ☞136(22)**

In action by patient against medical partnership for injuries sustained in fall

on asphalt tile floor of reception hall in medical offices, on ground that floor was too heavily waxed, whether partnership was negligent was for jury.

Johnston, Baker & Palmer, Bakersfield, for appellants.

Roland S. Woodruff, Bakersfield, for respondent.

GRIFFIN, Justice.

By a jury verdict, plaintiff and respondent was awarded a judgment against defendants and appellants for \$3000, for injuries she received on March 16, 1949, from a fall by slipping on the waxed asphalt tile floor of the reception hall in new medical offices opened by defendant doctors—(doing business as Bakersfield Medical Group, a copartnership) a few weeks before the accident. The court denied a motion for nonsuit, as well as a motion for new trial. The sole question involved is the sufficiency of the evidence to support the verdict in respect to the claimed negligence of defendants in maintaining the floors of the reception room.

Plaintiff was an elderly woman who had been a patient of defendant Dr. Stoops for a number of years. She had previously received treatment at the new offices on two or three occasions and, according to her testimony, she noticed, on each occasion, that the concrete floor was covered with a gray marbled tile; that it looked lovely; that it was "very highly polished, slick looking"; that she "commented on it when it was brand new"; that although she did not look for it she did not notice any dirt or foreign substance on the floor at the time of the accident; that on this particular occasion she and her husband were seated in the reception room awaiting their turn to see a doctor; that when her name was announced they both got up and went in a normal walk to meet the nurse; that plaintiff then turned to go down the hallway to an office; that shortly thereafter "both feet went out from under" her; that her feet "slipped" and she "went backwards", fell on her back and left side, and broke her arm at the elbow; that an



operation was necessary to reset it; that it did not heal properly and resulted in a permanent partial loss of its mobility; that she was wearing laced medical walking leather-heeled shoes, "hygiene type"—"not new" at the time; that after walking around to the X-ray offices of other doctors and to her own car, and after arriving at her home, she examined her shoes but saw nothing on them in the form of any foreign substance; that after her return from the hospital she again visited defendants' offices, and to her, the condition of the floor looked different, "it doesn't look as slick", i. e., "doesn't look like it has as high a gloss polish on it" or as "slippery". Plaintiff's husband testified that the tile looked "slick and shiny" and that plaintiff's feet "slipped out from under her" and that he made no examination of the floor at the particular spot where she fell.

Plaintiff called as her witness the janitor for defendant partnership. He testified he operated a janitor service and that as a part of his duties defendant company paid him \$150 per month to "keep the office clean"; that he cleaned it every night except Friday nights; that he furnished his own material and equipment; that he started to work at the new offices when they opened them up about February first, 1949; that the floor consisted of a factory waxed tile; that his procedure in caring for the tile floor was to sweep it, then mop it with cold water and when dry apply wax with a wool mop; that about one quart of wax to 800 square feet was used and then he would go over it with a buffing machine and if "there was any loose particles, I got them, I swept again, but ordinarily there wasn't" (any loose particles); that at first he applied a brown label wax and about two weeks before the accident he changed to a simonize type of wax; that they were the same type (water base) and would not skid; that this wax was made especially for that type of floor; that he followed the directions given on the container as to its application; that if it would ever skid it would skid immediately after the wax

was applied and would become less apt to skid as it wore down by foot traffic; that it was his custom to repeat this cleaning and waxing process every two weeks and that he believed he waxed it just ten days before this accident occurred, although he ran the polisher over it every week or so; that in his opinion the floor never did look any different than it did at the time of the accident.

Plaintiff called a witness, experienced in the floor covering business, who testified about the use of water base liquid wax, that asphalt tile usually comes from the factory with a coat of such wax; that when applied to light, as distinguished from dark colored tile, it would require a good deal more wax to accomplish the same polish or sheen with light colored tile; that the pores of the tile absorb the wax; that to accomplish the sheen on the floor there must be a film of wax over it; that it is the quantity of wax applied that makes the floor slippery; that if not evenly applied it may be slippery in one place and not in another; that if a floor is slippery it means that the wax was improperly applied, i. e., "too much wax" in one spot; that after ten days of wear in a well-traversed traffic lane one would not expect to find a slippery floor; that the simonize wax is a standard one and is customarily used in the community; that if the directions are followed in its application it does not tend to be slippery; that the use of the term "non-slip", when applied to it, is purely an advertising slogan. Another expert testified that simonize wax is not considered as "non-skid"; that there is no such thing as a non-slippery wax.

Defendants produced a witness who laid the tile for defendant partnership. He testified that in his opinion a buffer would remove all surplus wax that might be applied; that if the wax was applied according to directions a buffed floor would not be slippery; and that whether the tile was light or dark would make no difference.

The nurse testified that the floors were all "highly polished" and that they had been buffed that week-end.

It is defendants' contention that since the evidence shows, without contradiction, that the new floor was waxed when it came from the factory, was laid and subsequently waxed in accordance with the custom of the community, with the customary and best type of wax, that since it was waxed about ten days before, and buffed about four days before plaintiff fell, was clean and in well-kept condition at that time, and since plaintiff was well acquainted with its condition and no foreign substance was found thereabouts or on plaintiff's shoes, no negligence on the part of defendants was shown.

It is further argued that since the janitor was an independent contractor defendants would not be liable for any claimed negligence on his part; that since there was no evidence that defendants knew of or could have known of any condition that would cause the accident at any time before the accident happened, no liability could be attached to them; that negligence is never presumed, and since the burden of proof was upon plaintiff to prove its existence, the evidence falls short of showing any liability on the part of these defendants for plaintiff's injury. In support thereof they cite such cases as *Harpke v. Lankershim Estates*, 103 Cal.App.2d 143, 229 P.2d 103; *Owen v. Beauchamp*, 66 Cal.App. 2d 750, 152 P.2d 756; and *Vaughn v. Montgomery Ward & Co.*, 95 Cal.App.2d 553, 557, 213 P.2d 417.

The *Harpke* case involved a fall on a marble stairway where plaintiff lost her balance and where she had no knowledge as to the cause of the fall. The court held that no negligence was presumed merely because of the fact of the injury from the fall; that in the absence of proof of some foreign substance on the floor or proof of a dangerous condition created by or known to the defendant, plaintiff could not recover. The *Owen* case turned on the question of knowledge of a piece of dental wax found on plaintiff's shoe after she fell on the floor. The *Vaughn* case is somewhat parallel to the instant case, but the appellate court there said that there was no evidence that the floor was "slip-

pery" and no evidence that there was any excess wax on the floor.

Plaintiff relies principally upon *Tuttle v. Crawford*, 8 Cal.2d 126, 130, 63 P.2d 1128, 1130, where it is said: "It is the rule in California that the keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition and must use ordinary care to avoid accidents or injury to those properly entering upon his premises [on business]."

In *Nicola v. Pacific Gas & Electric Co.*, 50 Cal.App.2d 612, 615-616, 123 P.2d 529, 531, it is said: "If wax or, as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact."

From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, a jury might well find that the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury. See, also, *Means v. Southern California Ry. Co.*, 144 Cal. 473, 77 P. 1001; *Rothschild v. Fourth and Market Street R. Co.*, 139 Cal.App. 625, 34 P.2d 734; *Williamson v. Hardy*, 47 Cal.App. 377, 190 P. 646.

The facts here related are quite similar to the facts set forth in *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 117 P.2d 841. The law there applied, without repeating it here, is quite applicable to the instant case. See, also, *Davis v. Duncan*, 44 Cal.App.2d 280, 112 P.2d 300.

[1] In *Henderson v. Progressive, etc., System*, 57 Cal.App.2d 180, 134 P.2d 807, this court reversed a judgment of nonsuit in an action involving a plaintiff who slipped on an excessive deposit of wax on a slippery waxed floor in the office of an optometrist. We there held that in an action for injuries sustained through a fall on a slippery floor, where there is an admission of joint control of the premises and floor by defendants, and where it is shown that the waxing of the floor was done in a negligent manner and was the defendants' act, and the one creating the dangerous or defective condition, it is not necessary for plaintiffs to prove by additional evidence that defendants had notice or knowledge of the dangerous condition. Such knowledge is imputed. It should be noted that the complaint in the instant action alleges that these defendants negligently kept and maintained the floor of their premises so as to cause it to be in a slippery and unsafe condition. They did own and maintain the offices and floor involved. The only contention involves the manner in which they were maintained. The fact that defendants employed a janitor at \$150 per month to perform this service for them would not materially alter the rule as to ordinary care set forth in the quotation from *Tuttle v. Crawford*, *supra*.

In the *Henderson* case several of the cases cited by defendant are discussed and distinguished. In reviewing many decisions rendered in this state in actions of this character involving slippery floors, there appears to be present in some of those cases evidence of prior falls by other people on the same floor. In the *Rothschild* case, *supra*, it is stated that where there is testimony as to the conditions previous to the accident by persons who had also slipped on the same floor, such testimony is evi-

dence tending to show notice to the defendant of the dangerous condition. In this case there is no such evidence of previous accidents but there is proof of the existence of the highly polished and possible slippery condition of the floor for a period of at least six weeks, and such evidence might support an inference of notice or at least be sufficient to place the question of notice in the hands of the jury.

Although defendants insist that the floor was not waxed later than ten days prior to the accident, there is evidence that wax was applied to the floor once every two weeks commencing with the first day of February, and using this two-week interval period the jury might have concluded, as contended by plaintiff, that the last waxing date would have fallen about two or three days prior to the time of the accident. A new simonize wax purchase was made by the janitor service just a day or so previous to the accident, which might also indicate that the new wax was applied about the time of the accident.

[2] If we assume the existence of the facts and inferences most favorable to the plaintiff, we must conclude that the jury believed that the plaintiff, while walking in an ordinary and prudent manner, slipped and fell on a highly polished, slick and slippery floor which had been maintained in a slippery condition by the defendants over a period of several weeks by the application of an excessive amount of wax to the floor. There being substantial evidence of these facts in the record, the question was for the jury alone to decide whether defendants were negligent, and whether or not defendants had notice of such condition.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



109 Cal.App.2d 839

**CROFOOT et al. v. WEGER et al.**

Civ. 8048.

District Court of Appeal, Third District,  
California.

March 20, 1952.

As Amended March 25, 1952.

Action by H. C. Crofoot and another against Donald and Norma Weger for relief from forfeiture of contract to purchase timber. The Superior Court, Mendocino County, Lilburn Gibson, J., held that plaintiffs were not entitled to relief, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that trial court was obligated to determine the issue of plaintiffs' willful or grossly negligent breach as bearing on their right to equitable relief under statute and had further duty to determine whether or not termination resulted in defendants' unjust enrichment.

Judgment reversed with directions.

**1. Logs and Logging** Ⓒ3(15)

In action for relief from forfeiture of contract to buy timber where purchaser alleged, and introduced evidence to support allegations, that vendors' negligence caused fire to damage timber and led to purchasers' failure of payment, that amount paid was in excess of value of timber removed, that amount paid plus damages suffered from vendors' negligence exceeded value of remaining timber, trial court was obligated to find whether breach was either wilful or product of gross negligence so as to prevent relief from forfeiture. Civ. Code, § 3275.

**2. Logs and Logging** Ⓒ3(15)

Where purchasers had paid in excess of \$15,000 of \$30,000 price in contract to buy timber which was terminated by the vendors on default of installment payment under forfeiture provisions giving vendors right to retain payments made, if loss suffered by purchasers was forfeiture, and if breach was not wilful or grossly negligent, contract could be reinstated under equitable conditions or purchasers given recovery of amount held to be forfeiture. Civ. Code, § 3275.

**3. Logs and Logging** Ⓒ3(15)

In action by purchasers who had withheld payment on contract to buy timber un-

der belief that vendors' negligence caused fire which damaged timber and that vendors' indebtedness to purchasers exceeded amount owing against vendors who had declared forfeiture, if breach was found to be wilful or grossly negligent so as to prevent relief from forfeiture, court had duty to determine whether termination resulted in vendors' unjust enrichment and to give purchasers judgment for funds constituting unjust enrichment, if any. Civ. Code, § 3275.

---

Spurr & Brunner, Ukiah, for appellants.

Mannon & Brazier, Ukiah, for respondents.

VAN DYKE, Justice.

Plaintiffs and appellants entered into a contract with defendants and respondents wherein they agreed to buy all of the merchantable timber situate on certain lands owned by the defendants in Mendocino County at a price of \$30,000, payable \$5,000 on execution of the agreement and \$3. per thousand board feet as the vendees removed timber from the land. In addition to these payments, the vendees were required to pay \$2,000 on July 15th and \$3,000 on November 15th of the year the contract was made, and \$3,000 each July, November and March thereafter until by the combination of all payments made the purchase price would have been fully received by the vendors. Time was made of the essence of the agreement and it was provided if the vendees failed to pay the installments promptly when due or were guilty of any other breach of their obligations the vendors should be released from all obligation under the contract and the vendees should forfeit all rights thereunder and all payments theretofore made. It was provided that the vendors could retain such payments as their own property, and as rent for use of their premises and the removal of the timber to the date when the contract was, by reason of such breach, terminated. It was further agreed that any default of the vendees should be "conclusively established by the filing of an affidavit by the vendors in the office of the County Recorder

setting forth the facts constituting the default and accompanied by an affidavit of the mailing of a copy of the filed affidavit to the vendees." If this were done then at the expiration of 10 days from such recording and mailing all of the rights of the vendees were to be at an end and the vendors should be entitled to have delivered to them a quitclaim deed which by the contract was to be executed by the vendees and delivered in escrow. Pursuant to the agreement the vendees paid to the vendors a sum in excess of \$15,000, but the \$2,000 due to be paid in November of 1949 was not paid and the vendors filed the required affidavit for record and received from the escrowee the quitclaim deed which they likewise recorded. The action here was begun by the vendees on December 13th following. By the complaint plaintiffs and appellants alleged the execution of the agreement, the payment of the \$15,000, the recording of the affidavit and the receipt by the vendors and the recording by them of the quitclaim deed. Further, that before the notice of default and delivery of the deed occurred the defendants and respondents had negligently caused a fire to damage the timber which was the subject of the agreement, by reason whereof appellants were compelled to cease logging operations and had become unable to make the November payment. They alleged that the amount that had been paid the respondents was in excess of the value of the timber which had been removed and the amount paid plus the damages suffered from defendants' negligence exceeded the value of the remaining timber. They offered to make such payment and comply with such order as the court might make in the premises as a condition to granting relief from forfeiture under the facts alleged. By the prayer they sought to be relieved of the forfeiture of their interest and asked that the quitclaim deed be ordered canceled and that such further relief should be given as might be proper. By a second count they again pleaded the damage negligently caused by the respondent, alleging that there had been damage to felled timber and to standing timber aggregating \$38,382.46. Under this count they prayed

for damages in the amount alleged and for general relief. Respondents answered, raising generally the issues tendered by the pleadings.

The court found that the alleged sum had been paid and that the respondents had recorded the affidavit and received the quitclaim deed; that the respondents had not negligently caused the fire or the consequent damage; that appellants had not as a result of the fire been compelled to cease logging operations nor been made unable to make the November payment. The court found untrue the allegations that the amount paid was in excess of the value of timber removed and also found untrue the averments that the amount of damage caused by the fire, plus the amount paid on the contract, exceeded the value of the standing timber remaining. The court did not find whether or not the breach of the appellants in failing to make the November payment was wilful or grossly negligent and made no finding as to the allegations concerning the offer of the appellants to do equity as a condition for relief from the alleged forfeiture. The court concluded that appellants were entitled to nothing from the respondents.

[1] In view of the decisions of the Supreme Court in the cases of *Gonzalez v. Hirose*, 33 Cal.2d 213, 200 P.2d 793; *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367; *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13, and *Freedman v. Rector*, 37 Cal.2d 16, 230 P.2d 629, we think the trial court was obligated to consider and decide the issues concerning relief from forfeiture and recovery of unjust enrichment if any, all of which were sufficiently tendered by the pleadings and as to which evidence was introduced from which findings could have been made that the appellants were entitled to such relief. A great deal of evidence was taken concerning the issues as to respondents having negligently caused the burning of a substantial part of timber, both down and standing, which was the subject of sale and it is clear from the testimony that appellants were largely actuated in their failure to make the November payment by a belief that the damage so caused

justified their withholding further payments until the question of negligent injury could be settled. *El Rio Oils Ltd. v. Chase*, 95 Cal.App.2d 402, 412, 212 P.2d 927. In the cited case it was held that the fact a lessee had intentionally failed to pay royalty due under an oil lease did not necessarily mean that the default was wilful within the meaning of Section 3275 of the Civil Code where the trial court had found that the lessee had been honest in its assertion that it did not owe the amount demanded, even though it had been mistaken therein. In this case the appellant Henry Crofoot testified that when asked for the November payment by the respondent Donald Weger, he had replied that he believed Weger had been responsible for the damage done to the timber and wanted to look into the cause of the damage and the extent thereof; that he believed Weger owed him more than he owed Weger. We think that from all of the testimony the trial court could have found that the breach, though intentional in the sense that appellants knowingly withheld the payment due, was yet not wilful so as to prevent relief under Section 3275 of the Civil Code. That section provides that: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

[2] It is to be noted that appellants promptly brought their action for relief when respondents terminated the contract and secured the delivery to them of the quitclaim deed, offering to comply with such equitable conditions as the court might impose upon them as a condition to relief. As said by the court in *Barkis v. Scott*, supra [34 Cal.2d 116, 208 P.2d 370]: "Section 3275 presupposes that the party seeking relief is in default \* \* \*." Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the

nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.

[3] In addition to the foregoing, if the court had found that the breach was wilful or grossly negligent so as to prevent equitable relief under Section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment. *Freedman v. Rector*, supra. Upon this subject there was evidence that there remained unpaid upon the contract \$14,915.51; that there were originally about 10,000,000 board feet of timber to be harvested under the contract by appellants; that appellants had harvested 1,416,074 feet of this; that the fire had destroyed 245,643 feet, making a total of timber withdrawn and burned of 1,661,717 feet, leaving 8,338,283 feet to be harvested; that this remaining timber had a gross value of \$3. per thousand feet, adopting the stumpage value placed upon it by the contract, or double that amount if the most favorable testimony as to value be adopted. It is apparent that a situation was portrayed by the evidence which would have justified findings of unjust enrichment if relief could not be given through reinstatement of the contract, and it was therefore the duty of the court to proceed and find upon these matters and if it found unjust enrichment had resulted to give judgment for the amount thereof.

Count two of the plaintiffs' complaint was concerned essentially with allegations as to the damage caused by the fire and the liability of defendants therefor. Upon substantial evidence the court found defendants were not liable for the fire loss. The sufficiency of the evidence is conceded by



plaintiffs. Further trial upon those issues, therefore, is unnecessary. The judgment is reversed in so far as it fails to adjudicate the issues of forfeiture, unjust enrichment and relief therefrom if they occurred, with directions to the trial court to proceed in accordance herewith, either upon evidence taken or such additional evidence as the parties with permission of the court may see fit to offer, and that thereupon the court completely dispose of the issues presented.

ADAMS, P. J., and PEEK, J., concur.



**RICHFIELD OIL CORP. et al. v. CRAWFORD et al. \***  
Civ. 18549.

District Court of Appeal, Second District,  
Division 3, California.

March 13, 1952.

Rehearing Denied March 28, 1952.

Hearing Granted May 8, 1952.

Action by Richfield Oil Corporation and others against Walter M. Crawford and others for injunctive, monetary and declaratory relief from drilling of an oil well on land in which defendants and plaintiffs in intervention had interests. Maurice Henderson, and others, intervened. The Superior Court of Santa Barbara County, Charles F. Blackstock, J., entered judgment for defendants and plaintiffs and defendants in intervention appealed. The District Court of Appeal, Vickers, J., pro tem., held that the trial court properly determined that plaintiffs were entitled to none of the relief prayed for.

Judgment affirmed.

**1. Constitutional Law** ⚡81

Legislature has power to enact police regulations to protect public safety and welfare and to prevent waste of natural resources.

**2. Constitutional Law** ⚡45, 70(1)

It is a judicial question whether a particular regulation is a reasonable and just

\* Subsequent opinion 249 P.2d 600.

restraint although authority of courts to declare a regulation invalid is to be exercised with caution and only when it is clear that the law exceeds limits of legislative power and infringes on constitutional rights.

**3. Constitutional Law** ⚡278(1)

**Mines and Minerals** ⚡47

A landowner has a property right to drill on his land for oil and gas located beneath surface thereof and his absolute title attaches after substances have been reduced to possession, and such right is entitled to as much protection as property itself and undue restriction and use thereof is as much taking for constitutional purposes as appropriating or destroying it.

**4. Constitutional Law** ⚡211, 278(1)

**Mines and Minerals** ⚡92.4

Statute providing that any well drilled for oil or gas and permitted to produce oil and gas which is located within 100 feet of an outer boundary of parcel of land on which well is situated or within 100 feet of public street or road or highway dedicated prior to commencement of drilling of well is a public nuisance, is discriminatory and unreasonable in its application to defendants' oil bearing property, no subsurface portion of which was more than 99 feet distant from its boundary line or an adjacent public street or highway, and therefore statute as applied to defendants and their property would deprive them of their property without due process and equal protection of law. Public Resources Code, § 3600.

**5. Constitutional Law** ⚡278(1)

**Mines and Minerals** ⚡92.4

Where only portions of defendants' tract under which oil and gas pool was located were within 100 feet of boundary, statute declaring oil wells drilled within 100 feet of outer boundary a public nuisance was unreasonable, discriminatory and void as to defendants even though other portions of tract on which they could drill were more than 100 feet from boundary. Public Resources Code, § 3600.

**6. Estoppel** ⚡92(3)

**Mines and Minerals** ⚡78(1)

Where original co-sublessees of 80-acre tract surrendered 20 acres of tract to

their sublessor who in turn leased 20-acre tract to new sublessee, rights of sublessor in 20-acre tract were not affected by its rights in remaining 60 acres and by surrendering 20-acre tract original co-sublessees relieved themselves of lease obligation to drill not less than one well to each 20 acres, and having benefited by the surrender, original co-sublessees could not deny to new sublessee the right to drill.

**7. Mines and Minerals**  $\S$  74, 92.23

Where original co-sublessees of 80-acre tract surrendered 20 acres thereof to their sublessor, who was compelled to accept it and who in turn leased 20 acres to new sublessee, new sublessee was entitled to protect its own drilling rights and fact that original co-sublessees might have thought that statute requiring 100 foot set back from boundary would bar drilling of well which new sublessee drilled, in no way limited new sublessee's rights and neither did existence of statute which, if applicable to new sublessee, was unconstitutional. Public Resources Code,  $\S$  3600.

**8. Mines and Minerals**  $\S$  51(3)

In action by sublessors for injunctive, monetary and declaratory relief arising from the drilling by sublessees of an oil well on 20-acre tract leased to them by sublessors from original 80-acre tract of oil bearing land, evidence sustained finding of trial court that sublessees by reason of location of the bottom of their oil well, were not trespassing on sublessor's and co-sublessees' property.

---

Marlon F. Schader, Los Angeles, Griffith & Thornburgh and C. Douglas Smith, all of Santa Barbara, Cree & Brooks and John Brooks, all of Long Beach, O'Melveny & Myers, Jackson W. Chance and Rodney K. Potter, all of Los Angeles, for appellants.

Joseph A. Ball, Clark Heggeness, Ball, Hunt and Hart, all of Long Beach, Schauer, Ryon & McMahon and Thomas M. Mulen, all of Santa Barbara, for respondents.

Harry E. Templeton, Los Angeles, for intervenors.

VICKERS, Justice pro tem.

This is an appeal by the plaintiffs and the defendants in intervention from a judgment denying them injunctive, monetary and certain declaratory relief and granting the plaintiffs in intervention declaratory relief. The litigation resulted from the drilling of an oil well on land in which the defendants and plaintiffs in intervention have interests. This well was surfaced more than 200 feet from the common boundaries of such land and that in which the plaintiffs have interests and bottomed in an oil pool within a few feet of those boundaries. It is claimed by plaintiffs, and they so pleaded, that all portions of the well that are less than 100 feet from the common boundaries violate section 3600 of the Public Resources Code and also that the producing interval of the well extends into and trespasses on plaintiffs' property. The defendants assert, and so pleaded, that section 3600 does not apply to the subsurface location of this or any other well; that if it does apply it is unconstitutional in its application to this well; and that the producing interval is entirely within defendants' property. The court found and declared in accordance with the contentions of the defendants. It also found and declared that the plaintiffs in intervention were the owners of 23% of the production of the defendants' well and that the Richfield Oil Corporation had no interest in the production of that well.

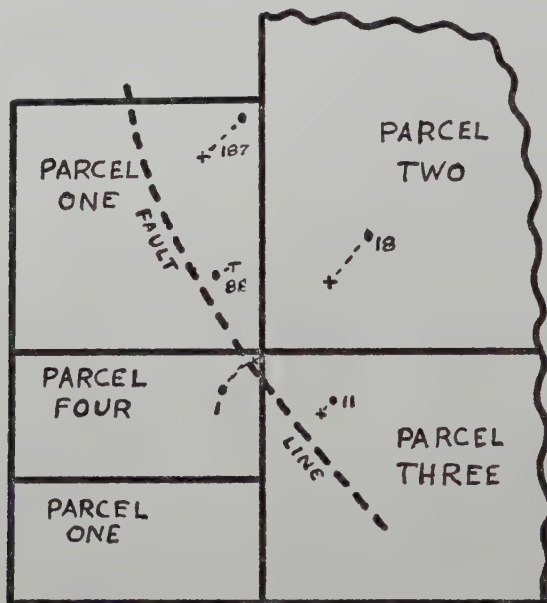
For the purpose of brevity the various parties and their respective predecessors will be hereinafter referred to in the following manner: The plaintiff and defendant in intervention Richfield Oil Corporation as "Richfield"; the plaintiffs composing the partnership F. R. Anderson Associates as "Anderson Associates"; the defendants and defendants in intervention composing the partnership Crawford & Hiles and the partnership itself as "Crawford & Hiles"; the plaintiffs in intervention Scott Carpenter and Maurice Henderson as "Carpenter & Henderson"; the Quality Oil Company as "Quality." It refused to join as a plaintiff, and while joined as a defendant does not appear to have

been served with process and made no appearance.

The relationship of the various parcels of land involved, the approximate location of the Hadley-Stone fault, which limits production from the Colgrove formation (the formation from which all the wells involved have been producing), and the approximate surface and subsurface locations of the wells are illustrated by the accompanying diagram.

ford & Hiles commenced the drilling of Well No. 1 on parcel four and ever since July 25, 1949 have been producing oil therefrom. Prior to the above quitclaims Richfield had drilled Wells No. 187 and No. 88 on the north 40 acres of parcel one and ever since their completion has been producing oil therefrom.

In March 1948 one Colgrove as sublessor made an oil and gas lease to Anderson Associates, of the acreage comprising parcel



In December, 1947, one Norris as sublessor made an oil and gas lease of 80 acres, composed of parcels one and four, to Carpenter & Henderson. On March 8, 1948, Carpenter & Henderson as sublessors made an oil and gas lease of this 80 acres to Anderson Associates. On July 14, 1948, Anderson Associates assigned an undivided one-half interest in this lease to Richfield. On May 25, 1949, Anderson Associates and Richfield quitclaimed to Carpenter & Henderson all their interest in the 20 acres that comprised parcel four. Shortly thereafter they also quitclaimed to Carpenter & Henderson all their interest in the 20 acres of parcel one immediately to the south of parcel four. On June 22, 1949, Carpenter & Henderson as sublessor made an oil and gas lease of parcel four to Crawford & Hiles. Within a few days thereafter Craw-

two, and in June 1948 the latter assigned an undivided one-half interest therein to Richfield. Thereafter and prior to June 1949 Richfield drilled Well No. 18 and ever since its completion has been producing oil therefrom.

On March 17, 1948, Quality as sublessee had an oil and gas lease on parcel three in which on March 17, 1948, it assigned an interest to Richfield. The latter thereupon drilled Well No. 11 on said parcel and ever since its completion has been producing oil therefrom.

The Hadley-Stone fault as shown by the broken line on the diagram runs in a general northwest to southeast direction passing through the east half of the north 40 acres of parcel one, then through the northeast corner of parcel four and continues



on through the west half of parcel three. It acts as a barrier to the migration of oil and gas from the Colgrove zone to the west and south thereof and prevents production from that zone west and south of the fault. The court found that all portions of the Colgrove zone which underlay parcel four were less than 100 feet west of the east boundary and less than 100 feet south of the north boundary of parcel four.

Except for their trespass cause of action plaintiffs cannot be successful on this appeal if it is determined either, that section 3600 of the Public Resources Code does not apply to the subsurface portion of Well No. 1 or, that if it does apply, such application under the circumstances of this case would be unconstitutional as to the defendants. We are satisfied the effect of such application of section 3600 would be unconstitutional, in that it would deny defendants the equal protection of the laws guaranteed by section 1 of the Fourteenth Amendment of the United States Constitution, and deprive defendants of their property without due process of law in violation of that amendment. It is therefore unnecessary for us to determine the fact of applicability and we will assume that fact for the purpose of this opinion only.

Public Resources Code, section 3600, reads as follows: "Except as otherwise provided in this chapter, any well hereafter drilled for oil or gas, or hereafter drilled and permitted to produce oil or gas, which is located within one hundred feet of an outer boundary of the parcel of land on which the well is situated, or within one hundred feet of a public street or road or highway dedicated prior to the commencement of drilling of the well, or within one hundred fifty feet of either a well being drilled or a well theretofore drilled which is producing oil or gas or a well which has been drilled and is not producing but which is capable of producing oil or gas, is a public nuisance." It is a part of Div. III, Ch. 3. This is the only chapter which attempts to regulate the spacing of oil wells. The chapter is composed of sections 3600-3608 inclusive. The regulations contained in sections 3600-3605 inclusive, were first adopted in 1931, Stats.1931, Ch. 586. That

act was entitled: "An act to protect persons and property against danger from fire and explosion in petroleum oil or gas wells by providing for the location of wells in relation to the outer boundary lines of the property, public streets, roads and highways and other wells." Section 3601 defines the term outer boundary where several contiguous parcels are operated as a single unit for oil or gas purposes. Section 3602 reads as follows: "Where a parcel of land contains one acre or more, but is less than two hundred fifty feet in width, there may be drilled on the parcel of land not more than one well to each acre of the area if the well is so placed as to be as far from the lateral boundary lines of the parcel of land as the configuration of the surface and the existing improvements thereon will permit." Section 3603 declares an alley is not a public street or road. Section 3604 declares each day of violation to be a separate offense. Section 3605 declares the provisions of the chapter do not apply to any field producing oil or gas on August 14, 1931. In 1939 the provisions of the 1931 Statute were made a part of the Public Resources Code virtually without change except for being numbered.

In 1945 sections 3606 and 3607 were added to the Code. (Stats.1945, Chs. 139 and 141.) Chapter 139 declared it was an urgency measure and recited that its purpose was to increase the production of oil and gas during the war emergency. Chapter 141 by its title stated it related to the spacing of oil wells. Section 3606 permits slant drilling into a parcel containing an acre or more where all or substantially all of the surface of that parcel is unavailable for a surface location of a well. Such well may be surfaced on another parcel of more or less than one acre which may or may not be contiguous to the other parcel. The section also provides that the producing interval must not be less than 75 feet from the outer boundary of the parcel into which it is drilled, and that the surface location of such well shall be not less than 25 feet from an outer boundary of the property on which it is located and not less than 25 feet from any dedicated street or highway. Section 3607 provides that the 100 foot prohibition

contained in section 3600 does not apply to a street or highway opened through a field in which drilling was commenced prior thereto.

In 1947 the Legislature readopted sections 3600-3607, inclusive, without change and added section 3608 to the Public Resources Code (Stats.1947, Ch. 1559). This act declared it was an urgency measure and recited that the facts constituting the necessity therefor were as follows: "A recent decision of the California Supreme Court held that Sections 3600 to 3607 of the Public Resources Code are unconstitutional under the circumstances set forth in that case. Unless this act takes effect immediately, wells will be drilled in violation of the policy of this State expressed in those sections for the conservation of natural resources and the observance of safe and orderly oil field operations upon the surface of the land and as a result of such violation large quantities of natural gas would be wasted to the air." Section 3608 is designed to protect the owner of a parcel of oil-bearing land containing less than one acre, which is surrounded by other lands subject to one or more oil and gas leases. It provides a method whereby the owner of such parcel can share in the royalties from the oil and gas produced under such lease or leases according to the ratio the surface area of his parcel bears to the surface area of such other lands.

It is clear that by sections 3602, 3606 and 3608 the Legislature was attempting to protect the owners of oil-bearing lands who otherwise, by reason of the 100 foot set back contained in section 3600, would be prevented from drilling to the oil sands underlying their lands. Under the conditions described in section 3602 drilling is permitted as close to the lateral boundary of the parcel as is made necessary by the configuration of the surface and the existing improvements. Under the conditions described in section 3606 the surface of the well can be within 25 feet and the producing interval within 75 feet of the outer boundaries of the parcels on which they are respectively located. Under the conditions described in section 3608, while drilling is not permitted the rights of the owner of

the parcel are protected by giving him what appears to be his fair share of the oil produced from the oil sands common to his and the surrounding lands. However, none of these sections protect the rights of land owners who find themselves in the position of the defendants herein. Yet the latter are as fully entitled to protection as are those who come within the provisions of sections 3602, 3606 and 3608. Furthermore the defendants' present well violates the provisions of section 3600 and the purpose recited in the title of the 1931 act less than do those permitted by section 3602 and section 3606, since its surface location of more than 200 feet from the boundary lines insures more protection from the "danger [of] fire and explosion" than is required by section 3600, while sections 3602 and 3606 greatly lessen that protection. In addition, the location of its producing interval constitutes no greater violation of the declared purpose of the 1947 act of "protection of natural resources" than may the location of those permitted by section 3602. Furthermore the defendants' parcel of land contains 20 acres, whereas the general area limitation per well established by Chapter 3 of Division III is one acre.

[1-3] The power of the Legislature to enact police regulations to protect public safety and welfare and to prevent the waste of natural resources is well established and not questioned by the parties hereto. Sections 3600-3608 are regulations of that character. However, such regulations are not valid to the extent that by their application they are unreasonable or discriminatory and result in a denial of constitutional rights. See *Bernstein v. Bush*, 29 Cal.2d 773, 777, 177 P.2d 913. It is a judicial question whether a particular regulation is a reasonable and just restraint although the authority of the courts to declare a regulation invalid will be exercised with caution and only when it is clear that the law exceeds the limits of legislative power and infringes upon constitutional rights. In *re Smith*, 143 Cal. 368, 371, 77 P. 180. A landowner has a property right to drill upon his land for oil and gas located beneath the surface thereof and his absolute title attaches after the substances have been re-

duced to possession. *Tanner v. Title Ins. & Trust Co.*, 20 Cal.2d 814, 129 P.2d 383. This is a right which is "as much entitled to protection as the property itself and an undue restriction on the use thereof is as much a taking 'for constitutional purposes as appropriating or destroying it.'" *Bernstein v. Bush*, supra, 29 Cal.2d at page 778, 177 P.2d at page 917; *People v. Associated Oil Co.*, 211 Cal. 93, at page 99, 294 P. 717. In the case of *Ohio Oil Co. v. State of Indiana*, 177 U.S. 190, 209, 20 S.Ct. 576, 584, 44 L.Ed. 729, 739, the United States Supreme Court said: "\* \* \* the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply \* \* \*." In the case of *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73, the Texas Supreme Court said that the denial to one surface owner of his fair chance to recover the oil and gas beneath the surface, or its equivalent, would be a confiscation of his property.

The case of *Bernstein v. Bush*, supra, 1947, 29 Cal.2d 773, 177 P.2d 913, is so similar in legal principles and ultimate facts involved as to be controlling in this case. It is asserted by counsel that it is the "recent decision" referred to in the urgency paragraph of Act 1559 of the 1947 Statutes. In the case of *Hunter v. Justice's Court*, 1950, 36 Cal.2d 315, 317, 223 P.2d 465, the court said that section 3608 was "probably adopted" in response thereto. The petitioners in *Bernstein v. Bush*, supra, sought a writ of mandate compelling the State Oil & Gas Supervisor to grant them a permit to drill for oil and gas upon the lease and properties owned by them. They owned several parcels of non-contiguous land, aggregating more than one acre, in the harbor area of the City of Long Beach, that had been subdivided into town lots, approximately 3000 square feet each, which were intersected by streets and highways. Wells had been drilled into the oil basin common to the area, under leases covering contiguous lots aggregating one acre or more, and

it was asserted that many wells had been located pursuant to the exceptions to the spacing requirements of section 3600. The petitioners alleged that due to the strategic placing of these wells and leases their single lots of less than one acre were isolated and cut off from participation in the leases and royalties from oil produced from adjacent property. They also alleged that the drilling of a well on some portion of their property would not cause the number of wells to exceed the number of acres in the field.

The court in *Bernstein v. Bush*, supra, refused to issue the peremptory writ on the ground that petitioners were not required to obtain a permit before commencing to drill. However it held that the prevention of the drilling of the proposed well, 29 Cal. 2d at page 781, 177 P.2d at page 918, "\* \* \*" would amount to a deprivation of the petitioners' right, coequal with the right of surrounding owners and lessees, to recover their fair share of the oil and gas from the common source of supply, and consequently would infringe upon the constitutional guaranties invoked. We conclude that the spacing provisions of the Public Resources Code are inapplicable to prevent the drilling of a well by the petitioners." In its opinion the court stated many of the principles of law recited herein and cited many of the supporting authorities. It also made the following statements, 29 Cal.2d at pages 778, 780, 177 P.2d at page 916: "Here then we are more directly concerned with the contention of the petitioners that in its application to them the statute is discriminatory and therefore unconstitutional. They assert that such discrimination results from the fact that the enforcement of the regulations permits some owners of lands overlying the oil basin to exercise and enjoy their property right to take oil from the field, while the petitioners, who are property owners overlying the same oil supply, are deprived of the use and enjoyment of their coequal right. The mere assertion of the problem suggests the answer. \* \* \* The decisions approving the regulatory legislation involved in the cases of *People v. Associated Oil Co.*, supra, 212 Cal. 76, 81, 297 P. 536, and *Bandini Petroleum Co. v.*



Superior Court, *supra*, 110 Cal.App. 123, 134, 293 P. 899, were based in part upon the legislative recognition and preservation of the correlative rights of the surface owners, and the necessity of one landowner to make productive use of his parcel in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels. \* \* \* Equal protection is so denied where, as here, the law, in its application at least, does not afford adequate means of protection as a substitute for the right to drill an offset well."

In the case of *Hunter v. Justice's Court*, *supra*, 1950, 36 Cal.2d 315, 223 P.2d 465, the Supreme Court upheld the constitutionality of section 3608 as applied to the circumstances and the parties there involved. But during the course of its opinion it reiterated many of the legal principles declared by it in *Bernstein v. Bush*, *supra*, and did not modify any of those upon which we rely. In the case of *Sindell v. Smutz*, 1950, 100 Cal.App.2d 10, 222 P.2d 903, this court held that a city ordinance which restricted oil wells to two in a city block, while more than two wells per block were permitted in nearby areas overlying the common oil and gas pool, was unduly oppressive, not reasonably necessary to promote the general welfare, and deprived the owners and lessees of the block in question of their right, coequal with the right of other owners and lessees, to recover their fair share of the oil from the common source of supply, thus infringing upon their constitutional rights.

[4] The defendants in our case are in a similar position to that of the petitioners in *Bernstein v. Bush*, *supra*, and are entitled to the same protection from the courts. If section 3600 applies they are not only deprived of the right to drill for and capture the oil and gas beneath the surface of their parcel but they are also provided with no lawful means for obtaining their fair share, or the proceeds therefrom, of the oil and gas recovered from the pool common to the property of all the parties to this action. The Legislature by sections 3602, 3606 and 3608 has provided a lawful means whereby the owners of oil bearing lands subject to the physical conditions therein described can be protected. Yet it has failed to do so

(if section 3600 applies) to one who may own a large quantity of oil bearing land no portion of which is more than 99 feet distant from its boundary line or an adjacent public street or highway. Such a failure is clearly discriminatory and unreasonable as to the latter. We therefore hold that section 3600, under the circumstances involved in this case, is unconstitutional as applied to the defendants and their property in that it would deny defendants the equal protection of the laws guaranteed by section 1 of the Fourteenth Amendment of the United States Constitution, and would deprive the defendants of their property without due process of law in violation of that amendment.

[5] Plaintiffs urge additional points, some of which require consideration herein. They claim that section 3600 does not deprive defendants of their opportunity to drill for oil because they may do so on any part of their 20-acre parcel that is 100 feet or more from the boundary lines. The equal opportunity to drill a well on one portion of a parcel which contains no part of the oil and gas pool in question, is not an equal opportunity to tap or an equal right to share in that part of the oil and gas pool that is contained in some other portion of that parcel. The equal opportunity and right to which defendants are entitled is to share in the oil and gas that is in their property. As said by the court in the zoning case of *Sindell v. Smutz*, *supra*, 100 Cal.App.2d 10, at page 21, 222 P.2d 903, at page 909: "The case is one 'related to regulations prohibiting the recovery of natural resources from the earth. Such a business must operate, if at all, where the resources are found. \* \* \*'"

[6] Plaintiffs also claim that the defendants Carpenter & Henderson are already receiving their fair share of the proceeds of the oil pool, by reason of their royalty interests in the wells located on the north 40 acres of parcel one, and that therefore the application of section 3600 would not be discriminatory as to them. However, the court found that Carpenter & Henderson were not receiving their fair share of the oil being produced from the Colgrove zone. It is difficult to understand how the court

could have failed so to find. The only restriction by law against the number of wells to be drilled by Carpenter & Henderson, or any other landowner, is one to an acre, and the fair share of the oil and gas to be recovered from an oil and gas pool will normally depend on the number of wells which tap it. Considering the number of wells in which Carpenter & Henderson have an interest the one well to an acre limitation has not been approached. The large quantities of oil already produced from Well No. 1, with resulting additional financial benefit to Carpenter & Henderson, demonstrates that they were not receiving their fair share of the oil and gas in the Colgrove zone by reason of their royalty interests in Wells No. 88 and No. 187. Plaintiffs seem to consider the 80 acres originally leased as the drilling unit. If there was any basis therefor it was destroyed by the act of Richfield when it quitclaimed parcel four to Carpenter & Henderson. Thereafter the rights of Carpenter & Henderson as to parcel four were not affected by their rights in parcel one. Parcel four became a separate and independent unit. By quitclaiming parcel four Richfield relieved itself from the obligation, contained in its lease, of drilling a third well (not less than one well to each 20 acres of the 80-acre parcel). Having benefited by its quitclaim, it is hardly in an equitable position to deny to defendants the right to drill upon the portion of the 80 acres so quitclaimed.

[7] Plaintiffs further assert that defendants "voluntarily created the hardship" and therefore should not be heard to complain. However, it was Richfield alone who created the hardship by quitclaiming parcel four. Carpenter & Henderson were compelled to accept it and therefore did not create it. They and their sublessee Crawford & Hiles were thereafter entitled to protect their own rights. The fact that Richfield may have thought that a well located as is Well No. 1 would be barred by section 3600 in no way limited defendants' rights. Neither did the existence of section 3600, since if applicable it was and is unconstitutional, as to the defendants, in so

far as the drilling of Well No. 1 by Crawford & Hiles is concerned.

We pass now to a consideration of the plaintiffs' second cause of action whereby they alleged that the defendants Crawford & Hiles, by reason of the location of the bottom of Well No. 1, were trespassing upon their property or that of Quality. In order to prevail it was necessary for plaintiffs to prove such trespass by a preponderance of the evidence. According to the findings and decision of the trial court and its memorandum of opinion, contained in the clerk's transcript filed in this appeal, the plaintiffs failed to carry this burden. Unless the evidence was such as to establish the claimed trespass as a matter of law we are bound by the findings of the trial court thereon since there was substantial evidence in support thereof. There is no contention that these findings do not support the judgment.

The dispute arose out of the interpretation to be given to the term "due north" and its abbreviation "due N." as contained in the various deeds, leases and assignments. The defendants contended that such term meant north according to the astronomical meridian, while the plaintiffs contended it meant north according to the "basis of bearings" as determined from the southwest line of the Russel Rancho, from which the various descriptions took their courses. Surveys made in accordance with the respective contentions of the parties resulted in a difference of approximately 12 feet in an easterly and westerly direction at the northeast corner of parcel four, with lessening difference as the surveys progress to the south thereof. The exact location of the producing interval of Well No. 1 was apparently not capable of determination. The court did not find that any portion thereof was located on the plaintiffs' or Quality's side of the common boundary line if the plaintiffs' survey was the correct one. It contended itself with the finding that "due north" meant "true north" and "along a true north meridian", and that no part of the defendants' well was on or in the plaintiffs' or Quality's property.

[8] During the course of the trial many days were devoted to the reception of oral and documentary evidence in support of the parties' respective contentions. The plaintiffs rely in part on certain deeds and documents executed in 1948, which was the year when the first conveyance of any part of the Rancho was made by a metes and bounds description. The defendants Crawford & Hiles were not parties to any of these documents. Their immediate predecessor in interest, Carpenter & Henderson, were parties to none of them except to a quitclaim deed made by them to Norris Oil Co. of all their interest in the Norris Oil Co. head lease, except the 80 acres in question, and to a re-lease of the 80 acres made by Norris Oil Co. to Carpenter & Henderson shortly thereafter. However, these latter documents were only a part of all the evidence received and considered by the trial court. We cannot say that it or the evidence as a whole, as a matter of law, established the east boundary of parcel four as other than one extending due north according to the astronomical meridian.

The trial court having properly determined that the plaintiffs were entitled to none of the relief prayed for and that the plaintiffs in intervention were entitled to relief as prayed, the judgment is affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

Hearing granted; SCHAUER, J., not participating.



109 Cal.App.2d 832

**DANIELSON v. ROCHE et al.**

Civ. 14729.

District Court of Appeal, First District,  
Division 2, California.

March 20, 1952.

Action by woman against doctor who removed parts of plaintiff's fallopian tubes during appendectomy. The Superior Court, City and County of San Francisco, Frank T.

Deasy, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that the evidence supported the implied finding that plaintiff's consent to be operated upon embraced the removal of her allegedly diseased fallopian tubes.

Affirmed.

#### 1. Evidence ⇨570

When matter in issue is one within knowledge of experts only and is not within common knowledge of laymen, expert evidence is conclusive.

#### 2. Assault and Battery ⇨35

In action by woman against doctor for removing plaintiff's allegedly diseased fallopian tubes during appendectomy, uncontradicted evidence disproved plaintiff's allegation that no medical or surgical emergency existed for the operation on her fallopian tubes.

#### 3. Assault and Battery ⇨35

In action by woman against doctor who removed her fallopian tubes during appendectomy, evidence supported implied finding that plaintiff's pre-operation consent that doctor could administer and perform all and singular any treatments or operation which was then or during contemplated operation deemed advisable or necessary embraced the removal of plaintiff's allegedly diseased fallopian tubes.

#### 4. Appeal and Error ⇨1002

Where evidence had been conflicting, appellate court would not review it for purpose of upsetting verdict, and such court was bound by jury's decision as to the facts.

#### 5. Appeal and Error ⇨730(1)

Appellate court should not be asked to search through record for errors which it may suspect appellant to be relying upon, and, therefore, if appellant believes that trial court committed error in reference to instructions, he should point out definitely wherein action of court in this regard was erroneous.

#### 6. Trial ⇨243

In action by woman against doctor who removed allegedly diseased fallopian tubes during appendectomy, there was no contradiction between instructions con-



cerning the authority of a doctor to perform an operation other than that consented to by his patient.

---

Joseph E. Isaacs, San Francisco, Alan H. Critcher, San Francisco, Martin J. Jarvis, San Francisco, for appellant.

Joseph A. Brown, San Francisco, for respondent.

GOODELL, Justice.

This appeal is from a judgment in favor of defendant A. W. Morton for costs. A new trial was denied.

On December 31, 1947 appellant filed this action against Dr. A. W. Morton, Sts. John Hospital, and four fictitious defendants, for damages arising out of an abdominal operation performed on appellant by Dr. Morton in said hospital on February 26, 1935. A nonsuit was granted as to the hospital and no further action was taken thereon.

After this appeal was taken Dr. Morton died and his executors were substituted in his place.

On or about February 25, 1935 appellant, then living in a hotel in San Francisco, was in severe abdominal pain and Dr. Morton was summoned. He called accompanied by a nurse, examined the patient, diagnosed her case as appendicitis and salpingitis, and advised an immediate operation. She was taken to the hospital and before the operation she signed the following writing: "I, the undersigned, having engaged Dr. Morton, physician and surgeon, do hereby grant him the authority and give my consent for him to administer and perform all and singular any treatments or operation to or upon me which may now or during the contemplated services be deemed advisable or necessary." Appellant testified that this writing was brought to her room by a nurse before the operation, that she had read it, and that the signature thereon was hers.

While operating, and while appellant was under a spinal anesthetic, Dr. Morton found that her fallopian tubes were full of pus, which was a condition more serious than the inflammation which he had diag-

nosed. He therefore removed not only the appendix, but the diseased part of both tubes. It is that part of the operation involving the tubes which forms the basis of this action as appears from the following allegation: "That no medical necessity, justification or excuse existed for cutting and tying said fallopian tubes of plaintiff; that no medical or surgical emergency was involved therein; that plaintiff was then and there of full age and of sound mind, fully capable of consenting to any operation that might be necessary; that her consent was not obtained by said defendant, A. W. Morton \* \* \* to the said operation insofar as the same involved the fallopian tubes of plaintiff."

Appellant's counsel say: "this action is not based upon any lack of skill on the part of the defendant physician. It is not based upon any theory of wrong diagnosis. It is an action for assault and battery."

Dr. Morton testified as follows with respect to the necessity for the operation on the tubes:

"Q. Dr. Morton, in your opinion, was it necessary to remove the portions of the fallopian tubes which you did remove, to save this patient's life? A. It was.

"Q. And for what reason did you believe her life to be in danger at that time? A. I did, because there was free pus there, and when you have got free pus in the abdomen with inflammation, it is liable to extend up above, and it is good judgment to take it out.

"Q. What will happen if it extends up above? A. Well, you get a general peritoneal inflammation of the cavity that they have described there, and that is called inflammation of the bowels, or general peritonitis, and when that does occur, it often produces fatality."

He elaborated by explaining the difference between an ordinary salpingitis (his initial diagnosis) where there is a drainage of pus, and a pyosalpinx, which results from a failure or lack of drainage. He said: "But whenever it becomes blocked and fills up, you get a pyosalpinx. Then you have got a very serious condition, and that is what happened in this case." The hospital's anesthesia record in

evidence shows that his pre-operative diagnosis was "appendicitis-salpingitis". This was arrived at from the examination at the hotel and from the history which the patient then gave. Dr. Morton testified that after the operation he wrote thereon the word "pyosalpinx" under the word "salpingitis". Thus the condition actually discovered in the operation appears on the hospital record in just a position to the condition as he first diagnosed it.

Dr. Carlos Fernandez, who assisted at the operation, testified:

"Q. Did you see the pus there? A. Yes, there was big pus, there was a mass of pus.

"Q. And did you see the tubes after they were taken out? A. Yes.

"Q. And what did you observe about them? A. That it was a mass involving other tissues, due to the inflammatory condition, so that it makes a mass altogether like inflammation of an abscess and pus is inside and around \* \* \*.

"Q. Now, was it necessary, to protect and preserve the life of the patient, to perform that operation? A. Yes. \* \* \*

"Q. And in your opinion, was there any way to cure that condition without removing the tubes? A. No. \* \* \*

"Q. And you believe that was the only thing that could be done to preserve her life and health? A. Yes, sir."

[1] When "the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive." *Engelking v. Carlson*, 13 Cal.2d 216, 221, 88 P.2d 695, 697.

[2] No evidence, either expert or otherwise, was produced by appellant to contradict the foregoing testimony of the two surgeons. More than that, it may be said here as it was in *Preston v. Hubbell*, 87 Cal.App.2d 53, 59, 196 P.2d 113, 116, (a case containing a comprehensive discourse on the law of emergency operations): "Plaintiff offered no evidence that an immediate operation was not required." It follows that the allegation that no medical or surgical emergency existed for the operation on the tubes was not only not

proved, but was definitely disproved by uncontradicted evidence.

[3] There was likewise a failure of proof of plaintiff's allegation "that her consent was not obtained by said defendant, A. W. Morton \* \* \* to the said operation insofar as the same involved the fallopian tubes \* \* \*." Such consent, or lack thereof, was thus tendered as one of the issues—and an important one—for the jury. The writing gave consent to "administer and perform all and singular *any* treatments or operation \* \* \* which may now or during the contemplated services be deemed advisable or necessary." (Emphasis added). The jury apparently treated the consent as embracing not only the appendectomy but whatever further operation might be considered necessary after the abdomen had been opened up and explored by the surgeon. The language of the consent (emphasized above) meant just such a situation as that which developed in this case. The verdict implies a finding that the consent included the operation in both its phases.

[4] Dr. Morton testified that before the operation he told appellant that he was going to take out both the appendix and the tubes and that after the operation he told her that it had been necessary to operate on the fallopian tubes, and he had done so, and that the consequence of such an operation was that thereafter she would be unable to become a mother, also that there was known to medical science an operation (which he described to her) which could be performed later, if she so desired, which would remove such disability and render conception again possible. Appellant testified that neither before nor after the operation did Dr. Morton tell her anything whatever about the fallopian tube operation or its consequences, and that she learned of it only on February 27, 1947, when another surgeon operated for adhesions. This testimony produced a sharp conflict which the verdict resolved against appellant. With respect to such matters appellant in her brief states that she "is fully cognizant of the rule that an appellate court in California will not review the evidence for the purpose of upsetting the

verdict of the jury and that this court is bound by the decision of the jury as to the facts." This removes the necessity for further discussion of this phase of the case.

The plaintiff requested four instructions, all of which were given.

The first simply said that an operation performed without consent is an assault and battery.

The second was very general, and stated only self-evident propositions.

The third was as follows: "I instruct you that a surgeon will only be justified in performing an operation without the consent of the patient where the following circumstances exist: that the patient is in such (a dire state or such) dire straits that his consent cannot be obtained and where delay in performing the operation will necessarily result in placing the life of the patient in hazard \* \* \*. [I]f you should find that the defendant cut and tied the fallopian tubes of the plaintiff without her consent, that the wrong committed is not negligence, it would be trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a physician who performs an operation without his patient's consent commits (as a matter of law) an assault for which he is liable in damages."

The fourth instruction told the jury simply that when any bodily function is destroyed by a wrongful act, compensation in damages follows.

The court gave instructions in addition to the four presented by plaintiff. It is claimed that the following four conflict with those tendered by plaintiff:

"You are instructed that if in the course of an operation to which the patient has consented, the physician should discover conditions that could not with reasonable professional skill be anticipated before the operation was commenced, and which condition or conditions, if postponed, would involve pain and distress to the patient out of proportion to the risk of the new operation, and if the condition found was such that a reasonable man would consent

to the operation, if he knew of the condition discovered by the doctor, then the doctor \* \* \* would, though no express consent had been obtained or given, be justified in extending the operation to remove the discovered condition and overcome it."

"When a patient places \* \* \* herself in the care of a surgeon without instructions to the surgeon or limitations upon his authority, and surgery is indicated, she thereby, in law, consents \* \* \* that the surgeon may perform such operation or surgery as in his best judgment, care and skill is necessary, proper and essential to the patient's welfare, and in case the surgeon (in the exercise of his best judgment) performs an operation upon the plaintiff, and there is no complaint against the surgeon for want of the exercise of care and skill, of course, there could be no recovery against the surgeon."

"You are instructed that the law recognizes that a surgical operation cannot be contracted for or performed according to plans and specifications, and that during the course of the operation, when the patient is unconscious, and his consent cannot be obtained, the surgeon may find a condition, previously unknown to exist, which condition may be a hazard to the life and to the health of the patient, and which requires the surgeon to act immediately for the best interests of the patient as to the extent of the operation. In such a case, the patient is presumed to have contemplated all of the risks incident to the operation and to have given an implied consent to the exercise of his best skill and judgment by the surgeon."

"You are instructed that a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, in cases of emergency, without the consent of the patient, where such operation is within the usual and customary practice among physicians and surgeons in the same locality, and where some immediate action is found necessary for the preservation of the life and health of the patient, and it is impracticable to first obtain consent to the operation or treatment which the surgeon deems to be immediately necessary."



[5,6] Appellant's counsel say: "The court instructed the jury \* \* \* that a surgeon may not, except in a case of dire emergency \* \* \* perform any operation, and then in the next breath proceeded to give instructions contrary thereto" but they do not point out any part of one which conflicts with any part of another. As said in *Elson v. Moore*, 11 Cal.App. 377, 382, 105 P. 271, 273, "If counsel believes that the court committed error in reference to the instructions, he should point out definitely wherein the action of the court in this regard was erroneous. \* \* \* We should not be asked to search through the record for errors which we may suspect counsel to be relying upon." See, also, 2 Cal.Jur. p. 731. However this may be, a comparison of plaintiff's third instruction with the four last quoted does not show any conflict. The consent did not specify either an appendectomy or a salpingectomy, or any other operation by name. It did, however, embrace "any \* \* \* operation \* \* \* which may now or during the contemplated services be deemed advisable or necessary" (Emphasis added). Appellant in her complaint tendered a distinct issue on whether the consent was broad enough to cover the operation on the tubes, and we fail to see how the jury could have been confused or misled by the four instructions which appellant, in the most general fashion, now criticizes.

The one-year statute of limitations was pleaded. The operation was performed on February 26, 1935, and this action was not commenced until December 31, 1947. The complaint alleges that plaintiff only on February 27, 1947 learned that the tubes had been operated on, a matter on which there was a decided conflict between appellant's testimony and Dr. Morton's. Appellant cannot complain of the instructions given on this subject since they were based on her theory that the statute commences to run only from discovery. Whether that rule applies in such a case as this, (which is disputed by respondents) need not be decided.

After Dr. Morton's death respondents moved to dismiss this appeal on the ground that the cause of action, if any, did not

survive his death. It is not necessary to decide this question in view of the conclusion reached on the merits of the case.

The judgment appealed from is affirmed and the motion to dismiss the appeal is denied.

NOURSE, P. J., and DOOLING, J., concur.



109 Cal.App.2d 854

**WOLD v. LUIGI CONSENTINO  
& SONS et al.**

Civ. 8063.

District Court of Appeal,  
Third District, California.

March 21, 1952.

Louis Wold brought action against Luigi Consentino & Sons, a partnership, and others, to recover one-half of the profits received by defendants in construction of a building. The Superior Court, Shasta County, Warren Steel, J., entered judgment that plaintiff take nothing, and thereafter granted plaintiff's motion for new trial, and defendants appealed from order granting new trial and plaintiff appealed from the judgment. The District Court of Appeal, Van Dyke, J., held that though no license to act jointly had been obtained, plaintiff could recover profits as allegedly agreed, and that appeal from the order was moot.

Judgment reversed with directions, and appeal from order dismissed.

See also Cal.App., 235 P.2d 217.

**1. Appeal and Error** ¶438

**New Trial** ¶163(2)

An order granting new trial vacates judgment, but when appeal is taken from such order, vacating effect is suspended, and judgment remains effective for purpose of an appeal from the judgment.

**2. Appeal and Error** ¶1177(1), 1178(6)

Reversal of judgment adverse to plaintiff will result in retrial unless upon record

appellate court would be justified in either limiting retrial or directing entry of judgment. Rules on Appeal, rule 3(a).

flict in evidence. Rules on Appeal, rule 3(a).

### 3. Appeal and Error ⇨790(3)

Where defendants appealed from order granting new trial after judgment was entered adverse to plaintiff, and plaintiff appealed from the judgment, and reversal of judgment would require retrial upon all issues because limitation of retrial or directed judgment was not justified, defendants' appeal was moot. Rules on Appeal, rule 3(a).

J. Oscar Goldstein, Burton J. Goldstein and P. M. Barceloux, all of Chico, (Jordan N. Peckham, Chico, of counsel), for appellants.

Carlton & Shadwell, Redding, for respondent.

VAN DYKE, Justice.

### 4. Joint Ventures ⇨1.15

In action by licensed contractor against other contractors to recover one-half of profits received by defendants for construction of certain building, evidence supported finding that parties were engaged in joint venture. Business and Professions Code, § 7000 et seq.

### 5. Licenses ⇨39.43

Illegality of operation of contracting partnership or joint venture without having procured license required does not preclude party thereto from instituting proceedings for dissolution of venture and an accounting. Business and Professions Code, § 7029.

### 6. Licenses ⇨39.43

Licensed contractor who allegedly engaged in joint venture with defendant licensed contractors who were members of partnership for construction of certain building could recover under alleged agreement one-half of profits received by defendants from owner, notwithstanding that joint venture was illegal transaction because no license to act jointly was obtained. Business and Professions Code, § 7029.

### 7. Appeal and Error ⇨1176(1)

Where judgment was entered adverse to plaintiff and thereafter motion for new trial was granted, though judgment was reversed on appeal on ground that plaintiff was entitled to relief sought, trial court would not be directed to enter judgment in favor of plaintiff, because trial court had indicated by its order granting new trial that it believed all issues in case should be retried and because there was much con-

plaintiff below commenced this action against defendants by a complaint in which he alleged that defendants were a partnership; that on or about July 1, 1947 defendants orally employed plaintiff to superintend, manage and direct the construction of a certain building near Redding, California; that defendants had theretofore contracted with the owners to construct said building; that they agreed to pay for plaintiff's services one-half of the profit resulting from the construction of the building; that the building was completed; that a profit resulted; and that defendants had not paid to plaintiff his one-half thereof. Defendants answered, alleging affirmatively that plaintiff had been employed as a foreman in the construction of the said building for foreman's wages; that these wages had been paid; that no other agreement existed for the payment to plaintiff of anything in connection with his services. They specifically denied they agreed to pay plaintiff one-half of the profit. Upon these pleadings the parties went to trial. It appeared that both the plaintiff and the defendant partnership had long been licensed as contractors pursuant to the Business and Professions Code, Div. 3, Ch. 9, and that they were so licensed during the construction of the building.

After the evidence was all in the court permitted the defendants to amend to conform to proof and by that amendment they pleaded that the plaintiff and the defendant partnership had in reality engaged in a joint venture in constructing the building which was the subject of the contract between defendants and the owners and that no license for such joint venture had been procured. The court found in accordance with this pleading and denied any relief to plaintiff, although also finding that there had

been an agreement between the parties to divide the profits that might be earned through performance of the building contract. During the course of the trial an accounting was had by which it was determined by the court what were the profits so derived and the court found that they amounted to \$26,212.45. Upon the theory that the case presented a proper one for the application of the rule that parties to illegal transactions cannot come into court and ask to have their illegal object carried out nor can any of them set up a case which must necessarily disclose an illegal purpose as the groundwork of the claim, judgment was entered that plaintiff take nothing and that defendants recover costs.

Plaintiff moved for a new trial and his motion was granted, the court ordering that a new trial be had on all issues. Defendants appealed from that order and thereafter, pursuant to Rule 3(a) of Rules on Appeal, the plaintiff appealed from the judgment.

[1] Concerning such an appeal the Supreme Court said in *Spencer v. Nelson*, 30 Cal.2d 162, 164, 180 P.2d 886, 887: "As to the appeal from the judgment: One effect of an order granting a new trial is, of course, to vacate the judgment; however, when an appeal is taken from such an order the vacating effect is suspended, and the judgment remains effective for the purpose of an appeal from the judgment."

[2,3] We believe that the judgment must be reversed and of course the effect of such reversal will be that the cause must be retried in the court below unless upon the record this would be justified in either limiting the retrial or directing an entry of judgment. We think neither a limitation of the retrial nor a directed judgment would be proper and consequently, since the effect of reversal will be a retrial upon all issues, the defendants' appeal from the order granting a new trial would become moot. We shall, therefore, take up the appeal from the judgment.

[4,5] It appears that plaintiff and defendants had for sometime and as licensed contractors performed various small building contracts, dividing profits resulting

therefrom; that in part these jobs were undertaken in order to maintain available crews in anticipation of larger undertakings and in particular in anticipation of obtaining the building contract which later was obtained and became the object of the action herein. Sometimes these several contracts were taken by plaintiff and sometimes by defendants. No license to engage in joint operations was ever obtained. Plaintiff, anticipatory to bid thereon, worked on the estimates of the cost of the subject building and a bid was submitted. While the bid was the lowest received by the owners, yet all bids were rejected and the plans for the building were modified by eliminating a penthouse that had been proposed. Bids were again called for and again a bid was made formally by defendants, based in part at least upon revised estimates prepared by plaintiff. The bid was accepted and the contract executed between the owners and the defendants. Some time elapsed between the submission of the two bids and after the first had been submitted Luigi Consentino, who seems to have been the controlling member of the defendant partnership, met with a representative of the owners and with plaintiff. In the presence of this representative he and the plaintiff mutually stated that although the contract would be in the name of the defendant partnership the profits would be divided between that partnership and plaintiff. Plaintiff testified that the same arrangement was agreed to as to the contract actually obtained and this was denied by Luigi Consentino who testified that as to the building contract obtained by the second bid the arrangements between the partnership and plaintiff had been modified so that plaintiff was merely employed as superintendent and general manager on the job, for which he was to receive and did receive wages, and nothing more. When asked by the trial court why, if the arrangement was as he claimed it to be, plaintiff did not join as a contracting party in the execution of the contract, plaintiff replied that he did not do so because the parties did not have a joint license. Enough of the evidence has been stated to show, we think, that the court's finding that the venture was joint is



supported by the evidence. We also think that a contrary finding would also have been supported, since the testimony and the inferences that could be drawn were conflicting. Also the evidence would have supported a finding that plaintiff was not a joint venturer but was entitled as an employee to receive one-half the profits derived by defendants from the performance of their contract and, indeed, the trial court appears to have made findings that he was so employed, which apparently conflict with the findings as to joint venture. But we think we are not here concerned with the task of harmonizing the findings and will proceed to a discussion of the problem posed by the fact that, considered as a joint venture, the parties thereto, each of whom had been issued a license to engage separately in the capacity of a contractor, undertook, although in the name only of the partnership, jointly to act in the capacity of a contractor within this State without having first secured an additional license for acting in that capacity, in violation of the provisions of Section 7029 of the Business and Professions Code. Remembering that each of the joint venturers was duly licensed as a contractor and that only the license to act jointly was lacking, that the contract which the joint venturers were to perform was completed and paid for by the owners, that the defendant partnership received into its possession, and still retains, the profits of the venture, and that this is an action, not against the owners for whose protection in the main part the statute requiring the license was enacted, and that because the joint venturers were licensed so as to bring to the performance of the contract the skill, knowledge and responsibility which in main part the licensing statute was enacted to assure to those with whom they dealt, we think that the decision must be controlled by application of the rule laid down in *Galich v. Brkich*, 103 Cal.App.2d 187, 229 P.2d 89, which was decided after the trial court's decision in this case. We quote the following from the headnote appearing in the report of the decision as follows: "The illegality of the operation of a contracting partnership or joint adventure without having procured the license required by Bus.

& Prof.Code, § 7029, does not preclude a party thereto from instituting proceedings for dissolution of the venture and an accounting."

[6] Obviously if such a party could maintain a proceeding for a dissolution of an unlicensed joint venture, and an accounting of its profits to the time of dissolution, then a party to a joint venture which has been completed can maintain an action for an accounting of the profits from the joint venturer who has received them. The Supreme Court denied a hearing in *Galich v. Brkich*. It likewise had denied a hearing in *Norwood v. Judd*, 93 Cal.App.2d 276, 209 P.2d 24, which presented a similar situation, although it must be said to have been distinguishable from *Galich v. Brkich*, supra, and the instant case, because turning in part upon a promise made by the co-venturer after his receipt of the proceeds of the venture and after the venture had been completed. Nevertheless *Norwood v. Judd* squarely challenged the rule laid down in *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90, that even where the illegal purpose of the partnership had been accomplished an action would not lie between the partners for an accounting of the proceeds. Indeed, the opinion in *Norwood v. Judd* declared, "If this case is still the law of California, it would require an affirmation of the instant case." [93 Cal.App.2d 276, 209 P.2d 31] The case was reversed.

We think it profitless to indulge in further discussion concerning these cases and those which preceded them, for we feel constrained to consider that this appeal as to the point under discussion is controlled by the decision in *Galich v. Brkich*, as succinctly stated in the headnote which we have quoted.

[7] Plaintiff in his appeal from the judgment has asked that it be reversed and that we direct the trial court to enter a judgment in his favor for one-half of the profits found to have been derived from the performance of the joint venture. This we think we should not do. The trial court has indicated by its order granting a new trial that it believed all the issues in the case should be retried and where, as we

have noted, there is so much conflict in the evidence we believe that disposition to be the only one that is fair to the parties.

The judgment is, therefore, reversed, and a new trial is ordered as to all issues. The appeal from the order granting a new trial, thus becoming moot, is dismissed. *Spencer v. Nelson*, supra.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.



110 Cal.App.2d 38

**PEOPLE v. ANSITE.**

Cr. 4743.

District Court of Appeal, Second District,  
Division 2, California.

March 25, 1952.

Rehearing Denied April 7, 1952.

Hearing Denied April 24, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Lewis Drucker, J., of forgery, and he appealed. The Court of Appeal, McComb, J., held, *inter alia*, that since defendant had voluntarily chosen to represent himself, he had not been deprived of his constitutional right to be represented by counsel.

Affirmed.

**1. Criminal Law** §641(1)

An accused has a constitutional right to appear and defend himself in person and he is entitled to waive assistance of counsel, and where he does so of his own volition and with full knowledge of what he is doing, he cannot complain that he did not have a proper defense at the time of his trial.

**2. Criminal Law** §641(1)

Where one accused of forgery voluntarily chose to represent himself, he was not deprived of his constitutional right to be represented by counsel.

**3. Criminal Law** §939(1)

Trial court did not err in denying defendant's motion for new trial on ground

that he had newly discovered evidence in support of his alibi, in absence of any showing of any reason why defendant did not know at time of trial of the alleged newly discovered evidence.

**4. Criminal Law** §670

In absence of offer of proof that witness for prosecution had been convicted of a felony, proof of particular acts of misconduct of witness was inadmissible and rulings sustaining objections to questions asked witness by defendant concerning prior trouble and witness's probation record were proper. Code Civ.Proc. § 2051.

**5. Forgery** §44

Evidence supported conviction for forgery.

George J. Ansite, Jr., pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty on four counts of forgery after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

*Facts:* Defendant forged the name "B. C. Robles" on four different checks, naming Donna M. Nolan as the payee. The payee in turn cashed each of the checks with various merchants in Los Angeles County. At the time the checks were drawn by defendant on the Bank of America, Wilmington Branch, the bank did not have an account with a "B. C. Robles."

After the information charging defendant with forgery was filed he was represented by counsel at the preliminary hearing and also at the time of arraignment. Subsequently the lawyers representing defendant were relieved and the public defender was appointed to represent him.

Thereafter defendant moved for permission to appear in propria persona which motion was granted. Defendant insisted on representing himself at the time of his trial though the court informed him that

the public defender was available and could aid him in the presentation of his defense.

[1,2] *Questions: First: Was defendant convicted without benefit of adequate legal counsel?*

*No.* A defendant has a constitutional right to appear and defend himself in person. (People v. Looney, 9 Cal.App.2d 335, 338 [3], 49 P.2d 889.) Likewise defendant is entitled to waive the assistance of counsel and where he does so, as in the instant case, of his own volition and with full knowledge of what he is doing, he cannot complain that he has not had a proper defense at the time of his trial. (People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001; People v. Pearson, 41 Cal.App. 2d 614, 619, 107 P.2d 463.)

In the present case defendant voluntarily chose to represent himself; therefore there is no merit in his contention that he was deprived of his constitutional right to be represented by counsel.

[3] *Second: Did the trial court err in denying defendant's motion for a new trial on the ground that he has evidence of an alibi which was unknown to him at the time of the trial?*

*No.* There is a total absence of any showing in the record of any reason why defendant did not know at the time of the trial of the alleged newly discovered evidence in support of his claim that he was not present at the time the crimes of which he was convicted were committed.

[4] *Third: Did the trial court commit prejudicial error in refusing to allow defendant to interrogate a prosecution witness relative to prior offenses committed by her, and as to her probation record?*

*No.* Section 2051 of the Code of Civil Procedure reads: "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, *but not by evidence of particular wrongful acts*, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a cer-

Cal.Rep. 241-242 P.2d-27

tificate of rehabilitation." (Emphasis added.)

In the absence of an offer of proof that the witness, Mrs. Tilden, had been convicted of a felony, proof of particular acts of misconduct of the witness was inadmissible under the rule announced in the italicized portion of the above quoted code section. The rulings of the trial court in sustaining objections to questions asked the witness by defendant concerning prior "trouble" and her probation record were correct.

[5] An examination of the record discloses that defendant was afforded a fair and impartial trial and given his constitutional rights. He was convicted after substantial evidence had been introduced to support each count in the information.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.



110 Cal.App.2d 145

CHACON et al. v. AUSTIN.

Civ. 18667.

District Court of Appeal, Second District,  
Division 3, California.

March 28, 1952.

Ruben Chacon, by and through his guardian ad litem, Agapito Chacon, and others brought action against Lonnie Austin to recover for death of pedestrian who was struck by automobile of defendant. The Superior Court of Los Angeles County, J. T. B. Warne, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Vickers, J., held that question whether pedestrian was contributorily negligent was a fact question, and that failure to find on that issue required reversal of judgment.

Judgment reversed.



**1. Automobiles** ⇨247

Finding that motorist carelessly, recklessly, negligently and unlawfully operated his automobile so as to run into pedestrian and that as result of injuries sustained by pedestrian, pedestrian died, did not negative existence of contributory negligence on part of pedestrian that proximately contributed to the happening of the accident.

**2. Appeal and Error** ⇨1071(6)

Failure to find in action against motorist for death of pedestrian on issue of contributory negligence of pedestrian required reversal of judgment in favor of plaintiffs unless it could be said as a matter of law that if a finding had been made on question of contributory negligence it would necessarily have been adverse to motorist.

**3. Appeal and Error** ⇨1071(6)**Automobiles** ⇨245(72)

In action against motorist for death of pedestrian who was struck in or near crosswalk, question whether pedestrian was contributorily negligent was a question of fact, and therefore failure to find on issue of contributory negligence, which was sufficiently pleaded by motorist, required reversal of judgment against motorist.

---

George W. Downing, Jr., Los Angeles, for appellant.

Altagen, Rubin & Umann, Los Angeles, for respondents.

VICKERS, Justice pro tem.

In this action the surviving husband and the children of Ramona Chacon recovered a judgment for damages for her death which was found to have been caused by the negligence of defendant Lonnie Austin in the operation of his automobile. Deceased was struck in or near the east crosswalk of the intersection of Fickett Street, a north and south street, and East Fourth Street, an east and west street, in the City of Los Angeles. Defendant appeals.

Three grounds of appeal are urged for reversal of the judgment: (1) The evidence was insufficient to justify findings that the accident was the proximate result

of defendant's negligence; (2) the evidence was insufficient to justify a finding that deceased died as a result of the accident; and (3) failure of the court to find upon material issues.

The following facts were disclosed by the evidence: Defendant testified that his car had been pushing another car traveling east on Fourth Street. He shoved the other car, disengaged it, and it went through the intersection. It was after dark and the lights of defendant's car were on. Defendant testified he was driving 15 or 18 miles an hour; he made a statement to a police officer that he was traveling 30 miles an hour. Deceased left the north curb of Fourth Street and started to cross the street in the easterly crosswalk. Defendant testified that he did not see her until she was within a foot or two of his car. When he saw her he turned sharply to the right and came into contact with another car which was on his right. He proceeded for a short distance when he stopped and came back to the scene of the accident. The left side of his car struck the deceased. She was knocked down and lay in about the middle of Fourth Street, some 29 feet easterly of the east curbline of Fickett Street. She was taken to the hospital in an ambulance, was confined there for some four and one-half months, and died without leaving the hospital. There was no evidence as to the nature of her injuries and no direct evidence as to the cause of death. The facts in evidence were some circumstantial evidence as to the cause of death.

[1-3] It is necessary to consider only the third point raised by defendant, namely, the failure of the court to find on all the material issues. Contributory negligence was sufficiently pleaded. The only finding with respect to the issue of liability reads as follows: "That it is true that the defendant, Lonnie Austin, carelessly, recklessly, negligently and unlawfully operated his automobile so as to run into and against the body and person of said Ramona Chacon, and that as a result of said reckless, careless and negligent operation of said automobile and the injuries sustained by said Ramona Chacon, the said

Ramona Chacon did die on the 23rd day of May, 1949." This finding does not negative the existence of negligence on the part of deceased that proximately contributed to the happening of the accident. The failure to find upon this issue requires a reversal of the judgment unless it can be said as a matter of law that if a finding had been made it would necessarily have been adverse to the defendant. Defendant testified that when he first observed Mrs. Chacon she was running. The only evidence in favor of plaintiffs on this issue would have been the presumption that she was exercising ordinary care. This was to be weighed by the trial court against the evidence that she ran into the side of defendant's car. A case in point is *Hall v. Kaufman*, 30 Cal.App.2d 283, 86 P.2d 151. Under facts strikingly similar to those of the present case it was held that the question of contributory negligence was one of fact and not of law and that the failure to find on the pleaded defense of contributory negligence requires a reversal of the judgment. See also the case of *Lowe v. Pierce*, 76 Cal.App.2d 316, 172 P.2d 936.

The judgment is reversed.

WOOD, Acting P. J., and VALLÉE, J.,  
concur.



109 Cal.App.2d 897

PEOPLE v. FREDERICK.

Cr. 4703.

District Court of Appeal, Second District,  
Division 1, California.

March 24, 1952.

Hearing Denied April 21, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Phillip H. Richards, J., of feloniously driving an automobile while under influence of intoxicating liquor and in an unlawful manner, causing bodily injury to other persons as result of intersectional collision with another automobile, and he appealed from the judgment and

from order denying a motion for a new trial. The District Court of Appeal, Doran, J., held that evidence justified conviction.

Judgment and order affirmed.

1. Criminal Law ⇨1144(13)

A court which reviews conviction for a crime must view evidence in light most favorable to judgment rendered.

2. Criminal Law ⇨1169(1)

Where evidence was conflicting as to whether sample of defendant's blood, examination of which disclosed .21 per cent of alcohol by weight, was taken with or without defendant's consent, admission of evidence of sample and of alcoholic tests of sample, over defendant's motion to suppress such evidence on grounds that defendant's constitutional rights to personal security and privacy were violated and that use of blood and chemical analysis in evidence would violate defendant's rights to due process of law and against self-incrimination, was not ground for reversal of conviction for feloniously driving automobile while under influence of intoxicating liquor and in unlawful manner, causing bodily injury to other persons. Vehicle Code, § 501; U.S.C.A.Const. Amends. 4, 14; Const. art. 1, § 13.

3. Automobiles ⇨355(6)

Evidence justified conviction for feloniously driving automobile while under influence of intoxicating liquor and in an unlawful manner, causing bodily injury to other persons, as result of intersectional collision with another automobile. Vehicle Code, § 501.

4. Criminal Law ⇨238

Evidence given at preliminary examination justified magistrate in finding that there was reasonable and probable cause to believe defendant was guilty of feloniously driving an automobile while under influence of intoxicating liquor and in unlawful manner, causing bodily injury to other persons as result of intersectional collision with another automobile, and evidence justified magistrate in holding defendant to trial on such charge. Vehicle Code, § 501.

5. Criminal Law ⇨1166½(12)

Statement made by trial judge in jury's presence in prosecution for feloniously

driving automobile while under influence of intoxicating liquor and in unlawful manner, causing bodily injury to other persons as result of intersectional collision with another automobile, which statement was to effect that defendant's attorney was not testing anybody's right to take test of defendant's blood which was taken after collision and which disclosed that defendant's blood contained .21 per cent of alcohol by weight, and that such was civil matter not to be decided by jury, was not ground for reversal of conviction where defendant did not assign statement as error or ask Court to admonish jury to disregard it, and statement was made to defendant's attorney and was not made to jury, and record disclosed no resulting prejudice. Vehicle Code, § 501.

**6. Criminal Law** ⇨822(1, 14)

In prosecution for feloniously driving automobile while under influence of intoxicating liquor and in unlawful manner, causing bodily injury to other persons as result of intersectional collision with another automobile, given instructions relating to duty to drive on right half of road, and referring to impeaching evidence concerning defendant's former conviction of felony, did not, when viewed as an entirety, violate defendant's fundamental rights and did not leave jury with erroneous view of its duties. Vehicle Code, § 501.

---

William C. Ring and Wells & Starkey, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged with violation of Vehicle Code, Section 501, by wilfully, unlawfully and feloniously driving an automobile "while under the influence of intoxicating liquor, and in an unlawful manner, causing bodily injury to Robert Russell Buzzell, Lorraine Buzzell and Francis Carter Gland, human beings".

About 2:30 or 3:00 a. m. on November 26, 1950, at the intersection of Florence Avenue and Alameda Street, a collision occurred between a 1936 Ford sedan driven by defendant south on Alameda, and a 1941

Ford sedan driven by Robert Russell Buzzell east on Florence. Frances Carter Gland was a passenger in defendant's car and Buzzell's wife, Lorraine, was riding in the Buzzell automobile. Both drivers and passengers sustained injuries and were transported by ambulance to the Tweedy Industrial Hospital in South Gate, three miles away. None of the injuries were fatal and apparently none resulted in permanent disability.

There is some conflict in the evidence. From the testimony of John de Paulis who was then driving south on Alameda Street, it appears that defendant's car passed with witness' car "awfully fast", later estimated at 50 miles per hour, swerved out onto the wrong side of the street, and collided with the Buzzell car which was almost through the intersection. There were boulevard stop signs and red flasher signals at the intersection. It is admitted in appellant's brief that defendant "violated the law in not completely stopping before entering the intersection", but claimed that neither that violation nor the fact that defendant was "driving slightly on the wrong side of the street", was a proximate cause of the injuries. Appellant maintains that "he proceeded across the intersection at less than 30 m. p. h. and had cleared all but 15 feet when Buzzell suddenly darted in front of him and was struck by defendant's car"; that "In this sudden peril he turned to his left or southeast across the center line and probably speeded up in hopes of averting the collision".

The evidence is also in conflict as to the circumstances surrounding the taking of a sample of appellant's blood at the Tweedy Industrial Hospital. The testimony of Dr. Victor Makita, who operates the hospital, was that when defendant was brought in, "He was complaining of pain in the left elbow, pain in the chest, principally; and his breath was markedly alcoholic. \* \* His temperature and respiration were normal, and he had a pulse rate of 80 and blood pressure of 120 over 75; and he was conscious and apparently not in shock". There was other testimony to the effect that appellant's breath was alcoholic. Appellant, who had been conveying two other men on



a drinking tour, denied having had anything to drink except two beers earlier in the evening.

According to Dr. Makita's testimony, after treating appellant's injuries, appellant was asked "whether it was all right to draw blood for blood alcohol tests for the California Highway Patrol", and "He said it was all right. Put his arm out". Dr. Makita then "put a tourniquet around his arm and cleansed the area with benzine, and Dr. Kern (who was there attending the Buzzells) extracted the blood with a syringe". The sample so obtained was delivered to the California Highway Patrol and a chemical examination disclosed that appellant's blood contained .21 of one per cent of alcohol by weight.

Appellant's version is that the blood extraction occurred while appellant was unconscious and without consent being given therefor. The appellant claims to have been unconscious from the time of the accident until waking up in the General Hospital between 9:00 and 10:00 o'clock the next morning, and denied any recollection of being at the Tweedy Industrial Hospital. Records of the General Hospital show a notation at 7:00 a. m.: "Admitted to Ward 5600 per stretcher. Conscious but rather drowsy".

Defendant, before trial, "moved the trial court to suppress evidence of the blood specimens coercively extracted from his body without his consent and the alcoholic tests of said samples". The grounds of this motion were that "defendant's rights to personal security and privacy were violated by said doctors, plaintiff and its agents in violation of the Fourth Amendment \* \* \* and that the use of said blood and any chemical analysis thereof in evidence \* \* \* will violate defendant's rights to due process of law and against self-incrimination and to not be a witness against himself and to not be compelled to furnish evidence against himself as guaranteed by the Fourteenth Amendment, Constitution of the United States, and Article I, sec. 13, Constitution of the State of California." The motion was denied. The taking of this blood sample, its chemical analysis, and use in evidence resulting in conviction, form

the basis of appellant's chief ground for reversal.

Cited and discussed in some detail by both parties to this appeal is the case of *People v. Rochin*, 101 Cal.App.2d 140, 225 P.2d 1, 913, which was a prosecution for unlawful possession of a preparation of morphine. Two capsules containing the preparation were found by officers who broke into defendant's bedroom without a warrant; later, the capsules which had been swallowed by defendant were forcibly recovered by means of a stomach pump. The appellate court, following the well established California rule, held that the capsules, although illegally obtained, were nevertheless admissible in evidence. A hearing in the Supreme Court of California was denied, three justices dissenting, in 225 P.2d 913.

In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 210, 96 L.Ed. —, the Supreme Court of the United States, on certiorari, unanimously held that the conviction, because obtained by the methods described above, should be reversed. A majority of the Court based the decision on the ground that the conviction violated the due process clause of the Fourteenth Amendment in that the methods employed offended "a sense of justice". Black and Douglas, JJ. in separate concurring opinions, relied upon the prohibition of self-incrimination in the Fifth Amendment, deemed to impose restraints not only upon the federal government but also upon the states.

An important difference between the Rochin case and the present prosecution is at once apparent. In the Rochin case there appears to be no doubt that the morphine capsules were illegally obtained. Three deputy sheriffs broke into defendant's room, "jumped upon the defendant, grabbed him by the throat", in an unsuccessful effort to recover the capsules which defendant had swallowed; defendant was then handcuffed, taken to a hospital, strapped on an operating table, and the capsules containing morphine were forcibly retrieved by the use of a stomach pump.

[1,2] The record in the instant case, however, discloses no such aggravated situation, but merely presents a direct conflict on the question whether the blood

sample was taken with or without the defendant's consent. Obviously if consent was given, any apparent similarity between the two cases ceases to exist, and the recent U. S. Supreme Court decision in the Rochin case can afford no relief to the appellant herein. In view of this conflict of evidence, and the duty of a reviewing court to view the evidence in the light most favorable to the judgment rendered, it becomes unnecessary to further discuss the Rochin case or this ground of appeal.

The testimony of Dr. Makita who attended the appellant at the Tweedy Emergency Hospital, has already been referred to, and furnishes substantial evidence that consent was given, notwithstanding appellant's denial thereof. It was likewise Dr. Makita's testimony that appellant was then conscious, moving around and uncooperative; "he wanted to smoke and wanted to drink, and this and that".

In appellant's brief various matters have been pointed out as affecting the credibility of the above mentioned testimony, such as alleged inconsistent statements in regard to defendant's condition, and a pending civil action against the physician for wrongfully extracting the blood sample. Opportunities for fabrication, and alleged unreliability of the blood analysis, are likewise stressed. Suffice it to say that such items of evidence were for the consideration of the jury which heard the testimony rather than for consideration by a reviewing court. It is reasonable and proper to assume that the verdict of conviction was the result of a careful study of all the evidence presented.

[3] That the record discloses substantial evidence in support of the judgment of conviction cannot be doubted. The admission that appellant had at least consumed some beer earlier in the evening; evidence that the purpose of defendant's drive was to convey certain other persons on a drinking tour; the surrounding circumstances of the accident, appellant's "markedly alcoholic" breath, and the final blood analysis showing .21 of one per cent of alcohol, undoubtedly provide substantial evidence to sustain the conviction. That there may have been other and con-

flicting evidence in appellant's favor does not furnish a ground for reversal.

[4] A survey of the testimony given at the preliminary examination fails to support appellant's contention that the committing magistrate had no probable cause to hold defendant for trial. The transcript of 145 pages of testimony indicates that the matter was gone into in considerable detail; it included evidence similar to that hereinbefore discussed, from which the magistrate was justified in finding that there was reasonable and probable cause to believe the defendant guilty.

Other contentions raised in appellant's brief charge errors in restricting cross-examination and in the admission and exclusion of evidence concerning defendant's intoxication. These alleged errors relate to the physician's opinion that defendant was intoxicated, and to the blood tests previously mentioned. The record fails to sustain appellant's contentions and no prejudicial error has been made manifest.

[5] The same may be said in reference to appellant's exception to the trial court's statement in the jury's presence: "You are not testing anybody's right to take that blood test in this action, Mr. Ring. That is a civil matter which will not be decided by the jury". As pointed out in respondent's brief, "appellant did not assign the remark of the court as error, or ask the Court to admonish the jury to disregard it". The remark was made not to the jury but to appellant's attorney in an attempt to keep the argument within the bounds of propriety. It was true that a civil action was pending to determine the matter in question. The record fails to disclose any resulting prejudice.

[6] It is claimed by appellant that the trial court erred in refusing certain requested instructions to the jury, and in the giving of certain instructions. Several of these assignments relate to the extraction of the blood sample and the use in evidence of the blood analysis, matters which have hereinbefore been discussed. Others relate to the duty to drive on the right half of the road, and in reference to impeaching evidence concerning defend-

ant's former conviction of a felony, alleged to have been secured by brutality and threats of the arresting officers. A review of the instructions given and refused discloses no prejudicial error; the instructions when viewed as an entirety cannot be deemed to have violated any of the defendant's fundamental rights nor to have left the jury with an erroneous view of its duties. Nor did the trial court err in overruling defendant's demurrer to the information, in denying a motion in arrest of judgment and a motion for a new trial.

A review of the record herein shows that the appellant was accorded a fair and impartial trial, and that the judgment of conviction is supported by substantial evidence. Under the showing made and the substantial evidence of the appellant's consent, the trial court's refusal to suppress evidence of the blood test cannot be deemed reversible error.

The judgment and order denying a new trial are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



110 Cal.App.2d 56

**ROSENBERG v. FEIGIN.**

Civ. 18580.

District Court of Appeal, Second District,  
Division 1, California.

March 26, 1952.

Herbert Rosenberg brought action against Emanuel V. Feigin. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered an order denying motion of plaintiff to set aside a ruling sustaining demurrer to third amended complaint, and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that order was not an appealable order.

Appeal dismissed.

### Appeal and Error — 113(1)

Order denying motion to set aside ruling which sustained demurrer to third amended complaint, was not an "appealable order", and appeal therefrom would be dismissed. Code Civ.Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

Edward B. Freed, Los Angeles, for appellant.

Ralph N. Highsmith, Henry E. Kappler, Los Angeles, for respondent.

HANSON, Justice pro tem.

The appeal is from an order denying a motion to set aside a ruling which sustained a demurrer to the third amended complaint. The order is not an appealable order. Code Civ.Proc. sec. 963; Title Ins. & Trust Co. v. Calif. etc. Co., 159 Cal. 484, 114 P. 838.

The appeal is dismissed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 885

**In re HEALY'S ESTATE.**

**WOOD et al. v. CROCKER FIRST NAT.  
BANK OF SAN FRANCISCO.**

Civ. 15012.

District Court of Appeal, First District,  
Division 2, California.

March 24, 1952.

Proceeding in the matter of the estate of Meta S. Healy, alias, deceased, wherein Crocker First National Bank of San Francisco, executor and trustee, filed its final account and Fielding S. Wood, and others filed objections. The Superior Court of the State of California, in and for the City and County of San Francisco, T. I. Fitzpatrick, and Daniel R. Shoemaker, JJ., entered an



order overruling the objections and settling the account, and the objectors appealed. The District Court of Appeal, Dooling, J., held that an order settling second account of executor was res judicata as to matters which were subject of exceptions filed to second account.

Order and decree affirmed.

#### 1. Executors and Administrators ⚖️514

Where matters are litigated and determined in settlement of intermediate account of executor of estate of a decedent order of court settling that account is conclusive on parties as to matters so litigated in all subsequent proceedings in probate of estate.

#### 2. Executors and Administrators ⚖️514

Where exceptions were filed to second account and report of executor by same parties and based upon same charges of fraud and concealment as exceptions to executor's final account and petition for final distribution, and such exceptions were found to be groundless and second account and report of executor was approved as filed, order settling second account was res judicata as to matters which were subject of exceptions filed to second account.

---

Henry J. Kleefisch, San Francisco, for appellants.

Chickering & Gregory, W. Burleigh Pattee, John Phillip Coghlan and Cooper, White & Cooper, San Francisco, for respondent.

DOOLING, Justice.

This appeal involves the same claim of fraudulent conduct by the Crocker First National Bank discussed in *Spencer v. Crocker First Nat. Bank*, 86 Cal.App.2d 397, 194 P.2d 775 to which reference is made for a statement of appellants' theory. In that case the first division of this court held that since the respondent bank was executor of the will of Meta S. Healy, deceased and the probate proceedings in her estate were still pending the probate court had exclusive jurisdiction of appellants' claim that the respondent bank was bound to account to the estate for the moneys lost

to the estate by its alleged fraudulent conduct.

Thereafter the executor bank filed its final account and appellants by written objections thereto urged the same matters alleged in their complaint in *Spencer v. Crocker First Nat. Bank*, supra. Appellants demanded a jury trial on the issue of the respondent bank's alleged fraudulent conduct which was denied by the court. From an order overruling the objections and settling the final account as presented this appeal was taken.

Appellants' sole ground of appeal is that the court erred in denying their demand for a jury trial. Appellants are met at the outset by the objection that the settlement of respondent's second account in 1945 is res adjudicata against them on the question which they sought to litigate by their objections to the final account. Although this question was fully presented in respondent's brief appellants filed no closing brief nor did they attempt to answer this contention on oral argument.

The record shows that the second annual account purported to show all money and property of the estate for which respondent executor was accountable and that these appellants filed written objections to that account in which in general language they asserted the same matters relied upon by them in their objection to the final account and that they further by reference incorporated into their written objections the allegations of their complaint in *Spencer v. Crocker First Nat. Bank*, supra. These objections were overruled and denied and the second account settled and approved by order of the probate court filed on December 11, 1945.

The probate court in the order settling the final account found as to this order of December 11, 1945: "That exceptions have heretofore been filed to the second account and report of the executor by the same parties and based upon the same charges of fraud and concealment as the exceptions to the executor's third and final account and petition for final distribution herein, and the said exceptions have heretofore been found to be groundless by the

above entitled Court and said second account and report of the executor was approved as filed."

[1,2] Thus is brought into play the settled rule that where matters are litigated and determined in the settlement of an intermediate account the order of the court settling that account is conclusive on the parties as to the matters so litigated in all subsequent proceedings in the probate of the estate. In re Estate of Wear, 20 Cal. 2d 124, 124 P.2d 12; In re Estate of Rider, 199 Cal. 742, 251 P. 805; Bank of America Nat. Trust & Savings Ass'n v. McRae, 81 Cal.App.2d 1, 8, 183 P.2d 385.

The application of this rule requires the affirmance of the order and decree appealed from.

The claim that certain attorneys' fees were improperly allowed was expressly abandoned at the oral argument.

The order and decree are affirmed and respondent is allowed costs on appeal pursuant to Rule 26(a), Rules on Appeal and a reasonable attorney's fee for resisting the appeal to be fixed by the probate court. In re Estate of Moore, 96 Cal. 522, 531, 31 P. 584.

NOURSE, P. J., and GOODELL, J., concur.



FRANCK et al. v. J. J. SUGARMAN-RUDOLPH CO. et al.\*

Civ. 18805.

District Court of Appeal, Second District,  
Division 3, California.

March 24, 1952.

Rehearing Denied April 11, 1952.

Hearing Granted May 22, 1952.

Action by George T. Franck and others against the J. J. Sugarman-Rudolph Co., a partnership, and others to recover money received by way of refund of income and excess profits taxes paid under protest out

\* Subsequent opinion 251 P.2d 949.

of purchase money due plaintiffs for sale of corporate stock, wherein defendants filed counterclaims. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment for plaintiffs and defendant J. J. Sugarman and others appealed. The District Court of Appeal, Vallée, J., held that the evidence supported finding that defendants had waived alleged breach of contract on which counterclaims were based.

Judgment affirmed.

#### 1. Corporations ⇨121(1)

Conclusion that buyer of all outstanding stock of corporation had waived claims based on alleged deficiency of assets and excess of liabilities of corporation was sufficient to support judgment denying recovery on such counterclaims.

#### 2. Corporations ⇨121(5)

Finding that buyer had waived alleged breach of written contract of sale of all outstanding stock of corporation, allegedly consisting of a deficiency in assets and an excess of liabilities of corporation as set forth in contract, by refusing to inform sellers of alleged deficiency or excess, despite repeated demands for such information, until almost three years after completion of audit was supported by the evidence.

#### 3. Contracts ⇨316(1)

A right given by contract may be waived.

#### 4. Contracts ⇨316(1)

A party to contract may waive performance of a condition thereof by conduct or representations or he may be estopped by such conduct or representations from denying that he has waived such performance.

#### 5. Estoppel ⇨52

A "waiver" is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from express agreement or be inferred from circumstances indicating an intent to waive.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

**6. Estoppel** ⇨90(1)

Implied consent by a failure to object or neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it may operate as a trap to the other party to insist upon it afterwards constitutes a "waiver."

**7. Estoppel** ⇨95

An implied waiver may arise from omission to object when the occasion gives proper opportunity, or from such negligence and failure to act as to induce a belief that it is the intention and purpose to waive, or it may arise in consequence of laches.

**8. Sales** ⇨168(2)

When personal property is delivered to buyer in fulfilment of contract for purchase thereof, buyer is bound to make an examination of the property within a reasonable time for the purpose of ascertaining whether it fulfils the contract and if it does not, buyer must promptly reject the property.

**9. Sales** ⇨176(5), 179(1)

Failure of buyer to promptly reject personal property delivered under contract of purchase for failure to fulfil contract may constitute a waiver of the defect and acceptance of the property constitutes such waiver.

**10. Estoppel** ⇨119

Whether there has been a waiver is ordinarily a question of fact.

**11. Appeal and Error** ⇨843(2)

Where court found that buyer of all outstanding stock of corporation had waived claims for damages based on alleged deficiency of assets and excess of liabilities of corporation, fact that court also found that counterclaims for such damages were barred by laches was immaterial, though counterclaims were at law, while defense of laches is equitable, since waiver is a legal defense.

**12. Limitation of Actions** ⇨49(1)

Where buyer pursuant to written modification of contract to purchase all outstanding stock of corporation used part of purchase money to pay under protest de-

linquent income and excess profits taxes assessed against corporation and corporation thereupon filed claim for refund for the use and benefit of sellers, limitations did not begin to run against sellers' cause of action to recover money received by way of refund until such refund was received and such cause of action would not be barred for at least two years thereafter. Code Civ.Proc. § 339, subd. 1.

**13. Appeal and Error** ⇨1071(6)

Failure to specifically find that plaintiffs' cause of action was not barred by limitations was not reversible error, where it was obvious that any specific finding on the issue of limitations must have been adverse to defendants.

**14. Appeal and Error** ⇨1071(6)

Where a finding, if made, would necessarily have been against appellants, they cannot complain of the lack of such finding.

**15. Money Received** ⇨10

Where written modification of contract of purchase of all outstanding stock of corporation by partnership expressly provided that buyer should use part of purchase money to pay under protest delinquent income and excess profits taxes assessed against corporation and cause corporation to file claim for refund thereof and assign its right, title and interest in and to such refund to sellers and that any such refund when received by sellers should constitute part payment for the stock, the partnership and individual members thereof were liable to sellers for net proceeds of refund to the extent of unpaid balance of purchase price of stock, though refund was made to corporation.

---

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles (Alfred Gitelson and Leon Savitch, Los Angeles, of counsel), for appellants.

John W. Preston and John W. Preston, Jr., Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiffs in an action for money due.



The complaint is in two counts: 1) a common count for money had and received; 2) for money due under written contracts with allegations for reformation.

On August 7, 1943, J. J. Sugarman-Rudolph Co., a partnership, referred to as the partnership, entered into a written contract with plaintiffs and their predecessors in interest, the owners of all the issued and outstanding stock of Hercules Foundries, Inc., a corporation, whereby the partnership agreed to buy the stock for \$110,000, payable \$10,000 on the signing of the contract, \$90,000 on delivery of the stock, and \$10,000 on receipt by the partnership of a certificate signed jointly by the respective auditors of the partnership and Hercules verifying the truth of certain statements appearing in a balance sheet of Hercules, dated July 31, 1943. The stock was delivered to the partnership on August 16, 1943.

On August 18, 1943, the Collector of Internal Revenue filed a lien against Hercules for income and excess profit taxes in the amount of \$103,112.67. On August 21, 1943, in order to pay the taxes under protest, plaintiffs, their predecessors in interest, and the partnership entered into a written contract modifying the contract of August 7, 1943, to provide that the moneys then due and to become due to plaintiffs and their predecessors in interest from the partnership be paid to the Collector under protest, and that the partnership would thereafter cause Hercules to file and prosecute a claim against the United States for a refund of the \$103,112.67 for the use and benefit of plaintiffs and their predecessors in interest. Thereafter the partnership paid the \$103,112.67 to the Collector out of moneys due from it to plaintiffs and their predecessors in interest, and Hercules filed a claim for refund.

The Collector paid Hercules \$80,495.86 on August 24, 1948, and \$2,050.59 on December 21, 1948, as refunds on the taxes.

On August 16, 1943, plaintiffs and their predecessors in interest delivered to the partnership the books, records, and all of the property and assets of Hercules, in accordance with the contract of August 7, 1943; and the partnership has retained the exclusive possession and control of them

ever since. Shortly after the books and records were delivered to the partnership, the latter caused its auditors to make an audit thereof. In September, 1943, the auditors made a preliminary report, and on September 25, 1944, submitted a full and complete report of their audit to the partnership; and at all times since, the partnership has had actual knowledge of all matters pertaining to the property, assets, and financial condition of Hercules as of July 31, August 7, and August 21, 1943.

On July 31, 1947, the partnership notified plaintiffs in writing that its auditors had audited the books of Hercules during 1943 and 1944, had submitted a report on September 25, 1944, and sent plaintiffs a copy which was received by them on that date. Until July 31, 1947, no member of the partnership informed plaintiffs, and the latter had no knowledge, that defendants claimed, or would claim, that the property and assets of Hercules were less in value than as stated and represented in the contracts of August 7 and 21, 1943, or that they claimed, or would claim, that the liability of Hercules was greater in amount than as stated and represented in the contracts. The partnership failed to give plaintiffs or their predecessors in interest any notice that it claimed a breach of any condition, promise, or warranty contained in the contracts until July 31, 1947.

The action was commenced June 8, 1949. Defendants pleaded the statute of limitations and counterclaims in the amount of \$98,448.74, alleged to have arisen by reason of a deficiency of property and assets and an excess of liabilities of Hercules.

The court found the facts as recited, and that: the period of time from September 25, 1944, to July 31, 1947, was not a reasonable time within which the partnership was required to give notice of any breach of promise or warranty arising out of any claimed deficiency of the property and assets, or any claimed excess of liabilities, of Hercules; either of said periods of time was unreasonable within which to give such notice; on April 30, 1946, J. J. Sugarman-Rudolph Co. was dissolved and Rudolph sold his interest to the remaining partners and they continued as partners under the

name of J. J. Sugarman Co., as successor to J. J. Sugarman-Rudolph Co.; the members of, and J. J. Sugarman Co. have received and now have \$84,546.45, being part of the purchase price of the Hercules stock; they paid out as expenses in securing the tax refunds \$20,491.84; the amount held by them for the account and benefit of plaintiffs is \$64,054.61.

The court concluded that: defendants were entitled to nothing by reason of their counterclaims; there was no basis for reformation; and "under the evidence it is clear that plaintiffs are entitled to judgment only for whatever money was had and received by defendants under duty to pay over to plaintiffs to the extent of, and equal to the unpaid balance on the purchase price of the corporate stock, as provided in an agreement of August 21, 1943."

Judgment was for plaintiffs for \$64,054.61, with interest from August 24, 1948. It was adjudged that defendants take nothing by their counterclaims "for the reason that said claims were waived by the defendants and are barred by reason of the unreasonable delay amounting to laches in equity and under Section 1769 of the California Civil Code in giving notice to plaintiffs and their predecessors in interest of the alleged deficiency in property and assets and excess of liabilities of Hercules \* \* \*."

[1] The principal point made by defendants is that the judgment denying them an offset, as pleaded in their counterclaims, is contrary to law. They first say the contracts were for the sale of shares of stock of a corporation and that section 1769 of the Civil Code is not applicable thereto. Civil Code section 1769 is included in the Uniform Sales Act and provides that if after acceptance of goods the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor. The argument is that shares of stock are not "goods" as the term is defined in section 1796 of the Civil Code, also a part of the Uniform Sales Act. See *Porter v. Gibson*, 25 Cal.2d 506, 514, 154 P.2d 703. The question is not material. The court concluded that the claims pleaded

in the counterclaims were waived by defendants. The conclusion that defendants waived the claims is sufficient to support the judgment irrespective of the applicability or inapplicability of section 1769.

It is next argued that plaintiffs breached the contracts; that the breach is alleged in the counterclaims and consisted of a deficiency in property and assets and an excess of liabilities of Hercules; that, therefore, defendants have the right to offset against their liability for the balance of the purchase price all damages sustained by them by reason of the alleged breach.

[2] The finding that defendants waived the alleged breach is fully supported by the evidence. On September 7, 1943, plaintiffs' then attorney, Gazlay, who signed the contracts on behalf of plaintiffs, was advised "that their [the partnership's auditors] audit of the assets and liabilities of Hercules \* \* \* was practically completed." On September 13, 1943, Gazlay wrote Katz, the partnership's attorney: "It seems very important to me that this audit be determined as soon as possible and that we receive a statement from the J. J. Sugarman-Rudolph Co. as to whether any differences are claimed between the statement furnished by their auditors and the statement of assets and liabilities as of July 31, 1943, which is a part of the contract \* \* \*. The time to settle this matter is now when the facts are fresh and the records are available." On September 14, 1943, Katz replied: "I agree with the sentiments expressed in your letter of September 13, and have asked our auditor to give me a report of any differences arising under the statement of assets and liabilities as of July 31, 1943. As soon as I have heard from the auditor I shall advise you."

A preliminary audit was completed and in possession of the partnership in September, 1943. No copy or any information with respect thereto was furnished to plaintiffs.

On September 30, 1943, Gazlay again wrote Katz: "Lybrand, Ross Bros. & Montgomery started their audit on August 9 and on August 18, Mr. Cassady informed me that the audit was completed except for verification of account which would not

take over ten days \* \* \*. I see no justification for any further delay and request that we be given the report called for by subparagraph (b) of the agreement of August 21, 1943." On October 4, 1943, Katz replied, stating the partnership expected "the final report to be ready for delivery about October 11 [1943]." On October 18, 1943, Gazlay again wrote Katz: "It seems to me that a reasonable time has long elapsed, especially in view of the statement of Mr. Cassidy made the latter part of August that the audit and report was practically completed. I again call your attention to the fact that the time to settle these matters is now while the facts are fresh in everyone's mind. On this proposition you and I seem to be agreed." Again on November 2, 1943, Gazlay wrote Katz, stating that he had not received a reply to his letter of October 18, and concluded: "I again request a copy of the statement. It is my opinion that failure on the part of your clients to furnish this statement is in violation of the aforesaid contracts." Again on January 6, 1944, Gazlay wrote Katz, calling attention to previous letters, failure to receive a copy of the audit, Katz's refusal to talk to him over the telephone, and concluded: "If your clients do not desire to give the statement you could at least have written an evasive letter, at which I am advised you excel. I resent the treatment received from you. I again request a copy of the statement hereinbefore referred to."

Gazlay died during the year 1944. After his death several of plaintiffs' predecessors in interest also died. The preliminary audit was not furnished to plaintiffs until just before the trial of this action. Defendants did not deliver to plaintiffs a copy of any statement or audit until July 31, 1947, at which time they delivered a copy of the audit completed in September, 1944.

[3-10] One may waive a right given him by contract. *Michaels v. Pacific Soft Water Laundry*, 104 Cal.App. 349, 363, 286 P. 165, 1071. A party to a contract may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance. *Panno v. Russo*, 82 Cal.App.2d

408, 412, 186 P.2d 452. A waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances indicating an intent to waive. *Jolin v. Spira*, 94 Cal. App.2d 356, 360, 210 P.2d 704. A waiver has also been defined to be: an implied consent by a failure to object; a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it may operate as a trap to the other party, to insist upon it afterwards. 67 C.J. 307, § 7. An implied waiver may arise from an omission to object when the occasion gives proper opportunity, or from such negligence and failure to act as to induce a belief that it was the intention and purpose to waive, or it even may take place in consequence of laches. 67 C.J. 307, § 7. It is the general rule that when personal property is delivered to a purchaser in fulfillment of a contract for the purchase thereof, the duty devolves on him to make an examination of the property within a reasonable time for the purpose of determining whether it fills the contract; and if from such examination he finds it does not, he must promptly reject it. If he does not promptly reject it, he may be held to have waived the defect, and acceptance of the property constitutes such a waiver. *Jackson v. Porter Land & Water Co.*, 151 Cal. 32, 39, 90 P. 122; *Byron Jackson Machine Works v. Duff*, 158 Cal. 47, 49, 109 P. 616. Whether there has been a waiver is ordinarily a question of fact. *Lyons v. Brunswick-Balke etc. Co.*, 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173.

The facts fully support the conclusion that defendants waived the claims pleaded in the counterclaims. The defendants were under the duty to promptly inform plaintiffs of any deficiency in property or assets or excess of liabilities of Hercules. They had actual knowledge not later than September 25, 1944, and probably in September, 1943, of the alleged deficiency. The court was warranted in concluding that their failure and refusal to inform plaintiffs thereof for nearly four years was wilful



and a waiver of their subsequent claims. While the court did not conclude that defendants are estopped to assert that there was a deficiency of property and assets and an excess of liabilities of Hercules, the evidence and the facts found amply justify such a conclusion.

[11] Defendants argue that their counterclaims are at law and that the defense of laches being equitable is not available against them. The point is immaterial. The court having found that the claims were waived, the fact that the court also concluded they were barred by laches is of no consequence. A waiver is a legal defense. 67 C.J. 314, § 14. See, also, *Miller & Lux, Inc., v. San Joaquin Light & Power Corp.*, 120 Cal.App. 589, 607-609, 8 P.2d 560; 56 Am.Jur. 105, 125, §§ 4, 23; 25 Cal.Jur. 932, § 8.

[12-14] The court did not find specifically that plaintiffs' cause of action was not barred by the statute of limitations. Defendants assign error. The error, if any, is not ground for reversal. Defendants, in their answer, expressly admitted that Hercules received \$80,495.86 from the Collector on August 24, 1948, and \$2,050.59 on December 21, 1948. The statute did not begin to run until the money was received. 17 Cal.Jur. 623, § 18. It cannot be seriously urged that the statutory period is less than two years. Code Civ.Proc. § 339(1). The action was commenced June 8, 1949, less than one year after the money was received. It is obvious that if a specific finding had been made on the issue of the statute of limitations, it would have been adverse to defendants. It is settled that where a finding, if made, would necessarily have been against the appellants, they cannot complain of the lack of such finding. *Chamberlain v. Abeles*, 88 Cal.App.2d 291, 300, 198 P.2d 927.

[15] The court found the refunds were made to Hercules. Defendants contend that in view of this finding, it was error to award judgment against J. J. Sugarman Co. and the individual partners thereof. The point is not tenable. The partnership paid the tax lien of \$103,112.67 to the Collector out of moneys due to plaintiffs. The

contract of August 21, 1943, expressly provided that if any portion of the \$103,112.67 should be refunded, defendants would cause Hercules to assign to plaintiffs "all of its right, title and interest in and to said refund." The contract further provided that any such refund when received by plaintiffs should constitute part payment for the stock. The partnership thus was obligated to pay to plaintiffs any refund received by Hercules from the Collector. Furthermore, the court found that defendants "have received and now have moneys belonging to the plaintiffs" in the net amount of \$64,054.61.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



110 Cal.App.2d 110

PEOPLE v. MISTRIEL et al.

Cr. 4724.

District Court of Appeal, Second District,  
Division 3, California.

March 27, 1952.

Prosecutions for unlawful possession of marihuana. From judgments of the Superior Court of Los Angeles County, Otto J. Emme, J., finding defendants guilty and sentencing them to imprisonment in the state prison, they appealed. The District Court of Appeal, Parker Wood, J., held that the code section prohibiting possession of narcotics except on a physician's written prescription is not unconstitutional as so vague and ambiguous as to deprive persons accused of unlawfully possessing marihuana of right to due process of law because of its failure to define "narcotics," defined in another section of same code division as including marihuana.

Judgments affirmed.

I. Constitutional Law 258  
Poisons 2

The Health and Safety Code section, prohibiting possession of narcotics except

on physician's written prescription, is not unconstitutional as so vague and ambiguous as to deprive persons accused of unlawfully possessing marihuana of right to due process of law because of its failure to define "narcotics," defined in another section of same code division, entitled "Narcotics," as including marihuana. Health and Safety Code, §§ 11000 et seq., 11001, 11500.

## 2. Poisons ☞2

The legislature had power to enact statute declaring possession of marihuana a public offense, even if marihuana were a beneficial herb, rather than a narcotic. Health and Safety Code, § 11500.

## 3. Constitutional Law ☞38

The validity of legislation necessary or proper under given state of facts, which law-making body may rationally believe to be established, does not depend on actual existence of such facts.

## 4. Poisons ☞9

Evidence supported convictions of unlawfully possessing marihuana. Health and Safety Code, § 11500.

---

Irving Isaac Mistriel, in pro. per., and James William Lawson, in pro. per.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant Mistriel was accused in two counts, and defendant Lawson was accused in one count, of violating section 11500 of the Health and Safety Code in that they unlawfully had in their possession flowering tops and leaves of Indian Hemp (*cannabis sativa*). Each defendant pleaded not guilty. Lawson admitted an allegation in the information that he had been convicted previously of a felony. Trial by jury was waived. By stipulation the cause was submitted upon the transcript of the preliminary examination. The defendants were adjudged guilty as charged. Their applications for probation were denied. Judgments were that the defendants be im-

prisoned in the state prison. Defendants appeal from the judgments.

[1] Appellants contend that section 11500 of the Health and Safety Code "is unconstitutional for the reason that it is so vague and ambiguous that it deprives them the right to due process of law." That section provides that "\* \* \* no person shall possess \* \* \* a narcotic except upon the written prescription of a physician \* \* \*." Appellants argue that said section is a "prescription section" relating entirely to narcotics, and it has nothing to do with marihuana; and that said section cannot be understood without a reading of section 11001 of the Health and Safety Code. Said section 11001 provides that "'Narcotics,' as used in this division, means any of the following: \* \* (h) All parts of the plant *Cannabis sativa* L., (commonly known as marihuana) \* \* \*." Sections 11001 and 11500 of the Health and Safety Code appear in Division X of said code. That division is entitled "Narcotics" and pertains to the regulation and control thereof. It was not necessary that the definition of "Narcotics" appear in section 11500. The contention of appellants is not sustainable.

[2,3] As a further argument that section 11500 of the Health and Safety Code is invalid, the appellants assert that marihuana is a beneficial herb and not a narcotic. As above shown, the possession of marihuana is, by statute, a public offense. The Legislature is empowered to enact such a statute. As stated in the Matter of Yun Quong, 159 Cal. 508, at page 515, 114 P. 835, 838: "[T]he validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established."

[4] Appellants contend further that the "verdict" is against the evidence. This contention is not sustainable. The evidence shows that on March 16, 1951, a deputy sheriff went to a flower stand which was operated by the appellants; he asked appellant Mistriel if he could help him

"pick-up some marihuana"; Mistrial replied that he was not dealing in marihuana, and at the same time Mistrial took a marihuana cigarette from a pocket of his trousers and gave it to the deputy sheriff, but he refused the deputy's offer to pay for it; on March 29, 1951, that officer and two other officers went to the flower stand and searched the appellants and the premises; they found 5 marihuana cigarettes on the person of appellant Lawson, and some crushed marihuana leaves in the pocket of a smock that was hanging in the stand; they also found a partially burned marihuana cigarette on the floor of Lawson's automobile, and a coffee can containing marihuana seeds and leaves in the trunk of his automobile. The decision of the trial court is supported by the evidence.

The judgments are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



110 Cal.App.2d 113

**MANCUSO v. KRACKOV et al.**

Civ. 7963.

District Court of Appeal, Third District,  
California.

March 26, 1952.

Hearing Denied May 22, 1952.

Felix Mancuso sued Ephraim A. Krackov, doing business under the firm name and style of Golden Dawn Wineries, for breach of an alleged oral contract to purchase four carloads of bottled wine from plaintiff. From a judgment of the Superior Court, Sonoma County, Donald Geary, J., on a jury's verdict for plaintiff, defendant appealed. The District Court of Appeal, Peek, J., held that the evidence supported the jury's finding of existence of the contract as against defendant's contention that no contract existed because of indefiniteness of the alleged terms as to prices and quantity.

Judgment affirmed.

#### 1. Appeal and Error ⇨930(1)

On appeal from judgment on jury's verdict, District Court of Appeal must resolve all conflicts in evidence in prevailing party's favor and indulge in all reasonable inferences supporting verdict.

#### 2. Contracts ⇨9(1)

While parties' mutual assent to terms of contract must be sufficiently definite to enable court to ascertain such terms, each term need not be spelled out in minute detail, but only essentials of contract must be agreed on and be ascertainable.

#### 3. Contracts ⇨9(1)

The law does not favor destruction of contracts on ground of indefiniteness, and if feasible, court will so construe agreement as to carry into effect parties' reasonable intention, if it can be ascertained.

#### 4. Sales ⇨52(5)

In action for breach of alleged oral contract to purchase four carloads of bottled wine, evidence supported jury's finding of existence of contract as against defendant's contention that no contract existed because of indefiniteness of alleged terms as to prices and quantity.

#### 5. War and National Defense ⇨120

An oral contract, made in October, 1944, for sale of four carloads of bulk wine to bottler at maximum price allowed by next O.P.A. schedule for bottled wine, was not void as violating subsequent O.P.A. price regulation amendment, prohibiting sale of packaged wine to bottler at prices exceeding maximum prices applicable to sale of equal quantity of bulk wine, but providing that until August 1, 1945, sales of packaged wine to bottler pursuant to agreement entered into before March 21, 1945, may be made at prices not exceeding maximum prices applicable to sales of packaged wine.

Albert Picard, San Francisco, Barrett & McConnell, Santa Rosa (Raymond N. Baker, San Francisco, of counsel), for appellant.

Mancuso & Herron, San Francisco, for respondent.



PEEK, Justice.

By his action plaintiff sought to recover damages for the breach by defendant of an oral contract to purchase, in bottle form, four carloads of wine. The jury returned a verdict in plaintiff's favor, and judgment was accordingly entered. Defendant's motions for non suit, for judgment notwithstanding the verdict, and for a new trial were denied. He has now appealed, contending (1) that this court must conclude as a matter of law that under the facts the jury could not find that a contract existed because of the indefiniteness of the terms as to prices and quantity, and (2) that even assuming the jury could so find, said contract was in contravention of O.P.A. regulations, and hence was illegal.

[1] At the outset, because of the first contention of appellant, which is essentially an attack upon the sufficiency of the evidence, we repeat the elementary rule that this court must resolve all conflicts in the evidence in favor of the prevailing party and indulge in all reasonable inferences in support of the verdict. *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; *Crawford v. Southern Pacific Company*, 3 Cal.2d 427, 45 P.2d 183.

The evidence so summarized shows that Mancuso was a vineyardist residing at Glen Ellen, Sonoma County, California. Krackov operated a winery located in Brooklyn, New York. They had known one another for several years. In the early part of October, 1944, they met at plaintiff's home. Defendant stated he desired to purchase ten carloads of wine, and plaintiff informed him that he was in no position to furnish that amount but that he felt he could sell at least three or four cars. After some discussion plaintiff agreed to sell, and defendant agreed to buy four cars. Plaintiff further testified that he agreed he would do his best to obtain a fifth car which defendant agreed to purchase. Although the exact cost of the bottling was not agreed upon at that meeting it was estimated that it would be approximately \$1 per case, and as to the sale of the bottled wine it was agreed that it should be the maximum price allowed by the next O.P.A. schedule which was due to be issued in the next two or

three months. Such arrangements are referred to in the trade as "Franchise Bottling". The essential characteristics of such a contract is that the bulk wine is shipped to the buyer-bottler, who in turn bottles the wine at a fee, and then in bottled form the title passes to him.

Thereafter Krackov returned to New York and upon arrival there found a letter from Mancuso requesting an advance, to which letter Krackov replied enclosing his check "for \$3500 as an advance to you against three or four cars of wine that you will ship us in bulk as soon as it is properly finished for bottling." The letter went on to state he hoped the wine would be ready about March and that he was anxious to know what the new O.P.A. ceiling price would be. Several communications followed concerning the progress of the processing of the wine and when it would be ready for shipment, in particular concerning the first shipment. The first car was shipped around the middle of April, 1945. About April 17 to 19, 1945, the parties again met at Mancuso's home. At this meeting directions were given as to when to ship the remaining cars and further discussion was had concerning a fifth car. Also since the new O.P.A. list had been issued the pricing arrangement was computed in detail.

Krackov later went to Los Angeles from where he wrote telling Mancuso to hold up shipment on the balance until further notice. However, no further orders were given by him. After numerous letters, which Krackov did not answer, Mancuso, by his counsel, informed defendant that plaintiff was holding the wine for his account and that in the absence of a reply the wine would be sold for defendant's benefit. Defendant's counsel replied denying the contract and stated that the money paid by Krackov was not in part payment for the first car but was a loan.

[2, 3] While it is essential that the mutual assent of the parties to the terms of a contract must be sufficiently definite to enable the court to ascertain what they are, *Moore v. White*, 98 Cal.App.2d 510, 220 P.2d 918, nevertheless it is not necessary that each term be spelled out in minute detail. It is only that the essentials of the contract

must have been agreed upon and be ascertainable. (12 Am.Jur. 554.) The law does not favor the destruction of contracts on the ground of indefiniteness, and if it be feasible the court will so construe the agreement so as to carry into effect the reasonable intention of the parties if that can be ascertained. *McIllmoil v. Frawley Motor Co.*, 190 Cal. 546, 213 P. 971. Furthermore, it is a well established principle of law that that which can be made certain is certain. Civil Code, section 3538; *Tuck v. Gudnason*, 11 Cal.App.2d 626, 54 P.2d 88.

[4] Applying the principles above stated to the facts shown by the record it is readily apparent that there was ample evidence to support the findings of the jury. It was a business arrangement, worked out in as much detail as was then possible; the items to be included in the bottling costs were ascertained at the October meeting of the parties. All that remained was the computation thereof, which would be made at a later date when the desired data would be available, which it ultimately was. The same was true concerning the sale price which was subject to the publication of the next O.P.A. schedule, which schedule had been issued prior to the meeting of the parties in April, 1945.

The cases relied upon by appellant in support of his argument, that because of the alleged indefiniteness of essential elements the jury could not find the existence of a contract, are distinguishable on their facts, and hence are not controlling in this case.

[5] The second contention of appellant is that the contract is void as violative of O.P.A. M.P.R. 445, Sec. 7.8(b) as amended March 21, 1945. That amendment provided:

"Specifically, it shall be deemed an evasion of this regulation for a person to sell packaged wine to the bottler thereof at prices in excess of the maximum prices applicable to the sale of an equal quantity of bulk wine. However, until and including August 1, 1945, sales and deliveries of packaged wine to the bottler thereof pursuant to an agreement entered into prior to March 21, 1945, may be made at prices not

in excess of the maximum prices applicable to sales of the packaged wine.

"This amendment shall become effective March 23, 1945. Issued this 21st day of March, 1945."

Here the record, as previously noted, amply supports the conclusion of the jury that the contract was entered into in October 1944, several months prior to March 21, 1945, the date specified in the amendment.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J.  
pro tem., concur.



110 Cal.App.2d 1

**HAYWARD LUMBER & INVESTMENT CO.  
v. CONSTRUCTION PRODUCTS  
CORP.**

Civ. 18870.

District Court of Appeal, Second District,  
Division 3, California.

March 24, 1952.

Hayward Lumber & Investment Company, a corporation doing business under the firm name and style of Hayward Hallett Equipment Company, sued Construction Products Corporation for unlawful detainer. The Superior Court, Los Angeles County, William R. Gallagher, J., gave judgment for defendant and plaintiff appealed. The District Court of Appeal, Vallée, J., held that finding that defendant was entitled to exercise option to renew and extend lease was an ultimate fact since it was a logical conclusion deduced from evidence that defendant had performed necessary conditions precedent, and, therefore, findings supported judgment.

Affirmed.

**I. Trial  391**

The rule which requires findings of fact does not require the finding of evidentiary facts but only that ultimate facts be

found, and it does not exclude conclusions of facts but only conclusions of law.

**2. Trial** Ⓒ391

If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such, but if resort must be had to the artificial processes of law, in order to reach a final determination, the result is a "conclusion of law".

See publication Words and Phrases, for other judicial constructions and definitions of "Conclusion of Law".

**3. Landlord and tenant** Ⓒ291(16)

In action for unlawful detainer, finding that defendant was entitled to exercise option renewing and extending lease was finding of an ultimate fact, as opposed to a conclusion of law, since it was a logical conclusion deduced from evidence that defendant had performed the necessary conditions precedent, and therefore, the findings supported the judgment for defendant.

Philip T. Lyons, Los Angeles, for appellant.

Larwill & Wolfe, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant in an action for unlawful detainer.

The court found that: On November 1, 1948, plaintiff leased certain premises to defendant under the terms of a written lease; it is untrue that the lease expired on December 31, 1950, and it is untrue that defendant has unlawfully detained the property; on December 29, 1950, defendant "was entitled to exercise the option herein-after mentioned and that on or about said date defendant gave to plaintiff a written notice of the exercise of defendant's option to renew and extend the said lease agreement from and after December 31, 1950 and to and including December 31, 1951, said option having been given by plaintiff to defendant as one of the provisions of the said written lease"; the notice of the exer-

cise of the option was a good and sufficient notice to renew and extend the lease, and by said written notice defendant did renew and extend the lease from January 1, 1951, to and including December 31, 1951, except as to the amount of monthly rental to be paid, which monthly rental was to be fixed and agreed upon by the parties as provided in the lease. Judgment was for defendant.

The sole question presented is whether the finding that defendant was "entitled to exercise the option" is a finding of fact or a conclusion of law. Appellant asserts it is a conclusion of law, that the court thus failed to make findings on a material issue presented by the evidence, to-wit, whether defendant had performed the necessary conditions precedent prior to exercising the option, and, therefore, the findings do not support the judgment.

[1, 2] The distinction between an ultimate fact and a conclusion of fact on the one hand, and a conclusion of law on the other, is not an easy one to draw. The finding of an ultimate fact usually, if not always, involves one or more conclusions. The rule which requires findings of facts does not require the finding of evidentiary facts but only that ultimate facts be found; it does not exclude conclusions of facts but only conclusions of law. Cf. Estate of Bixler, 194 Cal. 585, 589-590, 229 P. 704; Lewis v. Beeks, 88 Cal.App.2d 511, 521, 199 P.2d 413; Green v. Darling, 73 Cal. App. 700, 703, 239 P. 70; Lester v. Beer, 74 Cal.App.2d Supp. 984, 989, 168 P.2d 998. Whether a finding is one of an ultimate fact or a conclusion of law depends on the nature of the evidence. "If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law." Levins v. Rovegno, 71 Cal. 273, 278, 12 P. 161, 164; Wendt v. Gates, 102 Cal.App. 342, 343-344, 283 P. 312; Palmer v. Fix, 104 Cal.App. 562, 567, 286 P. 498; Rhode v. Bartholomew, 94 Cal.App.2d 272, 279, 210 P.2d 768; 24



Cal.Jur. 927, § 177. "Ultimate facts are the logical conclusions deduced from certain primary facts evidentiary in character." *Rhode v. Bartholomew*, supra, 94 Cal.App. at page 279, 210 P.2d 773.

In *Palmer v. Fix*, supra, 104 Cal.App. 562, 286 P. 498, 499, the court held that a finding that defendants "are not entitled to any commission on the sale of any goods, wares or merchandise of the plaintiffs" after the date the contract was cancelled, was a finding of fact and not a conclusion of law, and that it was not necessary for the court to give its reason for the finding since it was an ultimate fact and the evidence given at the trial furnished the reason therefor. The following have been held to be findings of ultimate facts: "plaintiffs became indebted to the insurance companies for the payment of such premiums", *Nisbet v. Rhinehart*, 2 Cal.2d 477, 482, 42 P.2d 71, 73; "plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom of said canal." *Weidenmueller v. Stearns, etc., Co.*, 128 Cal. 623, 625-626, 61 P. 374, 375; "plaintiff did not rescind said sales", *Hollenbach v. Schnabel*, 101 Cal. 312, 317, 35 P. 872, 873; "plaintiff was not the owner", *Daly v. Sorocco*, 80 Cal. 367, 368, 22 P. 211, 212; a guaranty "was executed and delivered without any consideration", *Rusk v. Johnston*, 18 Cal.App.2d 408, 409, 63 P.2d 1167; "Elizabeth Zink has 'no right, title, interest, claim or lien of, in or to or against, any of the land or premises \* \* \*'" *Dam v. Zink*, 112 Cal. 91, 93, 44 P. 331, 332. For further illustrations, see 24 Cal.Jur. 928, § 178.

[3] One of the issues at the trial was whether defendant had, prior to the exercise of the option, "currently complied with all of the provisions" of a specified paragraph of the lease and was not delinquent on any payments due plaintiff thereunder, and was "not delinquent on payments of any kind whatsoever" due plaintiff. There was a decided conflict in the evidence, defendant maintaining it had a credit balance, plaintiff maintaining defendant was in default. In determining this issue in favor of defendant the court neces-

sarily and impliedly found from the evidence before it that defendant had performed the necessary conditions precedent and, therefore, was entitled to exercise the option. The finding that defendant was entitled to exercise the option was an ultimate fact since it was a logical conclusion deduced from the evidence that defendant had performed the necessary conditions precedent. The evidence before the court furnishes the reason for the ultimate fact. The findings support the judgment.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



109 Cal.App.2d 891

PEOPLE v. BROWNSTEIN et al.

Cr. 4697.

District Court of Appeal, Second District,  
Division 1, California.

March 24, 1952.

Defendants were convicted in the Superior Courts of Los Angeles County, Charles W. Fricke, J., of conspiracy to engage in book-making, and all defendants appealed from order denying their motion for new trial, and three of the defendants also appealed from judgment of conviction. The District Court of Appeal, Drapeau, J., held that since defendants were granted probation and no judgment of conviction was pronounced, purported appeals from judgment of conviction were required to be dismissed, and that evidence sustained convictions.

Purported appeals from judgment of conviction dismissed, and order denying motions for new trial affirmed.

#### I. Criminal Law ⇨1023(10)

Where defendants were granted probation, and no judgment was pronounced, purported appeals from judgment of conviction were required to be dismissed.

**2. Conspiracy** ⇐23

The gist of crime of "conspiracy" under the Penal Code is the unlawful agreement between the conspirators to commit an offense prohibited by statutes, accompanied by an overt act in furtherance thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Conspiracy".

**3. Conspiracy** ⇐17

Conspiracy may be established by circumstantial evidence, and proof by direct evidence of an express agreement between the parties is not necessary.

**4. Conspiracy** ⇐44½

An agreement between co-conspirators may be inferred from the action and conduct of the parties in mutually carrying out a common purpose in violation of statute.

**5. Conspiracy** ⇐47

Evidence was sufficient to sustain conviction for conspiracy to engage in bookmaking in violation of the Penal Code. Pen.Code, § 337a, subs. 1-4, 6.

---

John J. Bradley and Max Solomon, Los Angeles, for appellants Brownstein, Rinck, Joffe and Horn.

Henry C. Huntington, Los Angeles, for appellant Norby.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

By information, defendants were jointly charged with the crime of conspiracy to engage in bookmaking, a violation of subdivisions 1, 2, 3, 4, and 6 of section 337a, Penal Code. Thirteen overt acts were therein alleged. The jury found defendants guilty as charged. Motion for new trial was denied as to each defendant; proceedings were suspended and defendants were granted probation subject to certain named conditions.

Defendants Brownstein, Joffe and Norby appeal from the order denying their motion for new trial and as well from the judgment

of conviction. Defendants Horn and Rinck appeal from the order denying motion for new trial.

[1] Since no judgment was pronounced, the purported appeals from the judgment of conviction must be dismissed. *People v. Steccone*, 36 Cal.2d 234, 235, 223 P.2d 17.

It is here contended that the evidence is insufficient to establish the charge of conspiracy.

[2-4] "The gist of the crime of conspiracy, under Section 182 of the Penal Code, is the unlawful agreement between the conspirators to commit an offense prohibited by the statute, accompanied by an overt act in furtherance thereof. The conspiracy may be established by circumstantial evidence. *People v. Black*, 45 Cal.App. 2d 87, 113 P.2d 746; 5 Cal.Jur. 497, § 3. It is not necessary to prove by direct evidence the express agreement between the co-conspirators. That agreement may be inferred from the action and conduct of the defendants in mutually carrying out a common purpose in violation of the statute. *People v. Montgomery*, 47 Cal.App.2d 1, 11, 117 P.2d 437; *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Jones*, 136 Cal. App. 722, 29 P.2d 902; *Underhill's Crim. Ev. p. 1401, § 773.*" *People v. Benenato*, 77 Cal.App.2d 350, 358, 175 P.2d 296, 300.

The facts giving rise to the instant prosecution are briefly the following:

On November 4, 1950, appellant Brownstein leased Apartment A at 8499 Fountain Avenue, Los Angeles, at a certain agreed rental, paying the first and last months' rent. He was given a key to the mailbox located on the west wall of the entry to the apartment.

Late in the afternoon of December 6, 1950, Police Officer Mullins was seated in a parked car across the street from the apartment. At six o'clock he saw appellant Brownstein drive up, park his car and enter the apartment; at 6:10 appellant Joffe drove up and went into the apartment carrying a package which he took from the rear of his car. A few minutes later an unidentified man entered the apartment. At half past six Brownstein left, and twenty min-

utes later Joffe and the unidentified man also left.

On December 14, 1950, at 8:45 A. M., Officer Mullins with Officers Brookes and Foster were staked out on the north side of Fountain Avenue where they could see the entrance to the Brownstein apartment. At 9:15 that morning, appellant Rinck parked her car near the entrance and went into the entry alcove of the apartment. She stayed a few minutes, returned to her car and drove to 1501 North Ogden Drive where she entered the house. That afternoon about 4:15, the three officers drove to the Ogden Drive address and saw appellant Rinck leave there around 4:45 and drive to the Brownstein apartment on Fountain Avenue. She was carrying some papers. One of them appeared to be a California Digest, a paper of limited circulation which lists horseracing information for each day that horses are running in the United States. She went into the apartment, stayed a few minutes and then drove away. At 5:45, appellant Joffe left the apartment and got into an automobile parked across the street. Officer Mullins placed him under arrest and took from his pocket a white envelope containing lined cards and a California Digest of December 15, 1950. With appellant Joffe in tow, the officers went into the Brownstein apartment. After forcing the lock, they searched the mailbox where they found several white envelopes. Two of these contained copies of California Digest all dated December 15, 1950. On the face of another envelope the initials "N.B." were written. Inside were a number of cards. In the opinion of Officer Mullins, these were professional type betting markers showing that the bookmaker's agent was "N.B." This envelope also contained an adding machine tape with the same figures as those written on the markers.

In a fourth envelope were some ruled cards and a piece of adding machine tape. Officer Mullins testified that these were professional betting markers and the figures on the tape corresponded to the figures at the bottom of the betting markers. A fifth envelope contained betting markers and a copy of the California Digest for

December 14, 1950 which had been marked to show the results of the races listed thereon and the amounts paid for a \$2 bet on horses that came in first, second and third.

In the Brownstein apartment, the officers found a wrapped package of blank betting markers, a bag of ruled cards numbered one to twenty under some paper in a drawer. In a desk in the bedroom were five sheets of ruled paper numbered one to twenty on the left-hand side. In a desk in the living room, they found a telephone index and a small blue notebook. The index contained the telephone numbers of appellants Horn, Norby and Joffe. The notebook contained a list of names at the top of the pages, and names and figures below. In the opinion of the officer, as accounting is carried on by bookmakers in Los Angeles County, the name of the agent would ordinarily be listed at the top of the page and the names of betters listed below. Also, financial arrangements between the betters and their agents would be shown. In the opinion of Officer Mullins, who was familiar with words, symbols, paraphernalia and language used by bookmakers, the notations under the names of agents indicated that the betters listed were to receive credit for an indicated percentage of all money bet by them when the notation was "H & C", and for the indicated percentage of money lost when the notation was "losers".

When questioned by the officers, appellant Joffe stated he had known appellant Brownstein for fifteen years, and that he was in the apartment to totalize the sheets and distribute them to the various envelopes; that he had been employed for about two weeks by a man named "Mac" to totalize the markers; that he entered the apartment with a key which had been left for him, so that he could pick up the sheets and deliver them to various stated locations. When asked if "Mac" was not Mr. Brownstein, Mr. Joffe declined to answer any more questions.

At 6:30 P.M. on December 14th when appellant Horn arrived at the apartment, he was placed under arrest. Upon search, a key to the mailbox was found on his



key chain. This he claimed was a key to his luggage. He also stated that he was a salesman and had come to the apartment to see appellant Joffe about some shirts; that he had known Mr. Joffe for several years, and Mr. Brownstein since they were "kids on the east side."

Appellant Brownstein arrived at the apartment about 6:45 P.M. He had a small brown address book in his pocket which contained letters corresponding to initials found on the envelopes and on the betting markers. In the opinion of Officer Mullins, this was similar to "set-ups" used by persons engaged in bookmaking in Los Angeles; that the pages were owe sheets and the letters at the left indicated the days of the week, to-wit: M, T, W, T, F and S, and the amounts written opposite the letters indicated the amount of money owed to or by betters.

When asked by the officers "Why do you let these men come to your house and use it for their bookmaking operations?" appellant Brownstein replied, "They are friends of mine and they can come here any time they want." He said he could not account for any of the betting paraphernalia found in his apartment by the officers.

Appellant Norby came to the apartment at 7:00 P.M. When searched, a key which opened the lock on the apartment mailbox was taken from him along with two small pieces of paper. Officer Mullins testified that the names listed on the left-hand side of the first piece of paper indicated the names of betters; that the figures indicated the amount of money owed by the agent to the betters. That the second sheet was an owe sheet showing amounts of money to be paid to or by an agent. That the name Morrie at the top of the owe sheet indicated the name of an agent. Appellant Norby told Officer Mullins that he had gone to the apartment to check the sheets to see if he had won on bets placed by him that day; that the key which the officers took from him was a key to the mailbox where he got his sheets.

At 8:45 the next morning, i. e., December 15, 1950, the three officers returned to the

Ogden Drive address. While waiting outside the building, they saw appellant Joffe go in. About 12:30 P.M. the officers entered the house and found appellant Joffe standing near a table upon which were a California Digest, a telephone and papers containing pencilled notations which were of a type commonly used by bookmakers. The officers remained in the house for an hour and a half to two hours, during which period the telephone rang a number of times. Officer Mullins answered each call and the person calling would identify himself. The officer took wagers on horses running or purporting to run on that day. He asked appellant Joffe why he had gone to the Ogden Drive address. Joffe answered that he had gone there to collect \$20 owing to him by Mac, and that the betting markers and the California Digest had been left on the desk for him.

On the same day Officers Mullins and Brookes had a conversation with appellant Rinck. They asked her about her bookmaking activities. She said she had heard about the arrest of the other four appellants from Max Brownstein that morning, and "I figured that you made my handwriting from yesterday's sheets, from the phone spot, which was on Ogden Drive. \* \* \* I have worked for Morrie Brownstein for about two weeks. I get \$100 a week and he has paid me twice personally." Also, that she worked at the phone spot on North Ogden Drive on the 8th, 9th, 11th, 12th, 13th and 14th of December, 1950. Officer Mullins explained that a "phone spot" is a place "in which there is a telephone and someone answers the telephone as it rings, and from the betters that call in they record the wagers that the betters call in on professional betting markers."

Thirteen exhibits, i. e., cards, betting markers, California Digests, telephone lists, etc., were introduced in evidence, all of which were identified by Officer Mullins as paraphernalia commonly used by bookmakers in Los Angeles County. Also, an examiner of questioned documents identified the handwriting on such documents as that of one or more of the appellants.

[5] There was ample evidence from which the jury could, and did, infer that a conspiracy had been formed by appellants pursuant to which telephone wagers on horseraces were to be taken at the Ogden Drive house; that a complete record of the wagers was kept on betting markers and the results of races noted on the California Digests; that these were placed in the mailbox at the Brownstein apartment on Fountain Avenue to be picked up by agents who had keys to the mailbox; that these agents collected and paid the amounts indicated on the betting markers and accounted to the bookmakers for such amounts collected and paid.

The evidence established that appellant Brownstein rented and maintained the Fountain Avenue apartment and the mailbox there for the purpose of bookmaking; that appellants Joffe and Horn met Brownstein there; that they both had keys to the mailbox and their names and telephone numbers were listed in the telephone index found in the apartment. Also that appellant Rinck drove back and forth between the apartment and the Ogden Drive house and deposited papers in the mailbox. When appellant Norby was apprehended in the apartment on the evening of December 14th, he had a key to the mailbox in his possession; his name or initials appeared on the bookmaking paraphernalia found in the apartment, all of which raised the inference that such paraphernalia had been left there for him and that he had been furnished with a key in order to pick up the documents for distribution.

A conspiracy to violate section 337a of the Penal Code was definitely established; also, that each appellant was active in such conspiracy, performing duties assigned to him in carrying out its purpose.

For the reasons stated, the order denying motions for new trial is affirmed. The appeals from the purported judgment are dismissed.

WHITE, P. J., and DORAN, J., concur.

**McKINNEY v. CITY AND COUNTY OF  
SAN FRANCISCO.**

Civ. 14838.

District Court of Appeal, First District,  
Division 2, California.

March 21, 1952.

Rehearing Denied April 19, 1952.

Action by Arthur McKinney against the City and County of San Francisco to recover for personal injuries sustained while feeding a polar bear at the San Francisco Zoological Gardens. The Superior Court in and for the City and County of San Francisco, Clarence W. Morris, J., granted defendant's motion for directed verdict and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that under the circumstances the city was not liable, either under the Public Liability Act, Governmental Code, § 53051, or under any theory of a dangerous condition amounting to a public nuisance.

Judgment affirmed.

**1. Evidence ⇨13**

It is common knowledge that the claws of a bear are dull and nonretractile.

**2. Appeal and Error ⇨927(7)**

Where plaintiff's appeal was from a judgment on a directed verdict for defendant, District Court of Appeal would accept plaintiff's testimony about the manner in which the accident happened as true.

**3. Municipal Corporations ⇨734**

In operation of zoo as a part of public park and playground facilities, city was engaged in a governmental capacity and liability for injuries arising from such operation should be based on the Public Liability Act. Government Code, § 53051.

**4. Municipal Corporations ⇨851**

Where no actually dangerous or defective condition existed with respect to manner of keeping polar bear in zoo which city maintained in a governmental capacity, and zoo director had no knowledge or notice of any dangerous condition, city was not liable for injuries incurred by plaintiff while feeding bear, either under the Public Liability Act or under any theory of a dangerous condition amounting to a public nuisance. Government Code, § 53051.

Belli, Ashe & Pinney and Walter E. Trefts, all of San Francisco, for appellant.

Dion R. Holm, City Atty., Thomas M. O'Connor, Deputy City Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries incurred while feeding a polar bear at the San Francisco Zoological Gardens. The trial court granted defendant's motion for a directed verdict and plaintiff appeals.

The zoological gardens is owned and operated by the City and County as a part of its park system and is under the supervision and control of the City Park and Recreation Department. Entrance to it is free to the public. In it the city maintained two polar bears in a cage fifty by one hundred feet. The distance between the bars of the cage in which the bears were confined is three inches. Three feet and eleven inches outside the bear cage a fence was constructed. It consisted of a railing four feet from the ground, below which, extending to the ground was a heavy steel wire mesh; above the railing were three strands of galvanized wire seven inches apart.

In feeding sugar to one of the polar bears plaintiff, according to his own testimony, leaned with his right shoulder over one of the protective wires and moved his right hand near to the cage; when later he demonstrated this movement at the time the jury viewed the scene, he brought his hand within four or six inches from the cage. His testimony is that the bear grabbed his arm with its right paw and swept his hand into its mouth, which was just against the bars; the bear then pulled hand and arm into the cage pulling plaintiff over the railing. Hand and arm were severely bitten.

[1,2] The director of the zoo testified that the polar bear could not put his claws outside the cage more than six inches and only sideways and that the claws of a bear are dull and nonretractile, so that bears cannot grab and hold on with their claws like a cat. Said character of the bear's

claws is a fact of general knowledge. It is therefore doubtful whether the accident can have happened in the manner described by plaintiff, and whether plaintiff did not bring his hand within direct reach of the bear's mouth, which according to plaintiff's own testimony, could not get outside the bars. However as the appeal is from a judgment on a directed verdict we shall for the purpose of this opinion accept plaintiff's testimony about the manner in which the accident happened as true. Even so we have come to the conclusion that the case was correctly taken from the jury.

[3] In the operation of the zoo as a part of the public park and playground facilities the city was engaged in a governmental capacity. With respect to parks and playgrounds as such it has been so held in *Kellar v. City of Los Angeles*, 179 Cal. 605, 609, 178 P. 505, and *Bauman v. City and County of San Francisco*, 42 Cal.App. 2d 144, 152, 108 P.2d 989, as referable to the duty of maintaining public health; the governmental character of the operation of a miniature railroad in the "*Fleishhacker Playgrounds*" was decided by this court in *Meyer v. City and County of San Francisco*, 9 Cal.App.2d 361, 363, 49 P.2d 893. It is true that the same does not necessarily apply to everything a city maintains in a public park. In *Rhodes v. City of Palo Alto*, 100 Cal.App.2d 336, 341, 223 P.2d 639, it was held that the operation of a community theater, situated in a public park was a proprietary activity, the court reasoning that it is the nature of the activity, not its location, nor by what department carried on, that determines its character. However, the purpose of the maintenance of public zoological gardens is the instruction and recreation of the people and the advancement of science (reasons given for the establishment by act of congress of the National Zoological Park, *Jackson v. Baker*, 24 App.D.C. 100, 103). In *Chafor v. City of Long Beach*, 174 Cal. 478, 487, 163 P. 670, L.R.A. 1917E, 685, both the preservation of public health and the education of the young are mentioned as delegated functions of sovereignty in the exercise of which the municipality under the common law is protected from liability. We have



therefore concluded that in this state the maintenance by a municipality of public zoological gardens must be considered a governmental activity, both from the point of view of healthful recreation and of education and that the liability for injuries arising from such operation should normally be based on the Public Liability Act of 1923, Stats. 1923, p. 675; Deering Gen. Laws, Act 5619, in force at the time of the injury (March 4, 1949), now replaced by section 53051, Government Code. The act read: "§ 2. Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, \* \* \* to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[4] The act imposes liability for injury only when caused by a dangerous or defective condition together with failure to remedy it within a reasonable time after knowledge or notice of its dangerous character is obtained. *Laurenzi v. Vranizan*, 25 Cal.2d 806, 811, 155 P.2d 633. The evidence in this case showed without conflict, that the bear which caused the injuries had been kept in the same cage under the same conditions as those existing on the day of the injury for the six preceding years; that before said injury no accident at the bear cage had ever been reported although the zoo had been visited by an average of 50,000 persons a week; that the nonretractile character of the bear's claws and the distance it could move its paws sideways through the bars limited a possibly unsafe zone to less than six inches outside the bars of the cage, whereas the fence described above kept the

visitors at a distance of three feet, eleven inches from the bars and was a clear warning for them not to move any part of their body into close proximity of the bear cage itself. It even made it impossible for a person not straining against the limitations imposed by the fence to reach the possibly dangerous zone. (Plaintiff, six feet tall, had an arm's reach of thirty-one inches, that is ten inches less than the distance between the fence and said zone.) No intrusion of visitors into it was reasonably to be anticipated. The fact that visitors were permitted to feed the bears by throwing food in the direction of the cage cannot be considered an invitation to strain to bring hands close to it, contrary to the evident purpose of the fence. Under these circumstances it could not reasonably be held that there was a dangerous or defective condition and certainly not that the director of the zoo had knowledge or notice of its dangerous character. Compare *Howard v. City of Fresno*, 22 Cal.App.2d 41, 70 P.2d 502.

Appellant contends that irrespective of the applicability of the Public Liability Act, the strict liability imposed on private keepers of ferocious animals, *Baugh v. Beatty*, 91 Cal.App.2d 786, 791, 205 P.2d 671, applies also to a municipality even if acting in governmental capacity. As at common law the normal tort liability does not apply to such municipality, it may well be that also the strict liability for wild animals follows different rules. As only authority for such strict liability of a city acting in governmental capacity appellant cites *City of Fort Worth v. Wiggins*, Tex.Com.App., 5 S.W.2d 761. In that case the appellate courts reversed the sustaining of a demurrer to a complaint for injuries to a child caused by a bear kept by the city in a park, which bear grabbed the child by putting its paw through the weak mesh of the cage and through a twelve inch wide opening in an outer fence. Both negligence and the creation of a public nuisance were alleged. The highest court held in substance that in Texas the maintenance of a park should be considered a proprietary function but that if the function were considered governmental there would nevertheless be liability

for the creation of a public nuisance. The latter part of the decision is in accord with what is considered the majority view of the courts, to wit: "that the immunity of municipal corporations from liability for acts done in the performance of governmental functions does not extend to cases of personal injuries or death resulting from a nuisance created or maintained by a municipality, and that a municipality is liable for such injuries, although the nuisance was created or maintained in the course of the discharge of public duties or governmental functions." Annotation 75 A.L.R. 1196, 1199; for nuisances in municipal parks see Annotation 99 A.L.R. 686, 696; 142 A.L.R. 1340, 1372. The keeping of ferocious animals is sometimes treated as a nuisance. See, over and above the case cited, the dissenting opinion in *Hibbard v. City of Wichita*, 98 Kan. 498, 159 P. 399, 400, L.R.A. 1917A, 399 and 3 C.J.S. Animals, § 143c, p. 1244.

In our case there is no express allegation of the maintenance of a nuisance but moreover there is still the question whether the keeping of ferocious animals by a municipality in a governmental capacity is to be considered as a nuisance per se for which strict liability exists independent of the careful manner of the keeping or whether such keeping is only a public nuisance when done in a manner which actually causes a public danger. The City of Fort Worth case, *supra*, does not decide that point as an actually defective and dangerous condition was alleged. However in *Guzzi v. New York Zoological Soc.*, 192 App.Div. 263, 182 N.Y.S. 257, affirmed 233 N.Y. 511, 135 N.E. 897, it was held that the defendant society, which maintained the Bronx zoo under legislative authority and in a safe and suitable manner, was not on the basis of absolute liability liable for injury to a girl who intentionally crept under the cage of a bear, and that the well fenced cages did not constitute a nuisance per se, "where the animals were maintained as a public enterprise under legislative authority for educational purposes and to entertain the public." [192 App.Div. 263, 182 N.Y.S. 259] If the common law nuisance exception to governmental immunity

applies also in California with respect to the keeping of ferocious animals—there are no decisions in point—then *Guzzi v. New York Zoological Soc.*, *supra* ought to be followed with respect to municipalities acting in governmental capacity and their liability restricted to situations where an actually dangerous condition constitutes a public nuisance. Where in our analysis regarding the Public Liability Act we have decided that no actually dangerous condition could be held to have existed, there is certainly no room for a dangerous condition amounting to a public nuisance, even if we disregard the lack of allegation to that effect.

Judgment affirmed.

GOODELL, J., and JONES, J., pro tem., concur.



109 Cal.App.2d 912

HOPKINS et ux. v. CARTER et al.

Civ. 18670.

District Court of Appeal, Second District,  
Division 3, California.

March 24, 1952.

Action by Glen W. Hopkins and Jeanette I. Hopkins against Floyd Alfred Carter and others for personal injuries and property damage arising out of collision between automobile of defendants and that of plaintiffs at wet and slippery intersection. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered judgment for defendants and denied plaintiffs' motion for new trial, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence warranted giving of plaintiffs' requested instruction on last clear chance doctrine, and that its denial was prejudicial error.

Judgment reversed.

# I. Appeal and Error ⇐928(I)

In determining question whether court erred in refusing to instruct jury on doc-

trine of last clear chance, evidence must be viewed in light most favorable to contention that doctrine is applicable, since plaintiff is entitled to instruction thereon if evidence so viewed could establish elements of doctrine.

## 2. Negligence ⇨83.1, 136(32)

The applicability of doctrine of last clear chance in given instance depends upon existence or nonexistence of elements necessary to bring it into operation, and such question is controlled by factual circumstances and is determinable by fact finder.

## 3. Negligence ⇨138(3)

An instruction stating last clear chance doctrine is proper when evidence shows that plaintiff has been negligent and that as result thereof, he is in position of danger from which he cannot escape by exercise of ordinary care, and that defendant has knowledge that plaintiff is in such situation, and knows, or in exercise of ordinary care should know, that plaintiff cannot escape therefrom, and defendant has last clear chance to avoid accident by exercising ordinary care, and fails to do so with resultant accident and injuries to plaintiff as proximate result.

## 4. Appeal and Error ⇨1067

### Automobiles ⇨246(58)

In action for personal injuries and property damage when defendant's automobile collided at wet and slippery intersection with automobile of plaintiffs which had proceeded into intersection and was making left-hand turn as defendant approached on through street, evidence warranted giving of plaintiffs' requested instruction on last clear chance doctrine and its refusal was prejudicial error.

Frye & Yudelston, North Hollywood, for appellants.

Williams & Cozy, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs, husband and wife, from a judgment entered upon a verdict

for defendant in an action for damages for personal injuries and property damage resulting from a collision between plaintiffs' and defendant's automobiles. As no appeal lies from an order denying a motion for a new trial, plaintiffs' appeal therefrom is dismissed.

The principal question is whether the court erred in refusing to instruct the jury on the doctrine of last clear chance. The form of the instructions is not in question.

[1] In determining this question, we state the evidence in the light "most favorable to the contention that the doctrine is applicable \* \* \* since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine. [Citations.]" *Selinsky v. Olsen*, 38 Cal.2d 102, 237 P.2d 645, 646.

The collision occurred on May 18, 1949, about 8 p. m., at the intersection of Foothill Boulevard and Maclay Avenue. Foothill Boulevard, an east-west street, is a through highway. Vehicle Code, § 82.5. Stop signs are located on the northwest and southeast corners of Maclay where it intersects Foothill. Although it was dark, the intersection was well lighted by three service stations located on the northwest, southwest, and southeast corners. It was drizzling, and while the pavement was wet it was not slick. Plaintiff Jeanette Hopkins, called plaintiff, was driving plaintiffs' car westerly on Foothill between 30 and 35 miles an hour. Just prior to the accident, defendant had been getting gasoline at the service station located on the northwest corner of the intersection.

Plaintiff testified she started slowing down some four or five or six car lengths back from the intersection. She came to a complete stop in the intersection to let an eastbound car pass. While in this position two cars passed her on her right, going west, and passed in front of defendant "while he was sitting on the driveway" of the service station. The intersection being clear, she then proceeded to make her left-hand turn. When "approximately half of my car was past the intersection of Maclay \* \* \* I first noticed the lights



shine into my car. \* \* \* and I knew the car [defendant's] was coming pretty rapidly. \* \* \* I was in second gear when I proceeded to make my left hand turn, so I immediately stepped on the throttle trying to avoid the accident, to get out of the way. Because I knew in that position, I could not possibly apply my brakes and get out of the way to avoid the accident." She was traveling approximately twelve or thirteen miles an hour while attempting the turn. At the time of the impact she was going "between eighteen and twenty miles an hour." Plaintiffs' car was struck almost dead center.

Defendant testified he was under the canopy of the service station on the northwest corner of Foothill and Maclay, facing west. He then moved his car so that it was flush with Foothill. There were no cars coming from the west. There were several cars approaching the intersection from the east. "I waited until these cars went by; and at that time there was another car [plaintiffs'] coming quite a ways down. So I turned out and proceeded to go down Foothill east. When I got approximately along in here (indicating),<sup>1</sup> I noticed the car [plaintiffs'] I had seen previously, coming up here (indicating)."<sup>2</sup> At this time he was going "between five and ten miles an hour" in low gear. He continued to observe plaintiffs' car. When plaintiffs' car was about 55 feet from the center of the intersection, he was going "approximately twelve or fifteen miles an hour" and "in second." When he was about 25 feet from the center of the intersection he again observed plaintiffs' car, which was then about 35 feet from the center of the intersection, "And then I saw the car swing over just a few seconds later. \* \* \* I put on my brakes to see if I could stop; but, because of the street being wet, I didn't come to a complete stop before the collision." His brakes took hold but slid a little. At the time of the impact he was going about twenty to twenty-five miles an hour. He did not swerve his car to avoid the collision because "I didn't

know for sure but what she would pull back when she saw me in the intersection. That would make a head-on." Instead, he put on his brakes and went straight ahead. Plaintiff did not give a signal. Defendant placed the point of impact near the center of the southeast quadrant of the intersection, a distance of about 40 feet from where he first became aware that plaintiff was cutting the corner.

[2,3] The applicability of the doctrine of last clear chance in a given case depends entirely upon the existence or non-existence of the elements necessary to bring it into operation, and this question is controlled by factual circumstances and determinable by the fact-finder. *Girdner v. Union Oil Co.*, 216 Cal. 197, 199, 13 P.2d 915; *Bailey v. Wilson*, 16 Cal.App.2d 645, 647, 61 P.2d 68. An instruction stating the doctrine is proper when the evidence shows: "[1] That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; [2] that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and [3] has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915, 917. *Selinsky v. Olsen*, supra, 38 Cal. 2d, 102, 237 P.2d 645, 646; *Peterson v. Burkhalter*, 38 Cal.2d 107, 237 P.2d 977.

Defendant contends the doctrine is inapplicable because he was unaware of plaintiff's perilous position in time to have had a clear chance to avoid the collision. This is based on his testimony that plaintiff suddenly cut the corner in front of him.

1. About 80 feet from the center of the intersection.

241 P.2d—67½

2. About 175 feet from defendant and about 90 feet from the center of the intersection.

[4] While the jury found for defendant, as a factual matter, it could have found for plaintiffs. It would have been warranted in concluding that 1) plaintiff through her own negligence, in either not looking, not seeing, or cutting the corner, placed herself in a position of peril from which she could not escape by the exercise of ordinary care; 2) defendant, when he was 40 feet from plaintiffs' car, knew, or in the exercise of ordinary care should have known, that plaintiff could not escape from her perilous situation; and 3) although defendant testified that at the time of the impact he was going about 20 miles an hour and in second gear, he was going less than that when he first saw plaintiff cutting the corner and, in the exercise of ordinary care, had the last clear chance to avoid the accident by stopping his car, sounding his horn, or swerving to the left or right. Under normal conditions, with a dry street, the driver of a vehicle going between 15 to 20 miles an hour should be able to stop between 20.8 and 37.0 feet. Vehicle Code, § 670. Whether under the facts, i. e. a wet but not slick street, defendant could have stopped his car within 40 feet; whether he could have avoided the accident by sounding his horn or swerving his car to the left or right; whether, in not sounding his horn or not swerving, he exercised reasonable care; and whether his conduct proximately caused the accident,—were questions of fact for the jury under a proper last clear chance doctrine instruction. *Girdner v. Union Oil Co.*, 216 Cal. 197, 204, 13 P.2d 915; *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 237 P.2d 645; *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 237 P.2d 977; *Galbraith v. Thompson*, 108 Cal.App.2d 617, 239 P.2d 468.

The facts in *Girdner v. Union Oil Co.*, supra, in which the doctrine was held applicable, were similar to those in the case at bar. There, plaintiff had his car moving into an intersection and was oblivious to defendant's approach thereto in a truck. The latter first saw plaintiff's car when 40 to 50 feet from it and was traveling about 20 miles an hour.

In refusing to instruct the jury on the doctrine, the court committed prejudicial error.

Other points made by plaintiffs are not likely to occur on a retrial and need not be discussed.

Judgment reversed.

SHINN, P. J., and WOOD, J., concur.



110 Cal.App.2d 156

**WILKIN et al. v. TADLOCK et al.**

Civ. 8114.

District Court of Appeal, Third District,  
California.

March 28, 1952.

Hearing Denied May 26, 1952.

Action by S. M. Wilkin, Jr., and others, against T. E. Tadlock, and another, wherein defendants moved for postponement and the Superior Court, Yolo County, C. C. McDonald, J., entered order postponing trial and requiring defendants to pay plaintiffs' costs incurred as result of postponement, and order denying defendants' motion to tax costs, and defendants appealed. The District Court of Appeals, Schottky, J., pro tem., held that inclusion of travel expenses in costs was proper.

Orders affirmed.

#### 1. Continuance ⇨49

A trial court, as condition of granting continuance, is not limited to costs ordinarily taxable after case has been tried, but can exercise reasonable discretion for purpose of compensating opposing party for expenses incurred in preparing for trial, including reporter's fee, transportation and hotel bills of witnesses and reporter, witnesses' fees, and fees of all jurors in attendance. Code Civ.Proc. § 1024.

**2. Continuance ⇨49**

Usually, if party to action seeks continuance when case comes on for trial and it is opposed, court will seek to ascertain what amount has been incurred in preparing for trial, and will then fix amount required to be paid as condition of continuance.

**3. Continuance ⇨49**

Where defendants on day of trial moved for and court ordered postponement on condition that defendants pay all costs incurred as result of postponement, without specifying amount of costs, but plaintiffs' counsel had stated that plaintiffs had come from Kansas and Mexico, and parties and court understood that "all costs incurred as result of postponement" included travel expenses, allowing plaintiffs' memorandum of costs in sum of \$722.62 including travel expenses of \$705.32, and denying defendants' motion to tax costs requesting that travel expenses be stricken, was not error. Code Civ.Proc. § 1024.

**4. Appeal and Error ⇨792**

Where order postponing date of trial and requiring defendants to pay plaintiffs' costs incurred as result of postponement, and order denying defendants' motion to tax costs, were determined by appellate court to be within power of court and not erroneous, appeal from such orders would be disposed of on the merits, in absence of issue raised as to appealability of orders.

---

Bailey & Young, Woodland, for appellants.

Chalmers, Cowing & Sans, Woodland, for respondents.

SCHOTTKY, Justice pro tem.

Defendants have appealed from an order "postponing the date of trial of the \* \* \* action and ordering these defendants to pay plaintiffs' costs incurred as a result of said *postponement*," and from an order denying defendants' motion to tax costs.

The record shows that the action was set for trial on June 12, 1951. On that date one of the attorneys for defendants made

a motion for postponement because of the illness of his partner, an attorney for defendants. The court thereupon rendered the following order:

"It Is Hereby Ordered, Adjudged And Decreed that the trial of this action be postponed until the 16th day of October, 1951, at the hour of ten o'clock A. M.

"It Is Hereby Further Ordered, Adjudged, And Decreed that defendants pay all costs incurred as a result of the postponement of the subject action, including all costs of plaintiffs in the amount of \$——."

Plaintiffs filed a memorandum of costs on June 13, 1951, in the sum of \$722.62, which included travel expenses of plaintiffs amounting to \$705.32.

On June 15, 1951, defendants filed notice of Rejection of Continuance Upon Condition, alleging therein that defendants at the time of making application for continuance "understood that the costs so imposed would be legal costs." On the same day defendants filed their motion to tax costs, requesting that the travel expenses be stricken from the memorandum of costs.

On June 28, 1951, the court denied defendants' motion to tax costs and made findings as follows: That Mr. Bailey, attorney for the defendants, moved the court for a continuance; that Mr. Roger Sans, one of the attorneys for the plaintiffs, announced that since the commencement of the action both of his clients had moved from the state of California, one to Kansas, where he was employed, and the other to Mexico, where he was employed; that both of said parties had traveled from their said places of employment to Woodland to testify on behalf of the plaintiffs at the trial of the action set for June 12, 1951; that Mr. Roger Sans further announced that they were anxious and ready and willing to go to trial but that, due to the illness and incapacity of both the attorneys for the defendants, he would not oppose a continuance of the trial of the action provided the defendants would agree to bear all of the costs sustained by the said plaintiffs, including the costs of their transportation from their places of employment to Woodland, and return; that



the court was satisfied that the attorneys for all parties in the case and the court well understood that all costs included all of the items of expense incurred by the said plaintiffs as thereinabove stated.

Section 1024 of the Code of Civil Procedure provides: "When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same."

Appellants contend that "While the Court has the power, C.C.P., Sec. 1024, within its reasonable discretion, to award costs as a condition of granting a continuance, the amount and items of the costs are to be regulated by the general statutes defining costs." Appellants argue that "the discretion vested in the Court by C.C.P., Sec. 1024, is not what items or amounts shall be allowed but whether or not costs shall be allowed at all."

[1] There seems to be little doubt that under the construction given to section 1024 by our appellate courts, a trial court, as a condition of granting a continuance, is not limited to the costs ordinarily taxable after a case has been tried. The rule is well stated in 5 Cal.Jur., section 29, page 1007, as follows: "The court is not limited to requiring a payment of the taxable costs as a condition of postponing the trial, but is at liberty to exercise a reasonable discretion for the purpose of compensating the opposing party for the expenses incurred in preparing for the trial. Hence in certain instances costs have included reporter's fee, transportation and hotel bills of witnesses and reporter, witnesses' fees, and the fees of all the jurors in attendance."

And in *Pomeroy v. Bell*, 118 Cal. 635, at page 638, 50 P. 683, at page 684, the court said: "The court did not err in imposing the payment of \$75 as a condition for postponing the trial of the action, or from proceeding with the trial upon the refusal of the defendants to comply with this condition. The cause had been sat down for trial upon that day with the consent of the defendants, and witnesses had been sub-

poenaed on behalf of the plaintiffs and were in attendance in court at that time, and one of the plaintiffs had himself gone from Los Angeles to Calaveras county to attend the trial. The record does not contain a copy of the bill of costs incurred by the plaintiffs, and we cannot say that the amount required to be paid was excessive. The court was not limited to requiring a payment of the taxable costs as the condition of postponing the trial, but was at liberty to exercise a reasonable discretion for the purpose of compensating the plaintiffs for the expenses incurred in preparing for the trial."

[2,3] The foregoing case was cited with approval by this court in *Fraser v. Fraser*, 39 Cal.App. 467, 179 P. 427, and we are not aware of any decision holding the contrary. Usually if a party to an action seeks a continuance when the case comes on for trial and it is opposed by the opposing side, a court will seek to ascertain what amount has been incurred in preparing for the trial, and will then fix the amount required to be paid as a condition of the continuance. In the instant case the findings made by the court in denying defendants' motion to tax costs (which findings are not challenged by defendants and appellants), show that it was stated by respondents' counsel that the two plaintiffs had come, one from Kansas, and one from Mexico, for the trial and that the parties and the court all understood that "all costs incurred as a result of the postponement" included those expenses. It is evident that appellants' counsel did not expect these expenses to be so large, or he would have had the amount ascertained at the time, but it would not seem to be reasonable for appellants to expect, as they now contend, that the costs of continuance would be the reporter's fee of \$7.50 and the witness' fees and mileage of one witness amounting to \$9.80. It must be borne in mind that appellants were seeking a continuance on the day the case came on for trial, and that under such circumstances they must expect to pay the "costs occasioned by the postponement."

[4] While no point is made by respondents as to whether the orders appealed

from, having been made prior to final judgment, are appealable orders, there may be some question as to their appealability. However, since we are convinced that the orders appealed from were within the power of the court and that there was no error in making them, we prefer to dispose of the appeal upon its merits.

The orders appealed from are affirmed.

PEEK and VAN DYKE, JJ., concur.



109 Cal.App.2d 656

PEOPLE v. SPRING VALLEY CO.,  
Limited, et al.  
No. 13190.

District Court of Appeal, First District,  
Division 1, California.  
March 12, 1952.

As Modified March 14, 1952.

Rehearing Denied April 11, 1952.

Hearing Denied May 8, 1952.

Condemnation proceeding by the People of the State of California, acting by and through the Department of Public Works, against Spring Valley Company, Ltd., and others, which proceeding was consolidated for trial with eight other cases. The Superior Court, San Mateo County, Andrew R. Schottky, J., denied motion of some of defendants for change of place of trial, and such defendants appealed. The District Court of Appeal, Bray, J., held that denial of the motion for change of place of trial on ground of convenience of witnesses was not an abuse of discretion.

Affirmed.

#### 1. Eminent domain ⇨262(4)

Weight of affidavits filed by parties on motion for change of place of trial in condemnation proceeding was for trial court to determine.

#### 2. Evidence ⇨12

The court may take judicial notice of constantly increasing population in the part

Cal.Rep. 241-242 P.2d-29

of state in which San Mateo County is located.

#### 3. Venue ⇨50

In proceeding to condemn land in San Mateo county, fact that a portion of the cost of amounts awarded would be paid by taxpayers of San Mateo county did not alone constitute a disqualification of jurors in that county as would warrant a change of place of trial.

#### 4. Venue ⇨49(1)

Fact that two judges of county disqualified themselves and another declined to participate in condemnation proceeding by state, did not establish that a fair trial could not reasonably be had in county in a subsequent condemnation proceeding by state.

#### 5. Venue ⇨70

In condemnation proceeding, evidence supported conclusion of trial court denying motion for change of place of trial, with provision that if upon proceedings for impanelment of a jury it should appear that a fair and impartial jury could not be obtained, court would then entertain a renewal of motion for change of place of trial.

#### 6. Venue ⇨52(3)

Convenience of witnesses who are to give expert testimony is not considered on a motion for change of place of trial on ground of convenience of witnesses, but an expert who also testifies as to facts is entitled to consideration on such a motion.

#### 7. Venue ⇨68

Where defendants in condemnation proceeding moved for change of place of trial on ground of convenience of witnesses, burden was on defendants to prove that convenience of witnesses and the ends of justice would be promoted by removal of cause.

#### 8. Venue ⇨52(1)

In condemnation proceeding, denial by trial court of defendants' motion for change of place of trial on ground of convenience of witnesses was not an abuse of discretion under the circumstances of the case.

#### 9. Venue ⇨52(1)

It is not an abuse of trial court's discretion to deny motion for change of place

of trial made on ground of convenience of witnesses, if affidavit of party in opposition to motion shows that his witnesses will be inconvenienced if change be ordered.

#### 10. Venue ⚡78

Doctrine of res judicata applies to motions for change of venue, but the doctrine does not apply where there are changed conditions and new facts which did not exist at time of prior judgment.

#### 11. Venue ⚡78

In condemnation proceeding, doctrine of res judicata did not prevent a re-examination of a motion for change of place of trial where, in interval between first and second actions, facts had materially changed and new facts had occurred which might have altered legal rights or relations of litigants.

#### 12. Counties ⚡215

Statute providing that whenever an action or proceeding is brought by county against a resident of another county or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a neutral county, was inapplicable in condemnation proceeding in which interest of county was twice removed from the entity bringing suit. Code Civ.Proc. § 394.

#### 13. Venue ⚡1½

It is for the Legislature to determine where venue shall lie.

#### 14. Venue ⚡49(1)

Even if judges in a condemnation proceeding were disqualified, such fact did not require a removal of the cause to another county in subsequent condemnation proceeding in view of fact that a qualified judge might be assigned for the trial, in event that all judges were disqualified.

---

A. P. Black, Eli D. Langert, San Francisco, Erskine & Erskine, San Francisco, Nichols & Richard, Oakland, Edwin H. Williams, San Jose, for appellants.

Fred N. Howser, former Atty. Gen., Edmund G. Brown, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., Holloway Jones,

Jack M. Howard, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from an order denying their motion for change of place of trial from San Mateo County to Alameda County.

Questions Presented.

1. Did the court abuse its discretion in denying the motion subject to a removal at the time of trial? 2. Is res judicata applicable? 3. Does section 394 of the Code of Civil Procedure require a change of place of trial? 4. Effect of alleged disqualification of judges.

Record.

Eight other cases were consolidated for trial with the above-entitled case. Each of the nine was filed in San Mateo County and is an action brought by the People of the State of California, acting by and through the Department of Public Works, to condemn respective portions of the right of way now or formerly owned by the Ocean Shore Railroad Company. The first action was filed April 1, 1935, and the others at various times up to December 9, 1942, when the last action was filed. The last answer was filed June 17, 1944. The notice of motion for change of place of trial in the consolidated cases was filed April 10, 1945.

The hearing on the motion to change venue was had before Hon. Andrew R. Schottky, assigned, on affidavits, court records, documentary evidence, including newspaper clippings, and the transcript of the evidence on which Judge Trabucco in the Mussel Rock case (hereafter referred to) granted the motion to change venue. The motion was made on the grounds (1) that there was reason to believe that an impartial trial could not be had in San Mateo County; (2) convenience of witnesses; and (3) that section 394 of the Code of Civil Procedure requires such change. The motion was denied July 23, 1945.

Background of Case.

The Ocean Shore Railroad Company was organized in 1904. From 1905 to 1909 it



was engaged in constructing a railroad from San Francisco to Santa Cruz, a distance of 75 miles. The right of way for the entire distance was obtained and the grading completed. However, due to lack of finances, a gap of some 26 miles in the center was never completed. The two ends were operated as a railroad from 1909 to 1920. Late that year a group of men headed by Selah Chamberlain, and known as the Selah Chamberlain Associates, secured an option to purchase the railroad company and all of its roadbed. Litigation then ensued between the railroad and the Spring Valley Water Company and others over a portion of the right of way, the water company claiming that the right of way over its lands had reverted to it. The railroad succeeded in finally quieting its title thereto. See *Ocean Shore Railroad Co. v. Spring Valley Water Co.*, 87 Cal.App. 188, 262 P. 53. In November, 1933, the Associates purchased the railroad company and its roadbed.

In 1930 Joint Highway District No. 9, comprised of San Mateo, Santa Cruz and San Francisco Counties, brought a suit<sup>1</sup> to condemn for highway purposes a certain portion of the roadbed (not involved in any of the nine cases). Hon. Maurice T. Dooling, Jr., presided without a jury at the trial and awarded defendants therein a judgment for \$112,000. This judgment was affirmed in *Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co.*, 128 Cal.App. 743, 18 P.2d 413.<sup>2</sup> The district refused to pay the award. Subsequent to the Dooling judgment and in 1931 the Board of Supervisors of San Mateo County raised the assessed valuation of the roadbed in that county over 5000 per cent. An action was brought by the railroad in San Mateo County against the board of supervisors attacking the validity of that assessment. A judgment was obtained therein to the effect that the assessment was illegal and void. On June 24, 1935, the State commenced a suit to condemn for highway purposes a portion of the roadbed in San Mateo County, re-

ferred to as the Mussel Rock Bluffs section.<sup>3</sup> September 18, 1935, the railroad filed a motion for change of venue on the ground that a fair and impartial trial could not be had in that county. The two local judges disqualified themselves and Hon. J. J. Trabucco was assigned to hear the motion. On June 15, 1936, he granted the motion transferring the case to Alameda County. His order was affirmed in *People v. Ocean Shore Railroad, Inc.*, 24 Cal.App. 2d 420, 75 P.2d 560. The case was tried in 1943 and a judgment totaling \$515,190 awarded defendants. A motion for new trial was granted on the issue of damages alone. On appeal the portion of the judgment denying the recovery of severance damages and the order granting the new trial were affirmed in *People v. Ocean Shore Railroad*, 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179.

#### 1. Did the Court Abuse Its Discretion?

##### (a) *Fair and Impartial Trial.*

Judge Schottky filed a "Memorandum Opinion and Order Denying Motions for Change of Venue \* \* \*" in which he stated: "That the showing made in support of the motion for change of venue is not sufficient to convince the Court that a fair and impartial jury cannot be obtained in San Mateo before whom defendants cannot have a fair and impartial trial. The lapse of time since the making of the former motion in another case, the increase in the population of San Mateo County, and other factors, present a far different situation from the one which obtained at the time of the former motion. If upon the proceedings for the empanelment of a jury it should appear that a fair and impartial jury cannot be obtained in San Mateo County the Court would then entertain a renewal of the motion for change of venue."

Aside from the legal effect of Judge Trabucco's decision, there can be no question that the record in the Mussel Rock case fully supports his conclusion that there

1. Originally brought in the name of the State of California, but the title was changed to Joint Highway District No. 9.

2. This case, for brevity, will hereafter be referred to as the Dooling case.

3. This case will be referred to as the Mussel Rock case.

was reason to believe that at that time, 1936, a fair and impartial trial could not be had in San Mateo County. It is unnecessary to detail the facts shown in that record. They are well summed up by Mr. Justice pro tem. Ogden in *People v. Ocean Shore Railroad, Inc.*, supra, 24 Cal.App.2d 420, 427, 75 P.2d 560, 564: "By reference to newspaper editorials and articles, by reports of civic meetings and statements made by numerous citizens of the county, the affidavits tend to show a widespread feeling of prejudice extending over a long period of years, both against the officials of respondent corporation and against its cause \* \* \*."

The record supports the conclusion that to and including 1936, through newspaper articles, chambers of commerce and other meetings, actions of county and other officials, the people of San Mateo County were led to believe that the Ocean Shore Railroad was an abandoned one, that its roadbed was practically valueless, that the defendants were determined to exact excessive and unreasonable amounts from the counties, the highway districts and the State or any other body seeking to condemn the roadbed for highway purposes, for the whole or any portion of that roadbed; that the amount awarded in the Dooling case was grossly excessive, and that the defendants were doing everything they could to block and obstruct the completion of the Ocean Shore Highway in order to force payment of excessive prices for the roadbed.

But we are concerned with the situation, not in 1936, but in 1945, when Judge Schottky considered the matter. The newspaper clippings after 1936 do not contain the same venom as found in previous clippings. In the San Mateo County papers after 1936 there appear very few references to the Ocean Shore situation. January 26, 1937, the Burlingame paper stated that "In another step" to obtain rights of way for the highway, suit had been brought against the railroad in which the state claims \$420 is a fair price for the land sought to be condemned. September 14, 1939, the Half Moon Bay paper published an article entitled "History of the Ocean Shore High-

way" in which it was stated, in effect, that the attempt to have a fair price set for certain "rights of way of the defunct Ocean Shore Railroad in San Mateo County" culminated in an action in eminent domain. "This litigation appeared to be endless and finally resulted in a decision in which the directors [apparently the joint highway district directors] refused to pay on the ground that the price per mile was inordinate. At this stalemate in the history of the road attempts followed to abandon the proposed route and eliminate the necessity of using all of the Ocean Shore right of way and only adopt part of it." October 18, 1940, two San Mateo County papers referred to the filing of a condemnation proceeding against the railroad "on the property involved in the State Highway project for eliminating the Sharp Park bottle neck." In December, 1940, five county papers stated that the Ocean Shore Railroad ceased operations in 1921 and since had been engaged in "extensive litigation concerning condemnation proceedings for Ocean Shore Hwy." August 6, 1941, a San Francisco paper stated that the new section of the highway "along the former right of way of the old Ocean Shore Railroad eliminates approximately 350 turns." February 7, 1943, a San Francisco paper, referring to the Mussel Rock case, stated that trial of the "long contested State condemnation proceedings against the right of way of the Ocean Shore Railroad" would begin that morning in Oakland, that the case had been transferred there on plea of the attorneys for the "old disused railroad." "Compensation of approximately \$6,000,000.00 is sought from the State for the properties, which comprise a right of way now partly in use by the state highway system." April 16, 1943, three San Francisco papers stated the amount awarded the day before to the "old Ocean Shore Railroad" "for violation of right of way." May 26, 1943, a San Francisco paper stated that "Simultaneously with the affirmation of a jury verdict granting \$772,595.00 judgment" to the Ocean Shore Railroad, the State Highway Commission had ordered abandonment of a project for improving highway 99 near Redding because of a Shasta County superior court decision "establishing the right



of way costs, which the commission considered excessive." It then stated that a new trial was pending in the Ocean Shore Railroad case and that the State's attorneys were hinting that if they lost the appeal to vacate the judgment, this strip might be abandoned, too. The San Francisco papers hereinbefore referred to apparently have a wide circulation in San Mateo County.

[1,2] In addition to the affidavits on the Trabucco motion defendants filed seven affidavits in which the affiants claimed that great prejudice still existed in the county against the defendants. Four of these were by disinterested San Mateo County residents. Plaintiff filed some 49 affidavits, most of which were by disinterested San Mateo County residents, in which the affiants claimed that there was no such prejudice. The weight of the respective affidavits was for the trial court to determine. It is unnecessary to consider the affidavits in detail. A reading of the plaintiff's affidavits together with a study of the newspaper clippings since 1936 supports the conclusion that the entire picture in the county has changed. The highway, which was mostly on paper at that time, has been built and has long since been in use. The bitterness which then existed no longer exists. The population has changed, and while the evidence would possibly have supported a different conclusion had the court reached it, it by no means *compels* such conclusion. In 1934, on the late date of tabulation prior to Judge Trabucco's decision, the qualified electors of San Mateo County were 46,853. On November 1, 1944, the last date of tabulation prior to Judge Schottky's decision, they were 80,873. It is the practice in that county to select trial jurors from the registered qualified electors. Thus the population of the county in the ten-year period had almost doubled. Moreover, by the time these cases get to trial, another eight or more years will have elapsed. The court may take judicial notice of the constantly increasing population in this part of the State. Moreover, the 1930 census gave San Mateo County a population of 77,405, while that of 1940

gave 111,782, and that of 1950, 235,659. It is reasonable to conclude that by the time of trial these figures will be increased substantially.

[3] While it is true that a portion of the cost of the amounts awarded in these condemnation proceedings will be paid by the taxpayers of San Mateo County <sup>4</sup> such fact alone does not constitute a disqualification of the jurors, any more than jurors in certain districts, such as school districts, reclamation districts, etc., would be disqualified in actions in eminent domain brought by such districts.

Section 1963, subdivision 32, Code of Civil Procedure, provides as a disputable presumption that "a thing once proved to exist continues as long as is usual with things of that nature". Defendants contend that this presumption, coupled with Judge Trabucco's opinion, alone compels a reversal. However, the presumption is "satisfactory if uncontradicted," and the evidence justifies the conclusion that it is contradicted. Moreover, the presumption relates to a continuance of a thing "as long as is usual with things of that nature." It is common knowledge that bitterness in a community dies out and that a community seldom remains static, particularly where, as here, there is ever changing population and a tremendous growth. As said in *Pennsylvania R. Co. v. City of Reading*, 254 Pa. 110, 98 A. 791, 792, "the influence of newspaper publications upon the state of the public mind, however potent at the time," is necessarily short-lived. See *Ross v. Kalin*, 53 Cal.App. 616, 200 P. 745, where the ruling denying plaintiff's motion for change of venue was affirmed even though the feeling against him some twenty months before the motion was so great in one portion of the county that he was tarred and feathered.

[4] Defendants place great stress upon the fact that at the time of the Trabucco motion the then two judges of the county disqualified themselves and the survivor continues to decline to participate in the case, and argue from those facts that any jurors chosen in the county will likewise feel

4. See discussion hereafter concerning application of Section 394, Code of Civil Procedure, for detail.



themselves disqualified. This is a non-sequitur. What the judge's reasons for keeping out of the case are does not appear, but whatever they are, they do not establish that a fair trial cannot reasonably be had in the county.

Plaintiff's affidavits are to the effect that either the affiant has heard no discussions of the acquisition of the Ocean Shore Railroad roadbed for a right of way, or its value, or that if he did it occurred ten years ago and he had forgotten about it, and that it has not been discussed in that time, nor have there been any local newspaper articles concerning the matter in that time. While there have been newspaper articles within that time, it is clear from them, as hereinbefore set forth, that they were not of an inflammatory nature. Defendants contend that the fact that these people had not heard the matter discussed did not indicate that the prejudice no longer exists. However, that fact is a strong circumstance, particularly as the affidavits show that many of the affiants belonged to or attended groups where the subject, if at all existent, would have been discussed. The weight of these affidavits as compared to those of defendants was for the trial court to determine.

[5] The effect of Judge Schottky's decision is merely to postpone until time of trial the consideration of the main question, namely, is there reason to believe that a fair trial cannot be had? Unless the evidence compels the conclusion at this time that it cannot, we cannot say that the court erred. The lapse of time since the bitter campaigns against defendants, the tremendous increase in population, the completion and use of the highway and the other evidence not only does not compel a conclusion contrary to the decision but supports the conclusion reached, namely, that the evidence does not show that *at this time* there is reason to believe a fair trial cannot be had. It cannot be said to be unreasonable that the determination of this matter be left to the time of trial, in view of the rapidly changing conditions and population. In *People v. Ocean Shore Railroad, Inc.*, supra, 24 Cal.App.2d 420, 75 P.2d 560, it was pointed out that the procedure of hold-

ing in abeyance until time of impanelment of the jury and the voir dire examination of the jurors the determination of whether a fair trial could be had, has been authorized and approved in criminal cases, and by way of *dicta* in civil cases. The court then stated that such procedure was not the *exclusive* test by which it might be determined whether a fair trial might be had, and then upheld the action of the trial judge in granting the change. It also stated, 24 Cal.App.2d at page 427, 75 P.2d at page 564: "Whether or not a change of venue should be granted because of reason to believe that an impartial trial cannot be had in the county where the action is properly commenced is a question first addressed to the sound discretion of the trial court. On appeal this court may review such ruling only to the extent of inquiring whether the same constituted an abuse of that discretion. [Citations.] We cannot say that the trial court abused the discretion which is by law vested in it unless it clearly appears that the evidence adduced at the hearing of the motion does not as a matter of law justify such determination. [Citation.]" Although the trial judge in that case came to a contrary conclusion at that time, we do not find that defendants here have met the burden.

We do not construe Judge Schottky's opinion and order, as contended by defendants, as holding that the change could be granted only if, as in the case of *Jacob v. Town of Oyster Bay*, 119 App.Div. 503, 104 N.Y.S. 275, there was a *conclusive* showing of prejudice. Judge Schottky obviously had in mind only that the showing had to be such as to give him reason to believe that an impartial trial could not be had.

(b) *Convenience of Witnesses.*

[6-8] Judge Schottky stated in his opinion and order that no showing had been made to justify a change for convenience of witnesses. Again, this matter is primarily in the discretion of the court and can only be upset by us if there was an abuse of that discretion. Defendants introduced into evidence the transcript of the trial of the Mussel Rock case to show the witnesses; among others, they propose to call. Af-

affidavits were filed to show the extent of their testimony, ages, residences, and their health. While some of them are to give expert testimony, and therefore their convenience is not to be considered, most of them, including most of the experts, are to give factual testimony. An expert who also testifies as to facts is entitled to consideration on a motion of this kind. *Security Investment Co. v. Gifford*, 179 Cal. 277, 176 P. 444. Defendants expect to call 36 witnesses whom they deem necessary. Of these, 12 reside in Alameda County, 16 in San Francisco, 4 from Marin, 1 from New Mexico, 1 from Los Angeles, 1 from Benicia, and 1 from Susanville. Plaintiff's affidavits show that of their witnesses 22 are from San Mateo and Santa Cruz counties. It is unnecessary to detail the facts set forth in the affidavits of the parties. The court undoubtedly considered how much of the proposed testimony was material, how many, if any, of the experts would testify to purely factual matters and just how much inconvenience defendants' witnesses residing outside of Alameda County would suffer in going to San Mateo County for trial instead of to Alameda County. Undoubtedly he balanced the injury to the 12 residents of Alameda County and the other witnesses in going to Redwood City as against that of plaintiff's witnesses. The land is in San Mateo County, and although defendants contend that for view by the jury it is more convenient to go from Oakland to it than from Redwood City, that question is debatable. Frankly, we are not too much impressed by the claim that it is a greater hardship for Marin and San Francisco residents and those from elsewhere than Alameda County to go to Redwood City than to Oakland to attend a trial, nor to bring records from San Francisco. On the defendants rests the burden of proving both that the convenience of witnesses and the the ends of justice will be promoted by the removal of the cause. *Willingham v. Pecora*, 44 Cal.App.2d 289, 112 P.2d 328. Plaintiff proposes to call 22 residents of San Mateo and Santa Cruz Counties. Of these 11 may not be used, depending upon the issues developed at the trial, and upon whether considerable of

the testimony proposed to be produced by defendants is admitted. Two of defendants' "main" witnesses are invalids residing in Oakland. One is over 83 years of age. Two of the others living in Oakland also are very old. The Marin County resident is an invalid, 76 years of age. Apparently none of plaintiff's witnesses are in this situation. Under all of the facts of this case we cannot say that the refusal of the court to transfer the case to Alameda County because of these witnesses was an abuse of discretion. It might be pointed out that if these witnesses, as claimed, are so ill that it will be virtually impossible for them to go to Redwood City, by the time this case gets to trial they will not be able even to get to the Oakland courthouse, and their depositions will have to be taken or their testimony on the other trial used.

[9] Applicable here is the language in *Scott v. Stuart*, 190 Cal. 526, 529, 213 P. 947, 948: "It is no abuse of the trial court's discretion to deny a motion for a change of the place of trial made on the ground of the convenience of witnesses, if the affidavit of the defendant in opposition to the motion shows that his witnesses will be inconvenienced if the change be ordered. *McNeill & Co. v. Doe*, 163 Cal. 338, 125 P. 345.

"There is no merit in the suggestion that the larger number of witnesses reside in or near the county of Monterey. A mere preponderance in number of the witnesses which either party expects to produce will not necessarily determine the order to be made. *Reavis v. Cowell*, 56 Cal. 588. Nor will the necessity of producing in this case the records and files in the partition suit and the expense incident thereto settle the question. This, in common with the other matters, is a consideration addressed to the discretion of the court."

## 2. Res Judicata.

[10,11] Defendants contend that the Trabucco decision is res judicata. There can be no question but that the doctrine applies to motions for change of venue. "It has been recently held in the case of

Karst v. Seller, [45 Cal.App. 623] 188 P. 298, that as an order of the court granting a motion for change of venue has all the characteristics of a final judgment, and an appeal would lie from such an order, the plaintiff is estopped by such order from bringing another action *upon the same facts* in the county from which said first action had been transferred, after a dismissal of said first action." *Fitzhugh v. University Realty Co.*, 46 Cal.App. 198, 202, 188 P. 1023, 1025; emphasis added. "The doctrine does not apply, however, where there are changed conditions and new facts which did not exist at the time of the prior judgment." *People v. Ocean Shore Railroad*, supra, 32 Cal.2d 406, 418, 196 P.2d 570, 578. The proceeding here is not upon the same facts, and the conditions are shown to be changed. "The doctrine of *res judicata* was never intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants. [Citations.]" *Hurd v. Albert*, 214 Cal. 15, 26, 3 P.2d 545, 549, 76 A.L.R. 1348. The lapse of time and changed conditions distinguish this case from those like *Southern Pacific Co. v. City of Los Angeles*, 5 Cal.2d 545, 55 P.2d 847; *Fitzhugh v. University Realty Co.*, supra, 46 Cal.App. 198, 188 P. 1023; and *Jacob v. Town of Oyster Bay*, supra, 119 App.Div. 503, 104 N.Y.S. 275.

### 3. Section 394, Code of Civil Procedure.

[12, 13] Joint Highway District No. 9, comprises the counties of San Mateo, Santa Cruz and the City and County of San Francisco. It was formed to construct a public highway from San Francisco to Santa Cruz, to be known as the Ocean Shore Highway. The general route of said Ocean Shore Highway was designated in 1933 by the California Highway Commission as State Highway Route 56. On February 27, 1936, the district entered into an agreement with the Department of Public Works of the State of California. This agreement states that the district desires the cooperation of the department in the construction of the

Pedro Mountain sector from Farallone City to Rockaway Beach, a length of approximately 5.90 miles, estimated to cost for right of way and construction \$425,000. The district agrees to contribute \$125,000 of its funds, also to provide all funds in excess of \$50,000 which the right of way, and removal or change of buildings or improvements on it, damages to property, court costs and other expense incidental to providing a right of way, clear of obstruction or encumbrances, might cost. Certain sums have been expended out of the \$50,000 for acquisition of rights of way of certain portions of the Farallone City-Rockaway project, leaving a balance in the fund of approximately \$15,000 only. It may be assumed that this sum will nowhere near cover the awards which defendants will get in these cases. Defendants point out that the district will have to pay this excess and that San Mateo County must pay 30 per cent thereof. There is evidence that in addition to the district's liability under the contract before-mentioned it has assumed or will assume large additional sums to pay to the State for the construction of the Ocean Shore Highway, and San Mateo County will have to pay 30 per cent thereof. They contend that the county's share will have to be raised by *direct* taxes. Whether this is true, or as contended by plaintiff it will come out of the county's share of state gas tax monies, is immaterial. Because of this liability defendants contend that although the actions are by the State to condemn lands for a state highway, the county is a party in interest, and therefore section 394 should apply. The portion of that section which they desire applied here states that "Whenever an action or proceeding is brought by a county \* \* \* against a resident of another county \* \* \* or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial \* \* \*" to a neutral county. Defendants argue that because of its financial interest in the outcome of the case this action is, in effect, "brought" by that county. Obviously, neither the district nor the county appear on the pleadings to be *bringing* the action. The question for us to determine is whether



for the purposes of that section this action may be deemed to be brought by the county. It must be borne in mind that it is for the Legislature to determine where venue shall lie. "The place of trial for all actions not governed by constitutional mandate may be fixed by the Legislature." *People v. Zegras*, 29 Cal.2d 67, 68, 172 P.2d 883, 884. The Legislature, in many instances, has not provided for change of venue in cases where the plaintiff public entity has the complete financial responsibility. Such situations, for example, are reclamation, irrigation, and other special districts. Therefore, we must determine here whether the Legislature intended that section to apply to a case where, as here, the interest of the county is twice removed from the entity bringing the suit. "In Black's Law Dictionary, 2d Ed., the phrase 'bring suit' is defined as follows: 'To "bring" an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit.'" *W. J. Lake & Co. v. King County*, 4 Wash. 2d 651, 104 P.2d 599, 601; see also 11 C.J.S., *Bring*, page 1141. Thus, "Whenever an action is brought by a county" means initiated, started or commenced. If the Legislature had intended the section to apply whenever a county has an indirect interest in an action, it could easily have said so. In *Metropolitan Water Dist. v. Superior Court*, 2 Cal.2d 4, 37 P.2d 1041, cited by both parties, the question was whether the superior court judges of Riverside County were disqualified in that action by reason of section 170 of the Code of Civil Procedure, subdivision 6, which provides, in part, that in any action "brought" by or against the Reclamation Board of the State or any irrigation, reclamation, levee, swamp land or drainage district "or any public agency" or their officers, affecting or relating to any real property, or an easement, right of way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board, a judge of the county in which the real property or the other matters mentioned is located shall be disqualified to sit in the action. It was contended that this section, by reason of the words "or any public agency" applied to the plaintiff, the

Metropolitan Water District of Southern California, which is comprised of several municipalities. However, the court pointed out, first, that under the then law the cities comprising the district might bring actions either separately or jointly and the judges of the county wherein the property was situated would not be disqualified; therefore, where they acted through a common instrumentality or agency the Legislature could not be held to have contemplated that the judges would be disqualified. Secondly, the very language of the section indicates that only agencies dealing with the subject of reclamation work were included in the term "any public agency" and did not include any agency like the water district which more closely resembles a municipal corporation than a state agency such as irrigation and reclamation districts. The court then held that the judges were not disqualified. The case shows that it is not the policy of the Legislature that all actions affecting a public body be tried in a neutral county. The fact that as to actions by certain agencies the Legislature has provided authority for removal, and not as to others, indicates that the Legislature did not intend that indirect interest in the outcome of the action should cause a transfer as to all public agencies.

While it is true that district No. 9 is comprised of three counties, it is not a "county" but a "public corporation." See *Stats. 1917*, p. 47, sec. 7. It is a "legal kind of taxing district." *Joint Highway Dist. No. 13 v. Hinman*, 220 Cal. 578, 584, 32 P.2d 144, 146. In that case it was held that the collection of a tax for the purpose of constructing a public highway and tunnel between Contra Costa and Alameda Counties was "for a state purpose—the development of the highway system of the state \* \* \*." 220 Cal. at page 588, 32 P.2d at page 148. There the district directors levied the tax by fixing the amount to be raised, and notifying the Boards of Supervisors of the counties comprising the district. These boards then caused "the amount to be collected by a tax upon and from the taxable property in the county." 220 Cal. at page 583, 32 P.2d at page 146.

Even though, as contended by defendants, the counties which originally desired the Ocean Shore Highway built had adopted for that purpose the method of forming a district and then persuading the State to bring the condemnation actions, still the purpose is a state one—the development of the state highway system. The fact that had the action been brought in the name of the county a removal of the cause would have been required, in nowise changes the situation that being brought by the State it is neither a district nor county project, but a state one. In a great many of the projects for the development of our state highways there is contribution to the state from one or more counties or municipalities. The Legislature has provided for such contributions. Streets and Highways Code, § 130. Had the Legislature intended that where such contributions are made, actions for condemnation should be removable, it could easily have said so. But it did not. Defendants contend that a highway district is merely the *alter ego* of the counties comprising it, and cite many sections of the Streets and Highways Code showing the relationship of the boards of supervisors and the counties to the district and its directors. It is not necessary to discuss these sections. In spite of a close relationship between the counties and the district the latter is a distinct entity—as pointed out before, “a public corporation.” See *Joint Highway Dist. No. 13 v. Hinman*, supra, 220 Cal. 578, 32 P.2d 144; *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72 (which distinguishes between a public corporation and a municipal corporation). See also *Sharp v. Joint Highway District No. 6*, 111 Cal.App. 81, 295 P. 841, where the court refused to uphold the contentions that the statute authorizing the highway district to issue bonds was merely a subterfuge for the counties, as the district’s powers are merely the powers of the several boards of supervisors and was “but a sham for giving some support to the issuance of the bonds.” 111 Cal.App. at page 85, 295 P. at page 843. *Yuba County v. North America etc. Min. Co.*, 12 Cal.App.

223, 107 P. 139, and *City of Stockton v. Ellingwood*, 78 Cal.App. 117, 248 P. 272, are not in point as there the plaintiff in the first case was a county, and in the other a city. Both came within the specific wording of section 394, Code of Civil Procedure. The Legislature having provided expressly for county participation in state highway projects, and having failed to provide for removal of actions brought by the State in such situations, the courts have no right to determine as a matter of law that such removals must be granted.

#### 4. Alleged Disqualification of Judges.

[14] We have herein stated that the two San Mateo County judges, incumbents in 1936, had disqualified themselves. This is based primarily upon a statement in a letter from one of them to the Judicial Council in 1944. It may be doubtful if they were disqualified. In a proceeding brought in 1936 to disqualify one of them it was held that he was not disqualified. Assuming, however, that they were disqualified in fact, such fact does not require, as contended by defendants, the removal of the cause. In the first place, of the three judges now in San Mateo County, one became such in 1945 and the other in 1949. There is no evidence that they are disqualified. Secondly, even if all the judges are disqualified, such situation does not require a removal. A qualified judge may be assigned for the trial, just as was done in connection with the motions to transfer. See *Matter of Application of Burch*, 168 Cal. 18, 141 P. 813, and *Yolo Water, etc., Co. v. Superior Court*, 28 Cal.App. 589, 153 P. 394; *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145, does not hold to the contrary. There, in reversing the denial of a change of venue it appeared that in addition to the “intense antagonism of the community toward defendants, \* \* \* the regular trial judge has forcefully presented his opinions as to the merits of the case and attacked the good faith of defense counsel \* \* \*.” 37 Cal.2d at page 800, 236 P.2d at page 150. The trial judge “was well known in the county and had been the only regular

superior court judge for approximately 17 years. \* \* \* His opinions were known to members of the jury. Under such circumstances the prejudicial effect of his statements was not materially less because they were made outside rather than inside the courtroom." 37 Cal.2d at page 799, 236

P.2d at page 150. There is no similarity between that situation and the one in the case at bar.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.











# CALIFORNIA REPORTER

## 242 PACIFIC REPORTER

### SECOND SERIES

---

38 Cal.2d 652

#### **HAMPTON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUN-**

**TY et al.**

**L. A. 22086.**

**Supreme Court of California in Bank.**

**March 25, 1952.**

William J. Hampton, and another, filed petition for writ of mandate and prohibition against the Superior Court of the State of California in and for the County of Los Angeles, Honorable W. Turney Fox, Presiding Judge of said Superior Court, and Helen Young, real party in interest. The Supreme Court, Edmonds, J., held that upon entry of minute of judgment in register of actions, judgment was of record and writ of mandate to compel entry of judgment would not lie, and that prohibition was proper remedy to restrain trial court from proceeding to trial in violation of terms of final judgment of Supreme Court.

Writ of prohibition issued.

Schauer, J., dissented.

#### **1. Judgment ⇨276**

Upon entry of minute of judgment in register of actions, judgment is of record and no further action by superior court is necessary. Code Civ.Proc. § 958.

#### **2. Judgment ⇨276**

##### **Mandamus ⇨16(1)**

Where minute of judgment was entered in register of actions, no further entry of judgment was required for protection of rights of either party, and hence writ of mandate would not issue to compel entry of judgment. Code Civ.Proc. § 958.

#### **3. Appeal and Error ⇨1197**

When there has been decision upon appeal, trial court is reinvested with jurisdiction of cause, but only as defined by terms of remittitur.

242 P.2d—1

#### **4. Appeal and Error ⇨1198**

Trial court is empowered to act only in accordance with direction of reviewing court, and action which does not conform to direction is void.

#### **5. Appeal and Error ⇨1180(1)**

An unqualified reversal by reviewing court presumes that cause has been remanded for retrial, since by reversal, order or judgment has no force but is in effect vacated.

#### **6. Appeal and Error ⇨1207(1)**

Where reviewing court by decision upon appeal directs entry of specific judgment, trial court has no discretion but to enter judgment called for. Code Civ.Proc. §§ 53, 956A.

#### **7. Appeal and Error ⇨1207(1)**

If order reversing judgment in favor of plaintiff should not have included direction for entry of final judgment in favor of defendants, error was "judicial".

See publication Words and Phrases, for other judicial constructions and definitions of "Judicial Error".

#### **8. Appeal and Error ⇨839(1)**

An appellate court decides only issues presented by parties.

#### **9. Appeal and Error ⇨1198**

If reviewing court inadvertently omits to include in instructions to trial court upon reversal, essential elements within issues necessarily determined on appeal, aggrieved party has remedy in petition for rehearing, and trial court cannot exceed specific directions of court of review and add conditions which it assumes reviewing court should have included.

#### **10. Courts ⇨207(5)**

Prohibition is proper remedy to restrain trial court from proceeding to trial

in violation of terms of final judgment of reviewing court.

# 11. Mandamus ☞4(1)

## Prohibition ☞3(5)

Where remedy by appeal is not speedy and adequate, in otherwise proper case, mandate or prohibition may lie.

# 12. Prohibition ☞3(5)

Where Supreme Court reversed judgment for plaintiff and directed that superior court enter judgment denying plaintiff relief, but trial court entered order setting cause for further trial, which would subject defendants to vicissitudes and expense of unnecessary trial, appeal from final judgment after such further trial would not afford defendants adequate and speedy remedy, and prohibition would issue, even if Supreme Court committed judicial error in directing entry of final judgment in favor of defendants, since plaintiff's proper remedy was by petition for rehearing.



Geo. L. Hampton, Van Nuys, for petitioners.

Ogden, Crocker & Steelman and Samuel Steelman, all of Los Angeles, for Real Party in Interest and respondents.

EDMONDS, Justice.

H. Young sued William J. Hampton and his wife to enforce a mechanic's lien arising out of the construction of a house and garage. The action was based upon a contract which specified that the work was to be done upon a cost-plus basis. The superior court rendered judgment for the contractor. The claim of the Hamptons, asserted by way of cross-complaint, for loss of rent arising out of the failure of the contractor to perform a prior contract for the erection of the same buildings for a fixed amount was disallowed.

Upon appeal, this court reversed the judgment, dismissed the appeal from the order denying a new trial and directed that the superior court enter judgment " \* \* \* denying Helen Young relief upon the cost-plus contract, and denying the Hamptons any recovery for rent". Young

v. Hampton, 36 Cal.2d 799, 806, 228 P.2d 1, 5, 19 A.L.R.2d 830.

The petition in the present proceeding is based upon the asserted failure of the superior court to enter judgment as required by the remittitur and an order setting the cause for further trial. The relief sought is a writ of mandate to compel the entry of the judgment and a writ of prohibition to forbid the continuance of the litigation.

[1,2] By section 958 of the Code of Civil Procedure, the duties of the clerk of the superior court upon the receipt of a remittitur are defined as follows: "When judgment is rendered upon the appeal, it must be certified by the clerk of the appellate court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the appellate court in the register of actions. \* \* \*" Upon entry of the minute of the judgment in the register of actions, the judgment is of record and no further action by the superior court is necessary. *McMann v. Superior Court*, 74 Cal. 106, 107, 15 P. 448; *McMillan v. Richards*, 12 Cal. 467, 468; *Marysville v. Buchanan*, 3 Cal. 212, 214. The petitioners allege that the remittitur was received by the clerk of the superior court, and it must be presumed that he complied with the provisions of the quoted code section. *Fischer v. Lukens*, 41 Cal.App. 358, 182 P. 967. No further entry of judgment is required for the protection of the rights of either party. The petition, therefore, fails to state any ground for the issuance of the writ of mandate.

The Hamptons take the position that the superior court should be prohibited from a further trial of the action because the decision of this court was a final determination of the rights of the parties. Miss Young contends that there are undetermined issues which must be disposed of before complete justice is done.

The points presented upon the appeal solely concerned the validity of each of the contracts. Miss Young was denied any

recovery because the second contract, being contrary to public policy, was void. It was also held that the Hamptons were not entitled to damages because of failure to complete the buildings within the time specified in the first contract. None of the parties, it was held, "intended that contract to be their true agreement. \* \* \* There being no operative promise on the part of Helen Young to complete construction on or before any particular date, there is no basis for the asserted claim for reasonable rental value". 36 Cal.2d at page 806, 228 P.2d 1, 5, 19 A.L.R.2d 830.

Miss Young does not spell out any issues which were not determined in the former action. She contends that no ruling was made on the validity of the flat price contract. She also asserts that she has not received the final payment of 20 per cent which " \* \* \* would be forfeited by the respondent and petitioners unjustly enriched in the same amount". Apparently she hopes to be able to continue her action upon the theory of *quantum meruit*.

[3, 4] When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. *Rice v. Schmid*, 25 Cal.2d 259, 153 P.2d 313; *Weaver v. San Francisco*, 146 Cal. 728, 81 P. 119; *Barnhart v. Edwards*, 128 Cal. 572, 61 P. 176; *Keller v. Lewis*, 56 Cal. 466; *Kramer v. Superior Court*, 35 Cal.App.2d 239, 95 P.2d 158.

[5] An unqualified reversal by the reviewing court presumes that the cause has been remanded for a retrial. *Rinaldo v. Superior Court*, 15 Cal.App.2d 585, 589, 59 P.2d 868. The reason for the rule is that, by a reversal, the order or judgment appealed from no longer has any vitality or force. In effect, the order or judgment appealed from is vacated.

[6] Under sections 53 and 956a of the Code of Civil Procedure, by a decision upon an appeal, the entry of a specific judgment may be directed. Under such circumstances,

the trial court has no discretion but to enter the judgment called for. *Rice v. Schmid*, supra, 25 Cal.2d at page 263, 153 P.2d 313; *Department of Water and Power v. Inyo Chemical Co.*, 16 Cal.2d 744, 108 P.2d 410; *Weaver v. San Francisco*, supra; *Carter v. Superior Court*, 96 Cal.App.2d 388, 215 P.2d 491; *Richardson v. Michel*, 59 Cal. App.2d 361, 138 P.2d 774; *Phillips v. Patterson*, 34 Cal.App.2d 481, 93 P.2d 807; *Snoffer v. City of Los Angeles*, 14 Cal.App. 2d 650, 58 P.2d 961; *English v. Olympic Auditorium*, 10 Cal.App.2d 196, 52 P.2d 267. The order of the appellate court, as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void." *Snoffer v. City of Los Angeles*, supra, 14 Cal.App.2d at page 653, 58 P.2d 961, 962.

[7-9] If it be assumed that the order reversing the judgment in favor of Miss Young should not have included a direction for the entry of a final judgment in favor of the Hamptons, the error was judicial. Throughout the trial of the action brought by her and the appeal from the judgment, Helen Young made no claim against the Hamptons on *quantum meruit*. An appellate court decides only the issues presented by the parties. "If a court of review inadvertently omits to include in its instructions to a trial court upon the reversal of a judgment essential elements within the issues necessarily determined on the appeal, the aggrieved party has his remedy in a petition for rehearing. A trial court may not exceed the specific directions of a court of review in remanding a cause after a reversal of the judgment on appeal and add thereto conditions which it assumes the reviewing court should have included." *English v. Olympic Auditorium*, supra, 10 Cal.App.2d at page 201, 52 P.2d 267, 269.

[10-12] Prohibition is a proper remedy to restrain a trial court from proceeding to trial in violation of the terms of a final judgment of the reviewing court. *Kramer v. Superior Court*, supra; *Lial v. Superior*



Court, 133 Cal.App. 31, 23 P.2d 795. Nor does the availability of an appeal, were the cause to proceed to final judgment, bar resort to the writ. It may be conceded that an appeal would lie from the final judgment were the superior court allowed to proceed with a further trial of the action. *Rice v. Schmid*, supra; *Richardson v. Michel*, supra. But where the remedy by appeal is not speedy and adequate, then, in an otherwise proper case, mandate or prohibition may lie. *McCulloch v. Superior Court*, 91 Cal.App.2d 641, 646, 205 P.2d 689. In the present case, an appeal would not afford the Hamptons an adequate remedy for they would still be subjected to the vicissitudes and expense of an unnecessary trial. *City of San Diego v. Superior Court*, 36 Cal.2d 483, 485, 224 P.2d 685; *Tomales Bay Oyster Corp. v. Superior Court*, 35 Cal. 2d 389, 392, 217 P.2d 968.

Let a writ of prohibition issue as prayed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

Construed as the majority now interpret and apply our order, I think that we erred against a basic policy of law in *Young v. Hampton* (1951), 36 Cal.2d 799, 806, 228 P.2d 1, 19 A.L.R.2d 830. We erred not in reversing the judgment there appealed from but in directing the trial court to enter a different judgment as specified, and thereby, now rule the majority, foreclosing the parties from litigating new issues, issues which had never been tendered or joined, let alone adjudicated.

I would not so construe our order. It can be given full effect and still permit the joining and determination of the issues now sought to be raised. We should not unnecessarily construe our own order in a manner which both brands it as erroneous and which precludes a party a day in court. The order reads "The judgment is reversed with directions to the trial court to enter judgment denying Helen Young relief upon the cost-plus contract, and denying the Hamptons any recovery for rent." The plaintiff had recovered judg-

ment in the trial court based on the cost-plus contract. On appeal it was contended, and the contention sustained, that the cost-plus contract was invalid. This warranted reversing the judgment based on the cost-plus contract but it does not warrant an order which precludes the plaintiff from litigating issues which would become material only after the cost-plus contract had been held invalid and the judgment thereon reversed. And our order does not on its face purport to so offend: It is the judgment, and, of course, only the judgment based on the cost-plus contract, which is reversed; the direction to the trial court is "to enter judgment denying Helen Young [plaintiff] *relief upon the cost-plus contract*, and denying the Hamptons any recovery for rent." (Italics added.) An order that judgment be entered denying the plaintiff *any relief whatsoever* arising out of her transaction with the Hamptons would have been easy to write if the court had intended it, rather than the order as drawn purporting to limit its applicability, insofar as plaintiff is concerned, exclusively to "relief upon the cost-plus contract."

I think also that we improperly prejudice a cause when we hold in effect, as the majority implicitly do, that it would necessarily be an idle act for the plaintiff to present, and beyond the jurisdiction of the court to entertain, an application for some form of legal or equitable relief, the nature and theory of which we do not know and which we now gag the plaintiff from disclosing.

Furthermore, I do not agree with the unnecessarily broad and in some applications inaccurate statement in the majority opinion that "An unqualified reversal by the reviewing court presumes that the cause has been remanded for a retrial. \* \* \* In effect, the order or judgment appealed from is vacated." Contra, see *People v. Hardisson* (1882), 61 Cal. 378, 380; *People v. Lee Look* (1904), 143 Cal. 216, 220, 76 P. 1028; *People v. Coronado* (1904), 144 Cal. 207, 79 P. 418; *People v. Lauman* (1922), 59 Cal.App. 144, 146, 210 P. 421; *People v. Hudson* (1928), 92 Cal.App. 593, 268 P. 687; *People v. Com-*

mons (1944), 64 Cal.App.2d Supp. 925, 937, 148 P.2d 724.

Lastly, it should not be presumed, and I think that petitioner has not established, that the respondent court will either exceed its jurisdiction, fail to exercise it properly on the facts as they may be made to appear, or neglect to give proper effect to the order which we made, if allowed to proceed.

Accordingly, I would deny the petition for the writ.



38 Cal.2d 693

**ORELLA v. JOHNSON et al.**

**S. F. 18262.**

Supreme Court of California, in Bank.  
March 27, 1952.

M. J. Orella brought an action against May Johnson and another for certain lands allegedly held in trust for plaintiff. The Superior Court, Santa Cruz County, James L. Atteridge, J., entered judgment of nonsuit at the end of plaintiff's evidence, and plaintiff appealed. The Supreme Court, Traynor, J., held that the evidence whether the conveyance was induced by fraud was sufficient for trier of facts.

Reversed.

Prior opinion 236 P.2d 867.

#### **1. Evidence ⇨258(1)**

In action by stepfather against stepdaughter to impress a trust on property which stepfather had conveyed to stepdaughter upon alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed upon request, evidence of a conversation which stepfather had with wife, that allegedly resulted in his executing deed to stepdaughter, was inadmissible to establish that stepdaughter agreed to hold property in trust for stepfather, in absence of proof that wife was stepdaughter's agent. Code Civ.Proc. § 1870, subd. 5.

#### **2. Evidence ⇨121(9)**

In action by stepfather against stepdaughter to impress a trust on property which stepfather had conveyed to stepdaughter upon alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed upon request, if establishment of a constructive trust should not be barred by statute of frauds, evidence of a conversation stepfather had with wife, that allegedly resulted in stepfather's executing deed to stepdaughter, was admissible as part of transaction in which stepfather conveyed property and was relevant to prove both the reason for the conveyance and what stepfather intended to accomplish by it. Code Civ.Proc. § 1850.

#### **3. Trusts ⇨96**

Where a grantor conveys property to another in reliance on oral promise of the latter to hold property in trust for grantor or a third person, and grantee subsequently repudiates the trust, a constructive trust may be enforced against grantee if conveyance was induced by fraud or if there was a confidential relationship between parties. Civ.Code, § 2224.

#### **4. Trusts ⇨96**

Under statute providing that one who gains a thing by fraud is an involuntary trustee of the thing gained, for benefit of person who would otherwise have had it, where grantor conveys property to another in reliance on oral promise of the latter to hold property in trust for grantor or a third person, and grantee subsequently repudiates trust, the trust is enforced in favor of the intended beneficiary. Civ.Code, § 2224.

#### **5. Frauds, Statute of ⇨138(2)**

A purchaser under an invalid oral contract to buy land may recover the amount he has paid if seller refuses to perform contract.

#### **6. Work and Labor ⇨10**

A person who renders services under an invalid contract to devise property may secure quantum meruit for the value of those services.

**7. Trusts** ¶96

Where stepfather conveyed land to stepdaughter upon alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed upon request, delivery of stepfather's deed to stepdaughter by wife put stepdaughter on inquiry as to purpose of the conveyance, as respects whether property was impressed with trust in favor of stepfather.

**8. Principal and Agent** ¶171(7)

Where stepfather conveyed land to stepdaughter upon alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed upon request, if wife informed stepdaughter of arrangement by which wife secured deed, stepdaughter's acceptance of deed with knowledge of facts would constitute a ratification of agency and would make wife's negotiations in behalf of stepdaughter binding on stepdaughter.

**9. Trusts** ¶111

In action by stepfather against stepdaughter to impress a trust on property which stepfather had conveyed to stepdaughter upon alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed upon request, evidence whether the conveyance was induced by fraud was sufficient for trier of facts. Civ.Code, § 2224.

---

Alfred J. Harwood, San Francisco, for appellant.

J. Frank Murphy and Eugene J. Adams, Santa Cruz, for respondents.

TRAYNOR, Justice.

Plaintiff has appealed from a judgment for defendants entered after the granting of a motion for nonsuit. Viewing the record in the light most favorable to plaintiff and disregarding conflicts, the evidence may be summarized as follows:

In 1933 plaintiff received from his parents as his separate property a home known as the Harder Road place in Alameda County. At that time he borrowed \$1,000 from defendant May Johnson, his step-

daughter, to pay off a mortgage on the property. Plaintiff and his wife lived on the property, and in 1938 he and his wife executed a grant deed conveying it to May. In 1941 the property was sold for \$3,900, which was paid to May, and the deed was executed by her. She retained the \$1,000 plaintiff owed her and the \$400 interest due thereon. \$1,800 of the \$3,900 was used to purchase a new home for plaintiff and his wife, known as the Winton Road place. Title was taken in May's name. In 1943 the Winton Road property was sold for \$4,500, and \$2,300 of this amount was used to purchase property in Santa Cruz. In December 1947 plaintiff learned for the first time that title to the Santa Cruz property was in May's name. Shortly thereafter his wife died, and he asked May to convey the property to him. She refused and thereafter conveyed the property to herself and her daughter as joint tenants. Plaintiff brought this action to impress a trust on the property and to obtain an accounting of the amounts May had realized through the sales of the Harder Road and Winton Road properties. Plaintiff sought to prove that the 1938 conveyance to defendant was intended as a deed of trust to secure his indebtedness to her and that she accepted the deed on the understanding that she would reconvey the property to him on his request.

To prove the alleged oral trust plaintiff sought to introduce evidence of a conversation he had with his wife that resulted in his executing the deed to May. The trial court excluded this evidence on the ground that any statements made by plaintiff's wife would not be binding on May in the absence of proof that plaintiff's wife was acting as May's agent in the transaction. Plaintiff then offered to prove that his wife stated to him: "Honey, I have got a proposition May wants me to put to you; she wants you to make a deed of trust of the property because she is afraid you will be involved in an automobile accident and the people who are injured might come on the property \* \*." In response plaintiff said, "yes, with the understanding that any time he wanted the property back in his name May Johnson



would deed it back to him." His wife then said, "Yes, that is okay."

[1,2] In the absence of proof that plaintiff's wife was May's agent, the evidence of this conversation was inadmissible to establish that defendant agreed to hold the property in trust for plaintiff. Code Civ.Proc. § 1870(5). Unless, however, the statute of frauds is a bar to the establishment of a constructive trust in this case, this evidence was admissible as part of the transaction in which plaintiff conveyed his property, and was relevant to prove both the reason for the conveyance and what plaintiff intended to accomplish by it. Code Civ.Proc. § 1850; *Sethman v. Bulkey*, 9 Cal.2d 21, 24, 68 P.2d 961; *Simons v. Bedell*, 122 Cal. 341, 349-350, 55 P. 3; *Airola v. Gorham*, 56 Cal.App.2d 42, 50-52, 133 P.2d 78; *Williamson v. Kinney*, 52 Cal.App.2d 98, 103-104, 125 P.2d 920. It is therefore necessary to consider the possible theories under which plaintiff might enforce a constructive trust against defendants in the light of the evidence presented.

[3,4] If a grantor conveys property to another in reliance on the oral promise of the latter to hold the property in trust for the grantor or a third person and the grantee subsequently repudiates the trust, it is settled that a constructive trust may be enforced against the grantee if the conveyance was induced by fraud or if there was a confidential relationship between the parties. *Brison v. Brison*, 75 Cal. 525, 527-529, 17 P. 689; *Odell v. Moss*, 130 Cal. 352, 358, 62 P. 555; *Jones v. Jones*, 140 Cal. 587, 590, 74 P. 143; *Lauricella v. Lauricella*, 161 Cal. 61, 65-67, 118 P. 430; *Huber v. Huber*, 27 Cal.2d 784, 790, 167 P.2d 708; see *Rest., Trusts*, § 44. Such trusts are enforced under the provisions of section 2224 of the Civil Code that "One who gains a thing by fraud \* \* \* is \* \* \* an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." It is either the actual fraud that induced the conveyance, or the constructive fraud arising from the confidential relationship coupled with the breach of the oral promise, that brings the provisions of

the section into play. *Brison v. Brison*, supra; *Lauricella v. Lauricella*, supra; *Robertson v. Summeril*, 39 Cal.App.2d 62, 65-66, 102 P.2d 347. Since under this section the trust is in favor of the person who, but for the fraud, "would otherwise have had" the property, the effect of its application when the grantee refuses to perform his oral promise, is to enforce the trust in favor of the intended beneficiary. *Lauricella v. Lauricella*, supra; *Cooney v. Glynn*, 157 Cal. 583, 587, 108 P. 506; see *Sears v. Rule*, 27 Cal.2d 131, 139, 163 P.2d 443; *Rest., Trusts*, § 45.

[5,6] Whether or not there is a confidential relationship or whether or not the original transfer was induced by fraud, the fact remains that the grantee will be unjustly enriched, if he is allowed to repudiate his promise and retain the property. Accordingly, the view has been forcefully advocated that although the grantee cannot be compelled to perform his promise in view of the statute of frauds, unjust enrichment should be prevented by compelling him to make specific restitution to the grantor. See, 1 *Scott on Trusts*, § 44, p. 248, and authorities cited. This view is supported by the rule that a purchaser under an invalid oral contract to buy land may recover the amount he has paid if the seller refuses to perform the contract, see *Moresco v. Foppiano*, 7 Cal. 2d 242, 247, 60 P.2d 430; *Rest., Restitution*, § 108(d), and the rule that a person who renders services under an invalid oral contract to devise property may secure quantum meruit for the value of those services. *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84. Although there are cases where recovery has been denied despite an apparent unjust enrichment; *Barr v. O'Donnell*, 76 Cal. 469, 18 P. 429; *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L.R.A. 826; see also, *Babcock v. Chase*, 111 Cal. 351, 43 P. 1105; *Russ v. Mebius*, 16 Cal. 350; *Gray v. Walker*, 157 Cal. 381, 108 P. 278 in none of them was the question raised or considered of the availability of the remedy of specific restitution as distinct from the remedy of a constructive trust based on the abuse of a con-

fidential relationship. In cases where the question has been considered, however, the right to relief has been recognized. *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 120, 140 P.2d 31; *Edwards v. Edwards*, 90 Cal.App.2d 33, 39, 202 P.2d 589; *Adams v. Talbott*, 61 Cal.App.2d 315, 319, 142 P.2d 775; see also, *Sears v. Rule*, 27 Cal.2d 131, 140, 163 P.2d 443; *Taylor v. Morris*, 163 Cal. 717, 722, 127 P. 66; *Sandfoss v. Jones*, 35 Cal. 481, 485-487. Accordingly, it is unnecessary to decide whether there was a confidential relationship in this case. The nonsuit must be reversed if there is evidence, either that plaintiff conveyed his property in reliance on an oral promise to reconvey it to him, or that the conveyance was induced by fraud.

Although there is no evidence that May authorized her mother to solicit the conveyance, plaintiff contends that there is sufficient evidence to sustain a finding that she ratified the transaction undertaken in her behalf. In this respect the record shows that May accepted and recorded the deed. She allowed plaintiff and his wife to live on the Harder Road property after the deed to her was executed. She also allowed them to live on the Winton Road property and the Santa Cruz property. She stated to her parents that she thought they were making a mistake in buying the Santa Cruz property, but nevertheless she provided the funds for its purchase from the proceeds of the sale of the Winton Road property. She stated to plaintiff that she did not see why he wanted to spend money in repairs of the Santa Cruz property, "but it is your money, you can do so," and she supplied the funds for the repairs.

This course of conduct is consistent with a recognition on May's part that she was acting as trustee for plaintiff with respect to his real estate transactions and the profits realized therefrom. From her cooperation in selling the Winton Road property and buying the Santa Cruz property, despite her own disapproval, the trier of facts could reasonably infer an admission that the property was plaintiff's and not hers. Similarly her providing the money that she described as "your money,"

suggests that she acknowledged that she held the profits from the sale of the Winton Road property in trust for plaintiff.

Plaintiff also introduced evidence of a conversation between himself and May's daughter at which May was present. This conversation took place after plaintiff's wife's death. Plaintiff asked the daughter what her mother intended to do with the property, and the daughter replied, "You know Ma is holding that property for you; that property is yours."

[7-9] The most compelling evidence in plaintiff's favor, however, either on the theory that May ratified her mother's arrangement with plaintiff or on the theory that the conveyance was procured by the mother's fraud, is the fact that May accepted and recorded the deed. When plaintiff's wife delivered plaintiff's deed to defendant, the latter was put on inquiry as to the purpose of the conveyance. *Phillips v. Phillips*, 163 Cal. 530, 534-535, 127 P. 346; *Ballard v. Nye*, 138 Cal. 588, 599, 72 P. 156. It may reasonably be inferred that her mother either informed her of the arrangement by which she secured the deed or fabricated a story with respect thereto. In the former case, May's acceptance of the deed with knowledge of the facts would constitute a ratification of the agency and make her mother's negotiations in her behalf binding upon her. Civil Code, § 1589; *Airola v. Gorham*, 56 Cal.App.2d 42, 49, 133 P.2d 78; *Moody v. Judah Boas Finance Corp.*, 93 Cal.App. 21, 25-26, 268 P. 974. If, on the other hand, May neither authorized her mother to act in her behalf nor was informed by her mother of the arrangements that were made with plaintiff, it is clear from plaintiff's offer of proof that he was induced to part with his property because of fraudulent representations made to him by his wife.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

109 Cal.App.2d 524

**PEOPLE v. BURNS.**

Cr. 2761.

Supreme Court of California.

March 31, 1952.

Hearing denied.

Prior opinion 241 P.2d 308.

CARTER, Justice (concurring on denial of petition for hearing).

In voting for a denial of respondent's petition for a hearing in this case I wish to state that I am in full accord with the views expressed in the concurring opinion of Mr. Presiding Justice Peters in said case.



38 Cal.2d 700

**BERMITE POWDER CO. v. FRANCHISE TAX BOARD OF CALIFORNIA.**

L. A. 21446.

Supreme Court of California, in Bank.

March 28, 1952.

The Bermite Powder Company, a corporation, brought action against the Franchise Tax Board of the State of California to recover interest on amount of a refund to plaintiff of overpayment of franchise taxes. The Superior Court of Los Angeles County, Otto J. Emme, J., entered a judgment for plaintiff, and defendant appealed. The Supreme Court, Edmonds, J., held that statute limiting to 90 days the commencement of an action for recovery of the whole or any part of amount claimed as a tax overpayment, authorizes recovery of overpayment, with interest, and therefore action for recovery of interest on an overpayment must be brought within 90 days.

Judgment reversed with directions to enter judgment for defendant.

Shenk, J., dissented.

Prior opinion, 228 P.2d 895.

**1. Taxation ⇐543(8)**

If the state receives money to which it is not entitled as payment of a tax,

242 P.2d—1½

interest may be recovered by taxpayer on amount of payment. Revenue and Taxation Code, § 50016; Const. art. 13, § 15.

**2. Taxation ⇐535**

Where taxpayer paid state franchise taxes based on its income for years 1943 and 1944, but after renegotiation of its contract with the federal government, taxpayer was required to refund about two-thirds of amount which it had received during those years, and taxpayer's claim against the state for overpayment of taxes to the state was allowed, constitutional provision that an action may be commenced to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected, was not applicable in action by taxpayer to recover interest on amount of overpayment, since there was no illegal collection of tax by the state. Const. art. 13, § 15.

**3. Taxation ⇐543(3)**

Statute limiting to 90 days the commencement of an action for recovery of the whole or any part of amount claimed as a tax overpayment, authorizes recovery of overpayment, with interest, and therefore action for recovery of interest on an overpayment must be brought within 90 days. Revenue and Taxation Code, § 26103a.

**4. Statutes ⇐220**

Where statute providing that interest shall be allowed on overpayment of taxes if overpayment was not made because of any error or mistake on part of taxpayer, was amended after institution of action to provide that 90 day limitation shall be applicable to any action of commissioner in disallowing interest on any refund claim, legislative intent to clarify rather than to change existing law could be inferred. Revenue and Taxation Code, § 26080.

**5. Taxation ⇐543(3)**

Taxpayer could not prevail in action to recover interest on amount of overpayment of franchise taxes to the state, where more than 90 days had elapsed since Franchise Tax Commissioner allowed taxpayer's claim for overpayment of taxes but rejected taxpayer's demand for interest. Revenue and Taxation Code, § 26103a.



Fred N. Howser and Edmund G. Brown, Attys. Gen., James E. Sabine and Irving H. Perluss, Deputy Attys. Gen., for appellant.

Arthur A. Armstrong, Los Angeles, for respondent.

EDMONDS, Justice.

Bermite Powder Company sued to recover interest upon the amount of a tax claim which was allowed. The appeal of the Franchise Tax Board is from a judgment in favor of the taxpayer.

As stated in the stipulation of facts, Bermite paid to the state taxes based upon its income for the years 1943 and 1944. After the renegotiation of its contract with the federal government, Bermite refunded about two-thirds of the amount which it had received during those years. The Franchise Tax Commissioner allowed Bermite's claim for more than \$30,000, paid as taxes but rejected its demand for interest upon the ground that the overpayment was due to "an error or mistake on the part of the taxpayer". § 27(c), Bank and Corporation Franchise Tax Act, Stats.1929, p. 19, as amended, Deering's Gen.Laws, Act. 8488. The complaint in this action was filed about 16 months later.

The Franchise Tax Board, which has succeeded to the duties of the commissioner, now concedes that the ground assigned by him as justifying the denial of interest is untenable. It has stipulated that if the action was timely commenced, Bermite is entitled to recover interest on the amount of the claim which was allowed.

The board takes the position that the only authorization permitting maintenance of an action against the state for the interest is section 30(b) of the former Bank and Corporation Franchise Tax Act. Stats. 1929, p. 19, as amended, Deering's Gen. Laws, Act 8488, § 30(b), now § 26103a, Revenue & Taxation Code. It relies upon a provision of that statute which limits to 90 days the commencement of an action "for the recovery of the whole or any part of the amount claimed as an overpayment."

Bermite argues that authorization to maintain the action must be implied from

section 15 of Article XIII of the Constitution and from the interest provisions of the statute. It construes the word "overpayment" in section 30(b) of the tax act as not including interest. Because the section is not applicable to the recovery of interest, it says, the only pertinent statute of limitations is section 338 of the Code of Civil Procedure, which specifies a limitation of three years in an action on a liability created by statute.

[1] In the event that the state receives money to which it is not entitled as payment of a tax, interest may be recovered by the taxpayer on the amount of the payment. There are two provisions of law authorizing suit against the state for that purpose. One of them is section 15 of Article XIII of the Constitution, which provides that an action "may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." The other legislation is a part of the former Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, as amended, Deering's Gen.Laws, Act 8488, repealed by Stats. 1949, ch. 557, § 2, now Revenue and Taxation Code, § 50016.

[2] Under the stipulated facts of this case, the constitutional provision is not applicable. It allows the recovery of interest upon "any tax claimed to have been illegally collected." On the basis of Bermite's income, before renegotiation, the tax was computed properly and the state was entitled to the amount which it received. There was no illegal collection of a tax.

Section 27 of the original tax act read: "Interest on refunds shall be allowed and paid at the rate of six percentum per annum from the date of the overpayment to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the commissioner." Stats.1929, p. 31; Stats.1931, p. 69. Subsequent enactments continued the declaration of the right to interest on overpayments in the following language: "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment was not made because of an error or mistake on the part of the taxpayer, at the rate of

6 per centum per annum \* \* \*. Stats. 1933, p. 702; Stats.1935, p. 978; Stats.1937, p. 2343; Stats.1939, p. 2966; Stats.1943, p. 1457; Stats.1947, p. 2863.

"Within 90 days after the mailing of the notice of the commissioner's action upon any refund claim \* \* \* the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment." Deering's Gen.Laws, Act 8488, § 30(b), now § 26103a, Rev. and Tax. Code.

"In any judgment of any court rendered for any overpayment in respect of any tax imposed by this act, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment \* \* \*." Deering's Gen.Laws, Act 8488, § 30(f), now § 26107, Rev. and Tax. Code.

As a prerequisite to suit to recover the overpayment, Bermite filed a claim for refund. The claim was allowed without the necessity for filing suit, as authorized by section 30(b) of the act, but without interest. Unquestionably, had the claim been denied, Bermite's time to sue would have been limited to 90 days after the mailing of notice of the commissioner's action upon the refund claim. § 30(b).

Under fundamental legal principles, a statute may not be construed as creating a right without a remedy. § 3523, Civil Code. The tax act clearly indicates the intention of the Legislature to allow a taxpayer to recover the amount of an overpayment, with interest, and to maintain an action against the state for that purpose. The right is established in section 27, Deering's Gen.Laws, Act 8488, § 27(c), now § 26080, Rev. and Tax. Code, the remedy in section 30. Deering's Gen.Laws, Act 8488, § 30(b), now § 26103a, Rev. and Tax. Code. "In the construction of a statute the intention of the legislature \* \* \* is to be pursued, if possible". § 1859, Code Civ.Proc. Also, "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." § 1858, Code Civ.Proc.

Section 30, by its terms, authorizes a suit for recovery of an overpayment, with interest. The only logical construction of the act which gives effect to its several provisions and to the obvious intention of the Legislature, is that it also contemplates suit for recovery of interest alone where refund of an overpayment has been allowed. Any other conclusion would reduce the statute to absurdity. Throughout, the act recognizes that interest shall be paid upon overpayments, with certain exceptions not here applicable.

It is not logical to say that the taxpayer could sue to recover an overpayment, with interest, but that he cannot recover the interest which was wrongfully denied when the overpayment was refunded. It is equally illogical to say that the taxpayer must sue for recovery of the overpayment within 90 days, but that he may sue for the interest upon that overpayment any time within three years.

[3] The statute authorizes the recovery of an overpayment, with interest. It must, therefore, be read as allowing an action for recovery of the interest upon an overpayment. This construction does not inseparably include interest as a part of the overpayment.

[4] That section 30(b) originally was intended to apply to an action to recover interest is further indicated by the 1949 amendment to section 27. Stats.1949, p. 1562. That amendment was adopted after the commencement of this action. Under such circumstances, a legislative intent to clarify rather than to change the existing law may be inferred. *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 923, 156 P.2d 1; *Standard Oil Co. v. Johnson*, 24 Cal.2d 40, 48, 147 P.2d 577; *Union League Club v. Johnson*, 18 Cal.2d 275, 279, 115 P.2d 425.

[5] For these reasons, section 30(b) provides the only statutory authorization for suit. When Bermite did not comply with the statutory time limitation, it lost the right to maintain this action.

The judgment is reversed with directions to the superior court to enter a judgment for the Franchise Tax Board.

GIBSON, C. J., and CARTER, TRAY-NOR and SPENCE, JJ., concur.

SHENK, Justice (dissenting.)

I dissent. I cannot subscribe to a result which denies a concededly proper claim for interest on an overpayment by the misapplication of a subsequently enacted statute. As the majority opinion states, the amendment which included the interest claim as well as the overpayment within the ninety day limitation was not adopted until after the commencement of the action. There is not only no asserted "absurdity" but on the contrary there is reason and justice in applying a statute of limitations upholding the taxpayer's action on an admitted claim to interest where otherwise there is no statutory limitation which expressly bars it. In my opinion there was no applicable statute except the general statute. Sec. 338, subd. 1, Code Civ.Proc. The action was commenced well within the time there specified. The subsequently enacted amendment, Stats.1949, p. 1560, was not a clarification statute. Its purpose was to include the claim for interest as well as the claim for the overpayment within the ninety day limitation. By the application of the "clarification" ipsi dixit the plaintiff's previously existing cause of action is destroyed. No valid warrant in the law is advanced to achieve that result.

Here the claim for the overpayment was allowed and the amount thereof refunded. Only the claim for interest is involved. Unquestionably the legislature established the right to the interest and provided the necessary consent to sue therefor. Section 27 of the original act was as follows: "Interest on refunds shall be allowed and paid at the rate of six per centum per annum from the date of the overpayment to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the commissioner." Stats.1929, p. 31; Stats.1931, p. 69. Subsequent enactments continued the declaration of the right to interest on overpayments in the following language: "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment was not made because of an error or mistake on

the part of the taxpayer, at the rate of 6 per centum per annum \* \* \*." Stats. 1937, p. 2343; Stats.1939, p. 2966; Stats. 1943, p. 1457; Stats.1947, p. 2863; Stats. 1949, p. 1561. Concededly the overpayment was not because of an error or mistake of the taxpayer and the claimant is entitled to sue and to prevail in this case unless prevented by an applicable statute of limitations.

Section 30(b) of the Act provided in its pertinent part: "Within 90 days after the mailing of the notice of the commissioner's action upon any refund claim \* \* the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment."

The defendant's contention invoking the ninety day limitation is necessarily based on the assumption that section 30(b) contains the only consent by the state to be sued for recovery of the interest. That section unquestionably contains authority to sue for the recovery of "the whole or any part of the amount claimed as an overpayment." It is only by a process of construction inseparably including interest as a part of the "overpayment" that the defendant's contention can have any merit whatsoever. The contention should not be sustained for the reason that the interest constitutes a sum of money that was never paid and could in no proper sense be deemed an overpayment under the circumstances here presented. The Commissioner at no time considered it a part of the overpayment. He treated it as a claim requiring separate consideration and action quite apart from the money actually paid.

In 1949 the legislature recognized that the ninety day limitation of section 30(b) did not theretofore apply to actions to recover interest by amending section 27 of the Act to make the ninety day limitation applicable also to the action of the Commissioner in "disallowing interest upon any refund claim". The purpose and effect of that amendment was to remove actions such as this from the operation of the general limitation statute and bring them.



within its special provision. The result of the misapplication of the statute is to defeat a concededly meritorious cause of action. I would affirm the judgment.

SCHAUER, J., concurs.



38 Cal.2d 880

**CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California, Respondent.**

Sac. 6255.

Supreme Court of California, in Bank.

April 1, 1952.

Rehearing Denied April 28, 1952.

Downey, Brand, Seymour & Rohwer, J. Richard Glade and Ralph R. Martig, all of Sacramento, for petitioner.

Edmund J. Thomas, Jr., Robert Ball, San Francisco, and Thomas L. Higbee, San Diego, for respondent.

PER CURIAM.

This petition for review of an order of the Industrial Accident Commission raises the same question as that disposed of in *Aetna Life Insurance Co. v. Ind. Acc. Comm.*, 38 Cal.2d 599, 241 P.2d 530, and that decision is controlling here.

The order is annulled and the cause is remanded to the Industrial Accident Commission for further proceedings in accord with our opinion in the *Aetna* case, *supra*.

CARTER, Justice.

I dissent.

The views expressed in my dissent in *Aetna Life Ins. Co. v. Ind. Acc. Comm.*, 38 Cal.2d 599, 241 P.2d 530, are applicable here, from which it follows that I would affirm the order here under review.

Rehearing denied; Carter, J., dissenting.

**COMMERCIAL CAS. INS. CO. OF NEWARK, N. J., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.**

No. 15109.

District Court of Appeal, First District, Division 1, California.

March 27, 1952.

Rehearing Denied April 26, 1952.

Hearing Denied May 25, 1952.

The Commercial Casualty Insurance Company of Newark, New Jersey and others, petitioners, brought proceedings against the Industrial Accident Commission of the State of California and John T. Porter, compensation claimant, to review an award of the commission to the claimant. The District Court of Appeal, Bray, J., held that contract of hire of claimant, a resident of Georgia, for work in the Middle East and Near East was a California contract, and that California Labor Code was applicable.

Award affirmed.

See also 242 P.2d 20.

# 1. Workmen's Compensation §81

Where corporation in California was employed by contractor to engage workmen to work for contractor in the Middle East and Near East, and application of carpenter residing in Georgia for employment was sent to corporation in California, and it sent him documents reciting that he was offering to enter into employment agreement with contractor and that on signing of documents by carpenter and acceptance by corporation contract should become a binding California agreement and that provisions of California Labor Code should constitute carpenter's exclusive remedy for injury or illness, and carpenter signed documents and corporation its acceptance, contract of hiring was entered into in California, and California Labor Code was applicable to claim of carpenter. Labor Code, § 5305; Civ.Code, § 1583.

# 2. Workmen's Compensation §74, 1182

Jurisdiction cannot be conferred on the Industrial Accident Commission merely by agreement of the parties, but in determining where contract of employment was entered into their interpretation of their own acts and intentions as to place of making the contract is of some significance.

**3. Workmen's Compensation** ⇨81

Where corporation in California was employed by contractor to engage workmen to work for contractor in the Middle East and Near East, and application of carpenter residing in Georgia for employment was sent to corporation in California, and it sent him documents reciting that he was offering to enter into employment agreement with contractor and that on signing of documents by carpenter and acceptance by corporation contract should become a binding California agreement and that provisions of California Labor Code should constitute carpenter's exclusive remedy for injury or illness, and carpenter signed documents and corporation then signed its acceptance, clause in documents with reference to California Labor Code could be considered in determining whether there was a contract of hiring in California. Labor Code, § 5305; Civ.Code, § 1583.

**4. Evidence** ⇨65**Workmen's Compensation** ⇨91

Where corporation in California was employed by contractor to engage workmen to work for contractor in the Middle East and Near East, and application of carpenter residing in Georgia for employment was sent to corporation in California, and it sent him documents reciting that he was offering to enter into employment agreement with contractor and that on signing of documents by carpenter and acceptance by corporation contract should become a binding California agreement and that provisions of California Labor Code should constitute carpenter's exclusive remedy for injury or illness, parties were presumed to know that they could not confer jurisdiction on California Industrial Accident Commission if contract of employment was not made in California, and therefore it was reasonable to conclude that it was their intention to complete contract in California so that clause relating to Labor Code would be effective in California. Labor Code, § 5305; Civ.Code, § 1583.

**5. Statutes** ⇨231

Fact that Legislature in codifying Labor Code reenacted exact language of Workmen's Compensation Act into Labor

Code after court had held section of Compensation Act to be unconstitutional, and requirement that injured employee must be a resident of California, did not establish that the Legislature never intended that the Industrial Accident Commission would have jurisdiction over an out-of-state employee and accident unless contract was made in the state with employee physically present at its making. Labor Code, §§ 2, 5305.

**6. Workmen's Compensation** ⇨1182

Where out-of-state employee who entered into California contract of employment filed a claim with the California Industrial Accident Commission, he thereby submitted to jurisdiction of commission, though he remained outside state and did not appear before Commission.

**7. Constitutional Law** ⇨70(3)

Contention that certain construction of Labor Code would endanger the economic welfare of the state was a matter for the Legislature and not for the courts.

**8. Workmen's Compensation** ⇨1652

Where physician who treated workman for tumor or skin cancer on nose, caused by exposure in Arabia to excessive sunlight, wrote on August 17 that employee was well of his disease, but that it would be most likely that he would have recurrence if he returned to excessive exposure to sunlight and that he should remain in the United States where exposure to sun could be controlled, and employee testified that physician advised him to keep out of sunlight and that therefore he was unable to work at his trade as a carpenter until December 16, there was sufficient support for finding of Industrial Accident Commission that employee was disabled until December.

---

Henry G. Sanford, San Francisco, for petitioner.

Tipton, Weingand & Tipton, Herlihy & Herlihy, Los Angeles, for amici curiae (in support of petition).

Edmund G. Thomas, Jr., T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

BRAY, Justice.

Petition by the employer and its insurance carriers to review an award of the Industrial Accident Commission to John T. Porter, employee.

#### Questions Presented.

The main question presented is whether the Industrial Accident Commission had jurisdiction to handle this claim, which question, in turn, depends upon the solution of the first four of the following questions: 1. Does the evidence establish that a contract of hire was made in California? 2. Does section 5305 of the Labor Code apply where the nonresident is not physically in California at the time of contracting? 3. Did claimant submit to the commission's jurisdiction? 4. Is the economic welfare of the state endangered? 5. Is the period of disability correct?

#### Facts.

There is practically no dispute concerning the facts of the employment. The controversy is over their legal effect, as the commission found that the contract of hiring was entered into in San Francisco. Porter is a resident of Atlanta, Georgia. At no time was he physically present in California. There are two corporations concerned with his employment, Bechtel International Corporation, hereafter referred to as San Francisco Bechtel, and International Bechtel, Inc., hereafter referred to as International. These two had entered into a written agreement under which San Francisco Bechtel was to engage persons in the United States to work for International in the Near or Middle East. In a local paper in Atlanta, Porter read an advertisement for construction workers for overseas work. In June, 1948, he went to the Atlanta representative of San Francisco Bechtel who gave him an employment application to fill out. This was directed to San Francisco Bechtel. Porter completed and delivered it to the representative in Atlanta, who forwarded it to San Francisco. Four days later he had a wire from San Francisco Bechtel stating terms and asking him to wire availability for assignment as carpenter, Persian Gulf area. Porter wired it that he was immediately available. Shortly

thereafter he received from San Francisco Bechtel by mail certain "processing documents" including lengthy instructions and printed forms of a Memorandum of Agreement. This document is directed to San Francisco Bechtel, and states, among other things: "You have entered into a written agreement with International Bechtel, Inc., which latter Company is hereinafter referred to as the 'Contractor,' to engage persons in the United States of America who will render service for the Contractor on construction or other work in Saudi Arabia or other locations in the Near and Middle East.

"I understand that in signing below *I am offering to enter into an Employment Agreement with the Contractor* to perform services in Saudi Arabia or other locations in the Near or Middle East in accordance with the terms and conditions set forth in the attached form of Employment Agreement.

"\* \* \* I offer to proceed to Saudi Arabia or other locations in the Near or Middle East at the salary and/or other compensation, and upon the terms and conditions set forth in the *attached Employment Agreement*, said salary or other compensation hereunder to commence on the date stated in your acceptance of this offer. Your acceptance to this offer assures me that when I arrive in Saudi Arabia or other designated locality in the Near or Middle East, the attached Employment Agreement will be duly executed by the Contractor and I likewise hereby agree then to execute the attached Employment Agreement and undertake performance thereof. \* \* \*

"I understand that upon this Memorandum of Agreement being signed by me and in writing accepted by you at San Francisco, California, it shall become a binding State of California, United States of America Agreement and that the Workmen's Compensation Insurance provisions of the California Labor Code shall constitute the exclusive remedy for any injury or illness (as defined in Section 7 of the Employment Agreement) that I may sustain while this Memorandum of Agreement is in force and effect.



"Your obligations under this Memorandum of Agreement shall continue only until the Contractor shall commence performance of said Employment Agreement, it being understood that your obligations under this Memorandum of Agreement and Contractor's obligations under said Employment Agreement shall be supplementary one to the other, and not cumulative.

"I understand that this Memorandum of Agreement is not, nor is it intended to be, a commitment to hire; but, on the contrary, it is intended and is to be considered an offer on my part to qualify and be prepared to accept employment if and when the said Contractor requests my services. This Agreement shall not become effective until it is accepted by you and salary shall not commence until the date inserted in said acceptance." (Emphasis added.)

Although the Memorandum of Agreement states that there is attached the "Employment Agreement" with International, it was not attached at the time Porter signed it nor when it was returned to him by San Francisco Bechtel as hereafter set forth. However, a copy of the Employment Agreement, marked "Information Copy," was included with the Memorandum Agreement and the other papers sent Porter. Porter then, in accordance with the instructions, signed in duplicate the Memorandum of Agreement, and forwarded it to San Francisco Bechtel at San Francisco. In a few days he received back one copy. The Memorandum of Agreement was signed by San Francisco Bechtel underneath the portion which reads: "The services of the applicant whose signature appears above are hereby accepted pursuant to the terms and conditions above set forth and it is agreed that the salary shall commence on the 16th day of August, 1948; it is further agreed that subsistence per diem shall commence on the 19th day of August, 1948. Dated August 19, 1948, At San Francisco, California." There then was another place for Porter to sign, which read: "Read and Accepted"—"Signature of Employee." Porter signed this. Porter obtained the necessary physical examination and inoculations, signed an application for visa, and followed the instructions

given him. This took approximately two months, the required documents being mailed to San Francisco Bechtel at different times. Porter in Atlanta received a wire from San Francisco Bechtel telling him he was scheduled to leave New York on August 19th. Further travel instructions were sent him, and pursuant to them he went to New York. There he signed a "Memorandum of Agreement" identical with the one he signed in Atlanta, but attached to it was the "Employment Agreement" which he also signed. The Memorandum of Agreement had been signed and the dates for commencement of salary typed in in San Francisco by San Francisco Bechtel and sent to New York. This Employment Agreement sets forth that the Contractor (International) employs Porter and the employee (Porter) accepts employment by the contractor on the terms and conditions therein set forth to which the parties agree. Then follows a lengthy statement of the conditions of work, salary and other pay, compensation for disability or death (compensation insurance benefits to be paid as provided in the California Workmen's Compensation Act, which benefits shall be the sole remedy for any injury or illness arising out of and in the course of the employment), jobsite facilities and many other matters. It also states: "Supplementary Agreement. The Employee has heretofore entered into a Memorandum of Agreement with Bechtel International Corporation which refers to this Employment Agreement and is supplementary hereto rather than cumulative." Porter took the Memorandum of Agreement with the attached Employment Agreement with him to Arabia where at the jobsite the latter was signed by International.

1. Was the Contract Entered into in California?

[1] The evidence supports the finding that it was. San Francisco Bechtel was employed by International to engage persons to work for International. It sent the Memorandum of Agreement to Porter. Although not attached to the memorandum, the latter was accompanied by an "Information Copy" of the Employment Agreement

with International which Porter agreed to sign when he got to Arabia and San Francisco Bechtel agreed that International would also then sign. This Employment Agreement contained all of the terms of the proposed employment. The memorandum expressly provides that it is an offer by Porter to accept employment on the terms and conditions set forth in the Employment Agreement if and when the contractor requests his services. This offer was accepted in *San Francisco* by San Francisco Bechtel, the International's agent, when it signed the paragraph below Porter's signature: "The services of the applicant whose signature appears above are hereby accepted \* \* \* and it is agreed that the salary shall commence," etc. Applicable here is the old rule of offer and acceptance. The offer contains all the terms of the proposed employment by reference to the Employment Agreement, which, although not attached, copies were in the hands of both parties. See *Twining v. Thompson*, 68 Cal.App.2d 104, 110, 156 P.2d 29, where it was held that when a number of writings dovetail so as to show a meeting of the minds, the contract is as well established as though it had been included in one writing. The offer and the terms were definite and certain. They were accepted by International's duly authorized agent and the contract then was complete. On its return to Atlanta Porter signed "Read and Accepted"—"Signature of Employee." This fact does not change the situation as the employer's acceptance at San Francisco was not conditional on Porter's again signing. This signature merely confirmed Porter's understanding of the date fixed for the commencement of his salary, even though it was contemplated that the formal Employment Agreement was to be later executed in Arabia. "This Agreement shall not become effective until it is accepted by you and salary shall not commence until the date inserted in said acceptance," is merely the converse of stating that on its acceptance it becomes effective and the salary commences from the date set forth. It was accepted in California.

Section 5305 of the Labor Code provides that the commission has "jurisdiction over

all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State." This was originally section 58 of the Workmen's Compensation Act and the requirement that the injured employee be a resident of this state was held unconstitutional in *Quong Ham Wah Co. v. Industrial Accident Comm.*, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190. In *Benguet Consolidated Mining Co. v. Industrial Accident Comm.*, 36 Cal.App.2d 158, 97 P.2d 267, it was held that section 5305 extended the benefits of the act to non-residents if the contract of employment was made in this state.

A persuasive case on this subject is *International Bechtel, Inc. v. Industrial Acc. Comm.*, *William J. Cushing, et al.*, 14 Cal. Comp. Cases, 150, in which this court denied a petition for writ of review. The circumstances of the employment were similar to those in our case except that after the preliminaries had been carried on in Oregon, the employee came to San Francisco where he signed the Memorandum of Agreement. It was then signed by San Francisco Bechtel. He then went to his home in Minnesota, where he received word to go to New York, and receive transportation to Saudi Arabia. On his arrival in Arabia he signed the Employment Agreement. The significant part of the decision lies in the interpretation of the Memorandum of Agreement, identical with the one here. It held that it constituted (as its very wording states) an offer to accept employment and that its execution by San Francisco Bechtel completed the acceptance of the offer in San Francisco, created the contract between the parties, and that what took place later was immaterial. While the employee there was physically present in California at the signing of the memorandum, that fact makes no difference, for it is the acceptance of the employee's offer which counts and that acceptance may be effective either by a delivery of the acceptance in person, as in the *Cushing* case, or by mailing, as in our case. In *Globe Cotton Oil Mills v. Industrial Accident*

Comm., 64 Cal.App. 307, 221 P. 658, the employer was engaged in construction work in Mexico. At Calexico, California, a workman asked the employer's superintendent for a job. The superintendent said he would see about it. Later he told the workman he could go to work. The court held that the workman's offer was then accepted. "A contract is made at the place where the offer is accepted. [Citations.] The place of the contract is the place at which the last act was done by either of the parties essential to a meeting of the minds." 64 Cal.App. at pages 309-310, 221 P. at page 659. In our case the minds of the parties met when San Francisco Bechtel on behalf of International accepted Porter's offer. The terms were definite and there was nothing further to be determined between the parties. Section 1583 of the Civil Code provides: "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer \* \* \*."

Petitioners' contention that the Memorandum of Agreement is merely an expression of willingness to accept employment when offered at the jobsite, overlooks the plain intentment of the instrument, and particularly the clause which provides, in effect, that when the offer is accepted his salary shall commence as of the date inserted in the acceptance, and the clause in the Employment Agreement headed "Supplementary Agreement," which states that the Memorandum Agreement is supplementary to it and not cumulative. See *Gavina v. Smith*, 25 Cal.2d 501, 504, 154 P.2d 681, which held, in effect, that where parties have agreed in writing upon the essential terms of a contract, there is a binding contract even though a formal one is to be prepared and signed later. See also *Gibson v. De La Salle Institute*, 66 Cal.App.2d 609, 152 P.2d 774.

Petitioners cite *Texas Employers' Ins. Ass'n v. Hoehn*, Tex.Civ.App., 72 S.W.2d 341, for the proposition that the contract between the parties was not complete until the Memorandum of Agreement was signed in Arabia. But the case does not support

it. There the employer had formerly employed the employee at a fixed union rate of pay. While in Arizona, the employee wrote to the employer at San Francisco asking for a job on a new El Paso, Texas, project the latter was about to commence, and asked that, if the employer could use him, to send him a card or letter stating when the job would start. The employer answered, stating that the job would soon start and he would drop the employee a line when he needed him. Shortly thereafter the employer went to El Paso, and while there wrote to the employee at Phoenix that the job was ready and to come. In the letter he included a railroad ticket from Phoenix to El Paso. The employee went to El Paso and started to work at his usual job and pay. He was killed in the course of his employment, and his next of kin applied to the Texas Industrial Accident Board for compensation. From such award the employer's insurance carrier appealed, contending that the contract of hiring did not take place in Texas, but in Arizona, when the letter containing the railroad ticket and notifying the employee to come to Texas was received by the employee. The respondents contended that the employer did not accept the employee's offer to take a job until he sent the letter and ticket which constituted an acceptance of the employee's continuing offer and thereby the contract was completed in Texas. The court refused to adopt either theory. It stated that the contract was complete when the employer in San Francisco deposited his letter in the mail stating that he would let the employee know when he needed him. The employee had advised that if his services were desired the employer should advise him and the employer's letter constituted an acceptance of his offer. This completed the contract in California. The court, although the case was decided on this theory, did go on to state that if these letters were considered as merely negotiations, then when the employer sent the letter and ticket, such act was not the acceptance of any offer of the employee, but was an offer by the employer which was not accepted until the employee received it and then accepted it by boarding the train at Phoe-



nix, at which place the contract was completed. The only purpose of the court in discussing this second theory was to show that in no event could the contract be considered to have been made in Texas. The actual decision of the court was that it was made in California. This second theory is not applicable to our case for the reason that we have an absolute acceptance in San Francisco, and therefore, the theory upon which the Texas case was decided applies.

[2-4] While it is true that jurisdiction cannot be conferred on the commission merely by agreement of the parties, nevertheless, in determining where the contract was entered into, their interpretation of their own acts and intentions as to the place of making the contract is of some significance. Thus, the clause in the Employment Agreement to the effect that compensation insurance benefits, in case of injury or illness, shall be paid *as provided* in the California Workmen's Compensation Insurance Act, as the sole remedy, can be considered in determining whether the acceptance of the Memorandum of Agreement in California was intended to constitute the contract of hiring. The parties are presumed to know that they could not confer jurisdiction on the commission if the contract were not made here. Therefore, it is reasonable to conclude that it was their intention to complete the contract in California so that that clause would be effective in California. While such interpretation is not conclusive of the question, it is a matter to be considered.

## 2. Employee Not Physically Present in California.

[5] It is contended that because the Legislature in codifying the Labor Code, reenacted the exact language of section 58 of the Workmen's Compensation Act into section 5305 of the Labor Code, after the court in the Quong Ham Wah case, *supra*, had held to be unconstitutional the requirement that the injured employee must be a resident of California, establishes that the Legislature never intended that the commission would have jurisdiction over an out-of-state employee and accident unless the contract was made in this state *with the employee*

*physically present at its making.* That this contention is without merit is shown by section 2 of the Labor Code: "The provisions of this code, in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." The effect of the Quong Ham Wah decision was to leave the original act as though it were merely modified.

## 3. Did Claimant Submit to Jurisdiction of Commission?

[6] Amici curiae raise the contention that Porter never appeared before the commission because he remained in Georgia, was represented by an attorney there, and the only evidence presented by him was at a hearing there. There is no point to this contention. Porter filed a claim with the commission, thereby submitting to its jurisdiction. A hearing was held in San Francisco as well as in Georgia. His situation is similar to that of a plaintiff in a court proceeding who, while a nonresident of the state, files a complaint here and has his deposition taken at his home. It could not be reasonably contended that he has not submitted to the jurisdiction of the court.

## 4. Economic Welfare Endangered?

[7] Amici curiae make the ingenious contention that by holding that section 5305 applies to a contract made in California but without the physical presence of the employee, the economic welfare of this state is endangered. This contention is based on the fact that under sections 4751, 4754 and 4755 of the Labor Code, an employee previously permanently partially disabled who sustains a subsequent injury compensable under the Workmen's Compensation Laws, under certain circumstances may be entitled to additional payments from the state treasury, the funds of which available for this purpose are general funds raised by taxation to which, of course, a nonresident would not contribute. If these sections should apply to Porter in the future, and thereby endanger the state welfare, such a matter is for the consideration of the Legislature and not for the courts.

## 5. Period of Disability.

[8] The commission found that Porter's injury caused temporary total disability commencing June 15, 1949, and continuing to and including December 15, 1949. Petitioners contend that the disability had terminated on June 15, or in any event on August 17. Porter's injury, which is not disputed, consisted of a tumor or skin cancer on his nose caused by exposure in Arabia to excessive sunlight. (The temperature there ran from 118 to 132 degrees.) It started in December, 1948. Some treatment was given him there, and in June, 1949, he was returned to New York for treatment, arriving here about June 20. On August 17, Dr. Alden, who treated him, wrote to San Francisco Bechtel stating: "He is *well* of his disease, but it would be most likely that he would have a recurrence or have another such area develop if he returned to excessive exposure to sunlight. We therefore advised that he remain in this country where he could control exposure to the sun in his occupation." (Emphasis added.) No further medical treatment was given him. Porter testified that Dr. Alden advised him to keep out of exposure to any sunlight and therefore he was unable to work as a carpenter until December 16. Coupling this statement with Dr. Alden's letter, there is sufficient support for the commission's finding that there was disability until December. "What the doctors told McClure also constitutes medical opinion upon which the Commission could base its award." *Bethlehem Steel Corp. v. Industrial Accident Comm.*, 70 Cal.App.2d 369, 378, 161 P.2d 18, 22. Petitioners' contention that because Porter was able to work from December, 1948, until he left Arabia June 14, 1949, shows that there could be no disability for the period thereafter, is not well founded. He was being treated from June 20 to August 17, at which time, although the doctor said he was "well of his disease," he was still cautioned not to expose himself to the sunlight, and because of that medical advice he was handicapped in his trade until December.

The award is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

**COMMERCIAL CAS. INS. CO. OF NEWARK, N. J. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.**

No. 15075.

District Court of Appeal, First District,  
Division 1, California.

March 27, 1952.

Rehearing Denied April 26, 1952.

Hearing Denied May 22, 1952.

The Commercial Casualty Insurance Company of Newark, New Jersey by American International Underwriters, Inc., and Morrison-Knudsen International Company, Inc., petitioners filed a petition for an award of compensation by the Industrial Accident Commission of the State of California to John F. Pidgeon, compensation claimant. The District Court of Appeal, Bray, J., held that contract employing claimant, who was a resident of New York, to work on foreign projects was a California contract of hire and that commission had jurisdiction of claimant's compensation claim.

Award affirmed.

**Workmen's Compensation §81**

Where corporation in California was employed by contractor to engage workmen to work on foreign projects, and contractor sent telegram to corporation in San Francisco instructing it to hire resident of New York as a welder, and corporation wired welder in New York offering him position, and sent him documents stating that on documents being signed by him and accepted in writing by corporation in California agreement would become binding as a California agreement and he signed agreements and returned them to California, and corporation signed documents and sent copies thereof to welder, contract of hire was a California contract, and California Industrial Accident Commission had jurisdiction of welder's injury claim.

Henry G. Sanford, San Francisco, for petitioners.

Tipton, Weingand & Tipton, Los Angeles, for amicus curiae.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

BRAY, Justice.

This petition for review of an award by the Industrial Accident Commission to John F. Pidgeon raises identically the same legal questions raised in *Commercial Casualty Insurance Company v. Industrial Accident Commission and Porter*, Cal. App., 242 P.2d 13, principally, was the contract of hire entered into in California, thereby giving the Industrial Accident Commission jurisdiction of the claim? No question is raised as to the disability.

#### Facts.

The facts are almost identical to those in the *Porter* case although the parties (except the insurance carriers) are different. Petitioner was injured while employed as a welder by Morrison-Knudsen International Company (hereafter called Morrison-Knudsen) at Inginiyalgala, Ceylon. International Engineering Company (hereafter called Engineering) is a subsidiary of Morrison-Knudsen and as one of its services selects personnel for certain of its foreign projects. Pidgeon resided in Baldwinsville, New York, and had recently returned from working for Morrison-Knudsen in Afghanistan. He at no time was in California. Engineering at San Francisco received a telegram from Morrison-Knudsen instructing it to hire Pidgeon as welder sub-foreman at \$600 and to contract through the Morrison-Knudsen office in New York. From San Francisco, Engineering in Morrison-Knudsen's name wired Pidgeon at Baldwinsville offering him a position in Ceylon as service foreman at \$600 per month and requested him to advise if interested. Pidgeon wired that he was interested. Engineering then wrote from San Francisco to Pidgeon at Baldwinsville enclosing "processing papers necessary for your trip to Ceylon" and instructing him to follow the enclosed processing procedure. Included was a Memorandum of Agreement which, among other matters, stated that upon its being signed by him and accepted in writing by Engineering at San Francisco it would become a binding State of California agreement. See *Porter* case for detail. Nine days later Engineering again wrote Pidgeon asking how far along he was in accomplishing his

processing for Ceylon and as soon as he passed the physical examination to return signed visas with his passport so it could notify "project" of his approximate departure. In the meantime, Pidgeon wrote Engineering asking what the status of a service foreman was, as he had never heard of that title. To this Engineering replied stating that he would be employed as welder sub-foreman and directing his attention to a particular paragraph of the "Employment Contract," sample of which was enclosed. Apparently Pidgeon had returned the Memorandum of Agreement which was included in the "processing papers" theretofore sent Pidgeon. These were again sent to Pidgeon "for additional signatures in the spaces marked." He was instructed to return all four copies for "our signature" and was informed that one copy would be returned to him when the departure date was established. He was also requested to forward his passport, visa applications and other material, as "we must have all the forms in our possession before a visa application and transportation arrangements can be made." Pidgeon signed the four copies of the Memorandum of Agreement in Baldwinsville and returned them to San Francisco and asked what his chances of advancement might be in Ceylon. In the reply letter Engineering stated that no promises could be made. "You are being employed as a welder, not foreman, at \$600 per month." Subsequently Engineering wrote a firm in New York: "Mr. John Pidgeon has been employed by the International Engineering Company, Inc., for work on the construction" of a dam in Ceylon and asked the firm to secure the necessary visas. Engineering in San Francisco then wrote Pidgeon to go to New York where his passport and transportation would await him, and was instructed to take a certain plane for his trip to Ceylon. The next day Engineering signed the Memorandum of Agreement in San Francisco and from there sent two signed copies thereof to Pidgeon at Baldwinsville with instructions to take one with him to the job and keep the other. On arriving in Ceylon Pidgeon signed the Employment Agreement. The Memorandum of Agreement



signed by the parties and the Employment Agreement referred to therein and of which a copy was sent Pidgeon are identical, so far as the questions here involved are concerned with those in the Porter case. See discussion of the two instruments in the Porter case, substituting Morrison-Knudsen for International Bechtel and Engineering for San Francisco Bechtel. The only practical difference in the facts of the two cases is that Pidgeon did not sign a second Memorandum of Agreement in New York as did Porter. The commission found, as in the Porter case, that the contract was entered into in San Francisco.

On the authority of the Porter case, in which we held under almost identical circumstances that the contract of hiring was made in California, thereby giving the Industrial Accident Commission jurisdiction of the employee's claim, the award is affirmed.

PETERS, P. J., and FRED B. WOOD,  
J., concur.



109 Cal.App.2d 917

**BARATTI v. BARATTI.**

Civ. 18732.

District Court of Appeal, Second District,  
Division 3, California.

March 24, 1952.

A husband brought a divorce action against his wife and she moved to vacate a default and an interlocutory decree of divorce based thereon. The Superior Court of Los Angeles County, Daniel N. Stevens, J., denied the motion and the defendant appealed. The District Court of Appeal, Vallée, J., held that denial of motion was not an abuse of discretion under evidence.

Affirmed.

Shinn, P. J., dissented.

**1. Judgment** ◊143(3)

The granting or denial of a motion to vacate a default and a judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, rests in sound discretion of trial court, Code Civ. Proc. § 473.

**2. Appeal and Error** ◊957(2)

Order granting or denying motion to vacate default and judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, will not be disturbed on appeal unless it clearly appears that trial court abused discretion. Code Civ.Proc. § 473.

**3. Appeal and Error** ◊935(2), 948

On appeal from the granting or denial of a motion to vacate default and judgment based thereon on ground of mistake, inadvertence, surprise or excusable neglect, all presumptions will be indulged in favor of correctness of order, and appellant has burden to show that discretion of trial court was abused. Code Civ.Proc. § 473.

**4. Judgment** ◊144

Inadvertence in the abstract is no plea on which to vacate a default. Code Civ. Proc. § 473.

**5. Judgment** ◊143(3)

The "surprise" referred to in statute authorizing court to relieve party from judgment taken against him through his surprise, is some condition or situation in which a party to cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Surprise".

**6. Judgment** ◊143(3)

The "excusable neglect" referred to in statute authorizing court to relieve party from judgment taken against him through his excusable neglect, is that neglect which might have been the act

of a reasonably prudent person under same circumstances. Code Civ.Proc, § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Excusable Neglect".

### 7. Judgments ⇨138(2)

A default judgment will not ordinarily be vacated at demand of a defendant who was either grossly negligent or who changed his mind after judgment. Code Civ.Proc. § 473.

### 8. Judgment ⇨153(1)

To obtain relief from a default judgment defendant must have acted within a reasonable time. Code Civ.Proc., § 473.

### 9. Judgment ⇨143(3)

A party will not be relieved from his default unless he shows that he acted in good faith and that his mistake, inadvertence, surprise, or excusable neglect was actual cause of his failure to appear. Code Civ.Proc. § 473.

### 10. Appeal and Error ⇨996, 1011(2)

In a matter in which an issue is tried on affidavits, rule on appeal is that those affidavits favoring contentions of prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is substantial conflict in facts presented by affidavits, determination of controverted facts by trial court will not be disturbed on appeal.

### 11. Divorce ⇨161

Fact that order which denied motion of defendant to vacate default and interlocutory decree of divorce based thereon, denied motion without prejudice to its renewal for limited purpose gave defendant no ground for complaint. Code Civ.Proc. § 473.

### 12. Divorce ⇨161

Action of trial court in denying motion of defendant to vacate a default and interlocutory decree of divorce based thereon, without prejudice to renewal of motion to set aside default and interlocutory judgment and file answer raising issue of whether there was or would be any issue of marriage, which motion was filed by defendant wife after she discovered she

was pregnant, was not an abuse of discretion under record. Code Civ.Proc. § 473.

### 13. Divorce ⇨161

A wife against whom default and interlocutory decree of divorce based thereon were entered before she discovered her pregnancy would be entitled to secure a determination of legitimacy of child or paternity of child and obtain order for its custody and support. Civ.Code, §§ 196a, 231.

George A. Pickering, Los Angeles, for appellant.

Walter C. Harbert, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an order denying her motion to vacate a default and an interlocutory decree of divorce based thereon.

The complaint was filed November 16, 1950. The summons and complaint were served on defendant on November 19, 1950. The default of defendant was entered December 4, 1950. Plaintiff was awarded an interlocutory decree on December 26, 1950. On May 21, 1951, defendant filed her notice of motion to vacate the default and the decree on the ground of "mistake, inadvertence, surprise and excusable neglect on the part of defendant," and an affidavit in support thereof.

The affidavit of defendant stated: the defendant is pregnant; the child is expected in July, 1951; plaintiff and defendant engaged in sexual intercourse until the end of October, 1950; the child is that of the parties; neither the complaint nor the interlocutory decree mentions the child; defendant did not know she was pregnant until December 26, 1950; had she known that fact, she would not have permitted her default to be taken; when she first learned she was pregnant she told plaintiff about it; he promised to help her with the expense of the child's birth and with its support; since then plaintiff has avoided her, and now denies he is the father.

The affidavit also stated: when plaintiff sued her she was confused and did not know

what to do; she consulted her present attorney on February 21, 1951; she has stated the facts to him and he has advised her she has a meritorious defense and a valid cause for cross-complaint; defendant is able to support her and the child, and she is not.

With her notice of motion defendant presented a proposed answer and a proposed cross-complaint.

Plaintiff filed an affidavit in opposition to the motion in which he stated: he saw defendant on November 19, 1950, after she was served with the summons and complaint, and she said she was not going to contest the action; she did not inform him she was pregnant until January 27, 1951, although he saw her on December 26, 1950, and on January 2, 1951; he did not engage in sexual intercourse with her after they separated on August 15, 1950; he is not the father of the child; he did not promise defendant he would help with the expense of the birth of the child or with its support.

Defendant, in a counteraffidavit, stated: she does not deny she knew she was being sued for divorce "but says that she was confused, inexperienced, and did not know what to do about it"; "her confusion arose out of consideration of the best course to follow in order to reach a result in accordance with the best interests of all concerned; that she still does not know the answer"; she is interested in possibilities of a reconciliation.

The order denying defendant's motion reads: "Motion denied without prejudice to renewal of motion for leave to set aside default and interlocutory judgment and file answer raising issue of whether there is or will be any issue of the marriage."

Defendant claims the court abused its discretion in denying the motion because 1) it denied the motion and at the same time imposed terms, 2) it imposed terms which tend to deny to defendant a full and fair trial on the merits, and 3) it is an abuse of discretion on the facts. Defendant also claims she should be relieved from the unintended effect of the trial court's order barring her from any relief, and should be permitted to file at least an answer herein.

[1-9] The granting or denial of a motion to vacate a default and a judgment based thereon on the ground of mistake, inadvertence, surprise or excusable neglect, rests in the sound discretion of the trial court; and the order will not be disturbed on appeal unless it clearly appears that the trial court was guilty of an abuse of discretion. All presumptions will be indulged in favor of the correctness of the order, and the burden is on the appellant to show that the court's discretion was abused. *Estate of McCarthy*, 23 Cal.App.2d 398, 400, 73 P.2d 914. No such showing is made in the present case. A mistake of fact is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. *People v. Kelly*, 35 Cal.App.2d 571, 574, 96 P.2d 372. Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. Webster's New Inter. Dict., 2d Ed.; *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 P. 693, 694. Inadvertence in the abstract is no plea on which to vacate a default. *Shearman v. Jorgensen*, 106 Cal. 483, 485, 39 P. 863. The "surprise" referred to in Code Civ. Proc. § 473 is defined to be some "condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." *Miller v. Lee*, 52 Cal.App.2d 10, 16, 125 P.2d 627, 631. The "excusable neglect" referred to in the section is that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Elms v. Elms*, 72 Cal. App.2d 508, 513, 164 P.2d 936. A judgment will not ordinarily be vacated at the demand of a defendant who was either grossly negligent or changed his mind after the judgment. *Kromm v. Kromm*, 84 Cal.App. 2d 523, 529, 191 P.2d 115. To obtain relief a defendant must have acted within a reasonable time. *Hewins v. Walbeck*, 60 Cal. App.2d 603, 611, 141 P.2d 241. A party will not be relieved from his default unless he shows he acted in good faith and that his mistake, inadvertence, surprise or excusable



neglect was the actual cause of his failure to appear.

[10] In a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom. *Wolfson v. Haddan*, 105 Cal. App.2d 147, 149, 233 P.2d 145. When there is a substantial conflict in the facts presented by affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal. *Deyl v. Deyl*, 88 Cal.App.2d 536, 543, 199 P.2d 424.

[11] The motion was denied without prejudice to its renewal for a limited purpose. Defendant argues that because the order was so made it imposed terms and therefore was in excess of the authority conferred on the court by section 473 and constitutes an abuse of discretion. Section 473 says relief may be granted "upon such terms as may be just". Defendant's argument is predicated on the erroneous view that the court denied the motion and at the same time imposed terms. No terms were imposed. The court was empowered to deny the motion without reserve. Defendant may not complain because the order left the door open to her to seek the same relief but for a limited purpose.

No showing was made to excuse defendant's failure to file her motion for relief until May 21, 1951, after consulting with her present attorney on February 21, 1951. In *Benjamin v. Dalmo Mfg. Co.*, 31 Cal.2d 523, at page 529, 190 P.2d 593, 596, the court said: "Defendant has not cited nor has independent research disclosed, any case in which a court has set aside a default where, in making application therefor, there has been an unexplained delay of anything approaching three months after full knowledge of the entry of the default." Courts do not relieve litigants from the effects of mere carelessness.

It was not shown that defendant understood the facts to be other than they were; thus there was no showing of a mistake of fact. Defendant did not claim she had a mistaken belief as to the legal con-

sequences of the facts; thus there was no showing of a mistake of law. No showing of inadvertence or surprise was made. It cannot be said that defendant's neglect was the act of a reasonably prudent person under the circumstances; thus it cannot be said that there was a showing of excusable neglect. Defendant knew and understood the nature of the proceeding against her. Her failure to appear was not due to mistake, inadvertence, surprise or excusable neglect but was solely due to a change of mind. *Mills v. Mills*, 101 Cal. App. 248, 281 P. 707.

[12] Patently there is ample evidence to support the order, and there was no abuse of discretion in denying the motion without prejudice with leave to renew it for the purpose stated.

[13] Defendant was given the privilege of renewing the motion for the purpose of raising the question "whether there is or will be any issue of the marriage." Counsel advise us that defendant did not avail herself of the privilege. The rights of the child are not prejudiced however. Defendant may secure a determination of the child's legitimacy or paternity and obtain an order for its custody and support. Civ. Code, §§ 196a, 231; *Sampsell v. Superior Court*, 32 Cal.2d 763, 780, 781, 197 P.2d 739; *Wong v. Young*, 80 Cal.App.2d 391, 395, 181 P.2d 741; *Southern Cal. Edison Co. v. Industrial Accident Comm.*, 92 Cal.App. 355, 358, 268 P. 415; 13 Cal.Jur. 931, § 13.

Determination of the motion was for the trial court. Holding, as we do, that the court did not abuse its discretion in denying the motion, this court is without power to consider the appeal "in the nature of an application for relief under Section 473 of the Code of Civil Procedure, or in the nature of a motion to vacate and enter *nunc pro tunc* a corrected order, or in the nature of an action for equitable relief."

Affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. The motion should have been granted. It was not denied upon the ground defendant had not moved promptly. She

was granted leave to have the judgment vacated for trial of the paternity issue only. I do not understand this procedure. She should be permitted to present whatever defenses and claims she may have on behalf of herself and the child. The courts have almost invariably followed a liberal policy in allowing divorce cases to be tried on their merits. What better reason could there be for granting relief than the discovery of pregnancy after default and judgment had been entered. Upon a showing such as defendant made relief from default was called for in the exercise of sound judicial discretion and therefore was a matter of right, not of grace; it should not have been meted out in small inadequate doses. In my opinion the order should be reversed.



110 Cal.App.2d 50

**In re WILLIAMS' ESTATE.**

**BLAND v. POTTER.**

**Civ. 15000.**

District Court of Appeal, First District,  
Division 2, California.

March 26, 1952.

Proceeding in the matter of the estate of Sarah Williams, deceased, wherein Marguerite Bland, executrix, sought probate of a will contested by John Potter. On appeal by Bland from judgment denying probate of will, judgment was reversed with prevailing party to recover costs on appeal. Potter and Bland both filed with county clerk cost bills on appeal, and cost bills on trial, and Superior Court, County of Santa Clara, M. G. Del Mutolo, J., ordered assessment of all four cost bills against estate, and Bland moved to re-tax costs so as to free estate from them, which motion was denied, and Bland appealed. The District Court of Appeal, Goodell, J., held that assessing Potter's appeal costs against estate was in direct contradiction of order of appellate court and void, and

that assessment of Potter's trial costs against estate was abuse of discretion.

Order reversed with direction to enter order in accordance with opinion.

#### **1. Wills ⚡392**

Where judgment denying will admission to probate was reversed on appeal by executrix named in will with prevailing party to recover costs on appeal, Superior Court order assessing against the estate the appeal costs of respondent, who had been named executor in another will, was in direct conflict with order of Appellate Court and was void. Probate Code, § 1232.

#### **2. Wills ⚡404, 410**

Where appellate court reversed order refusing admission of will to probate and awarded costs on appeal to prevailing party, prevailing party was the estate under the will admitted to probate and, therefore, assessment of executrix' appeal and trial costs against estate was illusory recovery to estate, and assessment against estate of contestant's trial costs, which were incurred to enforce his own right, was abuse of Superior Court's discretion, and all expenses should properly have been assessed against contestant. Probate Code, § 1232; Rules on Appeal, rule 26(a, b).

K. R. McDougall, Aubrey B. Fairfax,  
Palo Alto, for appellant.

Crist, Stafford & Peters and John M.  
Donegan, all of Palo Alto, for respondent.

GOODELL, Justice.

Sarah Williams died on June 24, 1948 and respondent, her nephew, filed for probate a will dated August 14, 1944 which named him as executor and left him half, and his sister half, of the estate.

A few days later appellant filed for probate a will dated May 11, 1948 which revoked earlier wills, named appellant as executrix, and named Rena Suddeth, a friend, as sole legatee and devisee. Paragraph "Fifth" thereof reads: "I intentionally make no provision for my relative John L. Potter or for any other person not mentioned herein, and if any person not provided for herein shall succeed in prov-

ing \* \* \* that he or she is entitled to share in my estate, I give to such person the sum of one dollar \* \* \*."

Respondent filed a contest of the 1948 will on the grounds of unsoundness of mind, undue influence, and fraud. The jury returned three special verdicts, (1) that the decedent was of sound mind, (2) that the will had been made under the undue influence of Rena Suddeth, and (3) that there was no fraud. The judgment denied the will admission to probate.

The proponent appealed and division one of this court reversed the judgment, 99 Cal.App.2d 302, 221 P.2d 714, 724, holding that there was "not sufficient evidence to sustain a finding of suspicion that Rena exerted undue influence, far less to sustain a reasonable inference that such influence was exerted."

On November 2, 1950 the remittitur was filed in the clerk's office of Santa Clara county.

Appellant, who was the prevailing party, thereupon filed with the county clerk a cost bill on appeal (\$438.92) and a cost bill on the trial (\$46.50).

Respondent, who was the losing party, filed a cost bill on appeal (\$184.60) and a cost bill on the trial (\$169.00).

The Superior Court taxed all four cost bills (\$839.02) against the estate, and appellant moved to retax costs so as to free the estate from them, which motion was denied.

In its order the court said: "I believe this is a proper case to assess all costs against the estate under the discretion given me by Section 1232 of the Probate Code." This appeal is from that order, appellant's contention being that such discretion was abused.

#### 1. Respondent's costs on appeal:

[1] The remittitur ordered "that the judgment of the Superior Court \* \* \* is hereby reversed. Prevailing party to recover costs on appeal." Such order was authorized by § 1232, Pro.Code, as amended in 1945, and by rules 26(a) and (b) of the rules on appeal adopted by the Judicial

Council in 1943 which have the force of law.

In Estate of Powers, 97 Cal.App.2d 888, 892, 218 P.2d 1007, 1010, the court said: "The appellate court is now the only court that has power to award appeal costs to either a successful or unsuccessful contestant. Once an appeal has been determined, and where, as here, the appellate court makes no specific mention of costs, the unsuccessful contestant and litigant is not entitled to costs, the probate court has no power to award them \* \* \*." That opinion makes it clear that Estate of Bump, 152 Cal. 271, 92 P. 642, relied on by respondent, is no longer authority on this question.

The final judgment awarding costs to the appellant precluded any order awarding costs to anybody else, hence the part of the order awarding \$184.60 to respondent was in direct conflict with the order of the appellate court and was void. No question of discretion was involved here.

#### 2. Respondent's costs on the trial:

[2] The Superior Court awarded respondent \$169 trial costs. The judgment which denied probate to the 1948 will ordered "that contestant recover his costs from the estate." That original award of course fell with the reversal of the judgment of which it was a part.

When, after the reversal, the probate court had the decision on appeal before it as a guide in exercising its discretion, 11A Cal.Jur. p. 250, *infra*, we are satisfied, for the reasons set forth at length under the next heading, that it was a clear abuse of its discretion to award trial costs to the respondent.

#### 3. Appellant's costs on appeal:

The appellate court adjudged that the prevailing party should recover costs on appeal but did not specify *in so many words* the party by whom they should be paid.

Section 1232, Probate Code, provides: "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the



court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

Rule 26(a), *supra*, reads: "\* \* \* In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, *but the superior court shall decide against whom such award shall be made.* \* \* \*" (Emphasis added.) See *Estate of Powers*, 97 Cal.App.2d 888, 892, 218 P.2d 1007, *supra*.

The first and foremost guide for the probate court was the appellate court's order that the prevailing party should recover costs. That party was the estate, represented by its executrix. One entitled to recover money occupies a creditor status but obviously the executrix, who had expended \$438.92 on the appeal, could not get back any part thereof out of the assets in her own hands since she could hardly be her own creditor. The order which "assessed all costs against the estate" therefore ran counter to the order of the appellate court since it resulted in the estate *paying* its own costs on appeal instead of *recovering* them. If the order stands, appellant's "recovery" is purely illusory and nothing but a paper recovery.

The real parties in interest on the will contest were Rena Suddeth, the sole beneficiary of the 1948 will, see 99 Cal.App.2d 304, 221 P.2d 714, and respondent, the sole beneficiary (his sister having died) of the 1944 will, the person who would have profited by the breaking of the 1948 will. However, Rena won and respondent lost, and if these costs were to come out of this small \$7,000 estate she would receive on distribution \$438.92 less than she would if the estate really *recovered* its costs as the appellate court ordered. In such event she would be paying her own costs.

The probate court gave the following reasons for charging all the costs against the estate: "In the case at bar the contestant was the only surviving relative of decedent, and although only a nephew, his relationship with decedent was equal to that of mother and son. She had once conveyed to him the house. When she re-

quested he deeded the house back to her. Decedent had previously made a will leaving the property to contestant and his sister. He contributed money to decedent. Decedent often told friends she was going to leave the house to contestant."

All these antecedent matters and many others (including the somewhat strained relations between aunt and nephew during the last three or four years of her life) were fully considered and discussed in the opinion on appeal. With the finality of that decision all such matters should have no bearing or significance in view of the rule that "The final determination of the litigation \* \* \* must have a weight in influencing the court, in the exercise of the discretion, to award costs with which the law has vested it, and not until the final determination can that discretion be properly exercised." *Estate of Yoell*, 160 Cal. 741, 743, 117 P. 1047; 11A Cal.Jur. p. 250. The appellate court's opinion does not indicate any "equities" or "hardship" on respondent's side. If it had found any, that court might have made a different order respecting costs.

The probate court said further:

"Under the circumstances contestant did what everyone should have done similarly situated. It was his duty to contest the will even though he was in no need of the small amount he would receive. If he failed to contest the will it could have been construed that he was not worthy to receive his aunt's bounty \* \* \*.

"I believe this case comes under the ruling in the *Estate of Bump*. Contestant acted in the utmost good faith and it would be a hardship to him to require him to pay the costs of the contest."

It is difficult to find any duty requiring respondent to contest his aunt's will. Whether his failure to do so might have been construed as showing "that he was not worthy to receive his aunt's bounty" has no bearing on the question of costs. Paragraph "Fifth" of the will expressed the views of the testatrix on the subject of worthiness, and she was the person most concerned.

As already noted, if respondent had succeeded in breaking the 1948 will he would

have received the whole estate under the 1944 will or at least as sole heir at law. We see no question of good faith involved. Respondent had a perfect legal right to contest the will but whether he was motivated by a high sense of duty or merely self-interest, is wholly immaterial. The fact remains that his action necessitated resistance and defense by the estate, which involved legal fees and expenses, delay, and everything else that goes with litigation. We fail to see any difference between this and any other will contest, or how "it would be a hardship to him to require him to pay the costs of the contest."

We are satisfied that there was a clear abuse of discretion and that the ends of justice by no means required the action which was taken by the court.

4. Appellant's costs in the trial court:

For the reasons given under heading 3, the assessment of appellant's trial costs against the estate instead of the unsuccessful contestant was likewise a clear abuse of discretion. The final judgment established the 1948 document as decedent's last will and testament after a legal battle carried through two courts and extending well over two years. In that litigation, which respondent started, the proponent won and the contestant lost, and there was no reason whatever to assess these costs *against the winning side* instead of the losing side.

Appellant in her opening brief cites several cases dealing with the subject in general, Estate of Yoell, 160 Cal. 741, 117 P. 1047; Estate of Marcus, 14 Cal.App.2d 254, 58 P.2d 385; Estate of Schwartz, 87 Cal.App.2d 569, 197 P.2d 223, and Estate of Selb, 93 Cal.App.2d 788, 210 P.2d 45. Respondent, instead of attempting to answer them, devotes most of his brief to a repetition of the facts which were before the court on the contest.

The order appealed from is reversed with the direction to the Superior Court to enter an appropriate order or orders that appellant shall recover from respondent Potter her costs on appeal of \$438.92 and her costs in the trial court of \$46.50, and annulling its order assessing against the estate respondent's costs on appeal of \$184.60

and costs on the trial of \$169. Appellant is to recover from respondent her costs on this appeal.

NOURSE, P. J., and DOOLING, J., concur.



110 Cal.App.2d 148

**WEISFELD v. SUPERIOR COURT IN  
AND FOR LOS ANGELES  
COUNTY et al.  
Civ. 18918.**

District Court of Appeal, Second District,  
Division 3, California.

March 28, 1952.

Proceeding for writ of prohibition to restrain Superior Court of Los Angeles County from proceeding in action by Harriet Tasoff and another against H. Daniel Weisfeld, a nonresident minor. The District Court of Appeal, Vallée, J., held that no service of process had been made on the defendant, and Superior Court was without jurisdiction to proceed until valid service had been made.

Writ granted.

**1. Process ⇨83**

Generally, court may not acquire jurisdiction in personam over nonresident defendant in an action by service of notice or other process outside territory or state in which the forum exists.

**2. Automobiles ⇨235**

Statute authorizing service of process on director of motor vehicles when nonresident is sued for damages arising out of automobile accident within the state prescribes a form of constructive service. Vehicle Code, § 404(b-e).

**3. Process ⇨77**

When jurisdiction is sought to be obtained by a prescribed form of constructive service, the statutory conditions on which the service depends must be strictly observed.

**4. Judgment** ⇨17(2)

Where statute prescribing form of constructive service has not been complied with, court has no power to render judgment.

**5. Automobiles** ⇨235

Under statute prescribing form of constructive service on nonresident sued for damages arising out of automobile accident within the state, only service made as provided therein has same force as service made on nonresident personally in the state. Vehicle Code, § 404(b-d).

**6. Automobiles** ⇨235

Statute prescribing form of constructive service on nonresident sued for damages arising out of automobile accident within the state, requiring notice of service on Director of Motor Vehicles and copy of summons and complaint to be sent by registered mail to defendant and requiring proof of service by return receipt "bearing the signature of said defendant", requires actual delivery to defendant by registered mail of a copy of the notice, summons, and complaint. Vehicle Code, § 404(b-e).

**7. Automobiles** ⇨235

Under statute prescribing form of constructive service on nonresident sued for damages arising out of automobile accident within the state, where notice of service and copy of summons and complaint were sent by a stranger to the action to the address of defendant's mother, and were receipted for by her, attempted service was a nullity, and court had no jurisdiction to proceed until valid service had been made. Vehicle Code, § 404(b-e).

**8. Prohibition** ⇨10(2), 17

Where nonresident minor defendant had not been served with process in suit for damages arising out of automobile accident within the state, prohibition was proper remedy and it was not prerequisite to granting writ of prohibition that petitioner should have first appeared specially in the action and have made a motion to quash service of process. Vehicle Code, § 404(b-e); Code Civ.Proc. § 372.

**9. Infants** ⇨79

If a guardian ad litem is appointed prior to service of process on a minor, the

appointment is void, and the appointee has no power to appear. Code Civ.Proc. § 372.

Bailie, Turner & Lake, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

No appearance for real parties in interest.

VALLÉE, Justice.

Petitioner seeks a writ of prohibition to restrain the superior court of the county of Los Angeles from taking any further proceedings in an action entitled "Harriet Tasoff and Lloyd A. Tasoff v. H. Daniel Weisfeld," No. 579348, until H. Daniel Weisfeld, the defendant in that action, has been served with process in the manner prescribed by law.

Harriet Tasoff and Lloyd A. Tasoff, at all pertinent times, have resided in Los Angeles. On October 27, 1950, they commenced action 579348 against petitioner Weisfeld to recover damages for personal injuries and caused a summons to be issued. The accident was alleged to have occurred in Los Angeles on August 5, 1950, and to have resulted from the operation of a motor vehicle by Weisfeld on a highway.

Petitioner Weisfeld, born February 17, 1931, was 19 years of age at the time action 579348 was commenced. Since January 8, 1945, his parents have constantly resided in Dallas, Texas. During all of said time petitioner has been, and is now, a resident of Texas, and is now, and ever since March 7, 1951, has been, a member of the armed forces of the United States, and ever since December 1, 1951, he has been, and still is stationed at Fort Hood, Texas.

On November 19, 1951, a copy of the complaint and summons in action 579348 was served on the Director of Motor Vehicles of California with a fee of \$2.00. On November 30, 1951, one Holland sent a notice of service of process on the direc-



tor<sup>1</sup> and a copy of the summons and complaint, by registered mail, to petitioner at "2409 Park Row, Dallas, Texas." The papers so mailed and the envelope in which they were contained were received and receipted for by petitioner's mother about December 5, 1951. Petitioner was not, at the time of the receipt of said papers by his mother, in Dallas, but was at Fort Hood, Texas. He has never subscribed his name, nor has he authorized any other person to subscribe his name, to any receipt for said papers. His mailing address at that time was "Private US54019834 ENL DET 4005th USU Fort Hood Texas." Petitioner has never been personally served with process, nor has summons been published, nor has he appeared in action 579348.

Section 404 of the Vehicle Code provides that when a nonresident accepts the rights and privileges of using the highways of California by driving a motor vehicle thereon, he, by such act, appoints the Director of Motor Vehicles as his attorney, on whom may be served all lawful processes in any action against such nonresident growing out of an accident or collision resulting from the operation of any motor vehicle on such a highway by himself or agent. Subsections (b), (c), (d), (e), and (h) of section 404 read:

"(b) The acceptance of such rights and privileges or use of said highways shall be a signification of the agreement of said nonresident that any such process against him which is served in the manner herein provided shall be of the same legal force and validity as if served on said nonresident personally in this State.

"(c) Service of such process shall be made by leaving a copy of the summons and complaint with a fee of two dollars (\$2) for each nonresident to be so served in the hands of the director or in his office at Sacramento and such service shall be a sufficient service on said nonresident

subject to compliance with subdivision (d) hereof.

"(d) A notice of such service and a copy of the summons and complaint shall be forthwith sent by registered mail by the plaintiff or his attorney to said defendant. Personal service of such notice and a copy of the summons and complaint upon said defendant wherever found outside this State shall be the equivalent of said mailing.

"(e) Proof of compliance with subsection (d) hereof shall be made in the event of service by mail by affidavit of the plaintiff or his attorney showing said mailing, together with the return receipt of the United States post office bearing the signature of said defendant. Such affidavit and receipt shall be appended to the original summons which shall be filed with the court from out of which such summons issued within such time as the court may allow for the return of such summons. In the event of personal service outside this State such compliance may be proved by the return of any duly constituted public officer, qualified to serve like process of and in the State or jurisdiction where the defendant is found, showing such service to have been made. Such returns shall be appended to the original summons which shall be filed as aforesaid.

"(h) As used in this section 'nonresident' means a person who is not a resident of this State at the time the accident or collision occurs."

[1-6] The general rule is that a court may not acquire jurisdiction *in personam* over a nonresident defendant in an action by service of notice or other process outside the territory or state in which the forum exists. *Frey & Horgan Corp. v. Superior Court*, 5 Cal.2d 401, 404, 55 P.2d 203. See 37 Cal.L.Rev. 80, 88. Section 404 of the Vehicle Code prescribes a form of constructive service. *Berger v. Superior*

1. "To H. Daniel Weisfeld, A Nonresident Defendant:

"Please take notice that due to the fact that you are a non-resident of the State of California, and being a resident of the State of Texas, and being a defendant in the above captioned action, that the plaintiffs herein have, pursuant to Section 404

of the Vehicle Code of the State of California, served a copy of the summons and complaint in the above entitled action on the Director of Motor Vehicles of the State of California, together with the required fee of \$2.00, on the 19th day of November, 1951."

Court, 79 Cal.App.2d 425, 428, 179 P.2d 600; *De Pier v. Maddox*, 87 Cal.App.2d 460, 463, 197 P.2d 87. See *Northwestern Mortgage & Security Co. v. Noel Const. Co.*, 71 N.D. 256, 300 N.W. 28. When jurisdiction is sought to be obtained by a prescribed form of constructive service the statutory conditions on which the service depends must be strictly observed. Unless the statute has been complied with, there is no power to render a judgment. *Pinon v. Pollard*, 69 Cal.App.2d 129, 133, 158 P.2d 254. It is only when service is made as provided in section 404 that it has the same force as service made on the nonresident personally in this state. In compelling proof of service by a return receipt "bearing the signature of said defendant" the statute requires actual delivery to the defendant by registered mail of a copy of the notice, summons, and complaint.

[7] The statutory conditions were not complied with in action 579348. Service on the director alone is not sufficient. A notice of such service, together with a copy of the summons and complaint, must be forthwith sent by registered mail *by the plaintiff or his attorney* to the defendant. Neither the notice, nor a copy of the summons, nor a copy of the complaint, was sent by the plaintiffs or by their attorney to the defendant. They were sent by someone who was a stranger to the the action. Proof of compliance with the provisions of subsection (d) must be made by affidavit of the plaintiff or his attorney, showing the mailing, together with the return receipt of the United States post office bearing the signature of said defendant. Proof of compliance with subsection (d) was not made by either the affidavit of one of the plaintiffs or their attorney as required; neither was there a return receipt of the United States post office bearing the signature of the defendant obtained. The return receipt bears the signature of the mother of the defendant only. The attempted service of process on the defendant was a nullity, and the superior court is without jurisdiction to proceed until valid service has been made in the manner prescribed by law.

[8,9] Prohibition is the proper remedy. *Berger v. Superior Court*, 79 Cal.App.2d 425-426, 179 P.2d 600; *Briggs v. Superior*

*Court*, 81 Cal.App.2d 240-241, 183 P.2d 758. It is not a prerequisite to the granting of the writ that petitioner have first appeared specially in the superior court action and have made a motion to quash service of process. Petitioner, a minor, could only have appeared in that court by his general guardian or by a guardian ad litem. Code Civ.Proc. § 372. He does not have a general guardian. If a guardian ad litem is appointed prior to service of process on a minor, the appointment is void and the appointee has no power to appear. *Akley v. Bassett*, 189 Cal. 625, 639, 209 P. 576; *McCloskey v. Sweeney*, 66 Cal. 53, 4 P. 943. Petitioner, therefore, could not have appeared specially in the superior court to object to the jurisdiction of that court prior to instituting the present proceeding.

Let a peremptory writ of prohibition issue commanding the superior court to refrain from further proceedings in that certain action entitled "*Harriet Tasoff and Lloyd A. Tasoff v. H. Daniel Weisfeld*," No. 579348, at the behest of the plaintiffs therein, until H. Daniel Weisfeld, the defendant, has been served with process in the manner prescribed by law.

SHINN, P. J., and WOOD, J., concur.



110 Cal.App.2d 128

**BUTT v. BERTOLA et ux.**

No. 14861.

District Court of Appeal, First District,  
Division 1, California.

March 28, 1952.

Francis Butt brought an action against Peter Bertola and Anna Bertola, his wife, for damages resulting from eviction of plaintiff from store plaintiff had leased. The Superior Court of the State of California, in and for the City and County of San Francisco, Robert McWilliams, J., rendered a judgment in favor of plaintiff in respect to some items of damage, and rendered a judgment in favor of defendants in respect to other items of

damage and both parties appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence justified finding to effect that as result of defendants' refusal to adequately repair a leak, sewerage water escaped and flooded store and caused plaster and rubble to fall from ceiling and walls upon plaintiff's equipment and other personalty, rendering demised premises unfit for use as store and compelling plaintiff to abandon demised premises.

Reversed in part with instructions and affirmed in part.

#### 1. Landlord and Tenant ⇨180(3)

In action against landlords for damages resulting from alleged eviction of plaintiff from store plaintiff had leased, evidence justified finding to effect that as result of landlords' refusal to adequately repair a leak caused by disrepair of pipe connected with sewerage and plumbing system of flat above plaintiff's store, sewerage water escaped and flooded store and caused plaster and rubble to fall from ceiling and walls upon plaintiff's equipment and other personalty, rendering demised premises unfit for use as store and compelling plaintiff to abandon premises.

#### 2. Landlord and Tenant ⇨180(4)

Fact that plaintiff tenant adjusted himself to difficult situation for period of time by removing several stools near leak caused by disrepair of pipe connected with sewerage and plumbing system of flat above premises rented by plaintiff for use as store, which resulted in escape of sewerage water, and by keeping a pail under leak to minimize damage, did not absolve landlords from liability for damages resulting when sewerage water flooded store and caused plaster and rubble to fall from ceiling and walls upon plaintiff's equipment and other personalty, rendering demised premises unfit for use as store and compelling plaintiff to abandon demised premises.

#### 3. Landlord and Tenant ⇨180(5)

In action against landlords for damages resulting from eviction of plaintiff from store plaintiff had leased, which damages resulted when sewerage water escaped as result of leak and flooded store and caused plaster and rubble to fall from

ceiling and walls upon plaintiff's equipment and other personalty, rendering demised premises unfit for use as store and compelling plaintiff to abandon demised premises, evidence justified finding that plaintiff sustained a loss of \$2,666.66.

#### 4. Landlord and Tenant ⇨166(5)

Clause in lease of store premises exculpating landlords from liability for damages to goods, property or effects caused by gas, water, or other fluid did not exculpate landlords from liability for loss of profits resulting when sewerage water escaped and flooded store and caused plaster and rubble to fall from ceiling and walls upon plaintiff's equipment and other personalty, rendering premises rented by plaintiff unfit for use as a store and compelling plaintiff to abandon such premises.

#### 5. Landlord and Tenant ⇨184(2)

Where store premises were leased to plaintiff and plaintiff deposited money with landlords pursuant to lease provision that if plaintiff did not default plaintiff would be allowed free rent for last six months of lease term, and lease provided that if it was terminated for any reason before expiration of lease term plaintiff would have no claim for any allowance or rebate on account of deposited money, latter provision did not include wrongful eviction of plaintiff by landlord, and plaintiff was entitled to recover value of plaintiff's rights to six months' free rent and occupancy when plaintiff was wrongfully evicted eight months before expiration of lease term.

#### 6. Landlord and Tenant ⇨166(5)

Lease provision that landlord would not be liable for damages to goods, property or effects in or upon premises leased for use as a store, caused by gas, water, or other fluid, would be read in light of subject matter of lease and apparent intent of parties.

#### 7. Landlord and Tenant ⇨166(5)

Lease provision that landlords would not be liable for damages to goods, property, or effects in or upon premises leased to plaintiff for use as a store, caused by gas, water, or other fluid, did not relieve landlords from liability for damages to



plaintiff's stock in trade, equipment, and other personalty which resulted when sewerage water escaped and flooded store, where such escape was due to affirmative negligence of landlords.

#### 8. Contracts Ⓒ169

Each contract must be viewed in its own setting and applied to particular set of facts presented to court for consideration.

#### 9. Appeal and Error Ⓒ110

Order denying defendants' motion for a new trial was a nonappealable order.

---

Pierre J. Ibos, San Francisco, James A. Himmel, San Francisco, of counsel, for appellants.

Horace T. Beverly, Bertrand F. Lurie, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff leased from defendants a ground floor store for a sandwich, grocery, or soft drink business, for the term of three years, commencing May 1, 1947.

Claiming that he had been evicted during the term of the lease, plaintiff brought this action for damages allegedly caused thereby. The trial court found: (1) that plaintiff was evicted and compelled to and did abandon and give up possession of the store on August 31, 1949; (2) that plaintiff thereby suffered loss of profits in the amount of \$2,666.66; (3) that defendants still retain an advance deposit of \$600 given by plaintiff to defendants upon execution of the lease; (4) that plaintiff's stock in trade was damaged in the amount of \$170.33; and (5) that plaintiff's equipment and other personal property was damaged in an amount ranging between \$1,600 and \$1,900.

The court rendered judgment in favor of plaintiff in respect to the items of damage mentioned in clauses (2) and (3) above, but, because of an exculpatory clause in the lease, rendered judgment in favor of defendants as to the items mentioned in clauses (4) and (5) above. Defendants appealed from the judgment and the whole thereof and from an order deny-

ing their motion for new trial. Plaintiff appealed from that portion of the judgment which did not award him damages to his stock in trade, equipment, and other personal property.

(1) *As to the eviction*, the trial court found that defendants had control of the sewerage system and plumbing used in the building except as to the store leased by plaintiff; that within a few weeks after plaintiff took possession, the sewerage system and plumbing, other than that connected with plaintiff's store, developed leaks and became in bad repair, causing sewerage water to leak from the ceiling into the store and on the personal property of plaintiff, which leak continued intermittently and at irregular intervals throughout plaintiff's occupancy; that upon plaintiff's first discovery of the leak, he notified defendant Peter Bertola and showed him the leak on numerous other occasions, at all of which times said defendant knew the leak was caused by a pipe connected with the sewerage and plumbing system of the flat above plaintiff's store becoming in a state of disrepair; despite such knowledge, defendants would either disregard the notice and refuse to make any repair, or would take improper and inadequate measures to fix the leak; that on August 18, 1949, as a direct result of defendants' failure, refusal and neglect to adequately and properly repair the leak, a great quantity of foul sewerage water escaped from such system located directly above the store and ran into and flooded the store and caused a quantity of plaster and rubble to fall from the ceiling and walls upon plaintiff's equipment and other personal property; and as a result thereof plaintiff's quiet enjoyment of the demised premises as a tenant of defendants was interfered with in that the demised premises were rendered wholly unfit for the use and purpose for which they were leased to plaintiff, and plaintiff was evicted and compelled to and did abandon and give up possession of the store as of August 31, 1949.

[1] The evidence supports this finding. Plaintiff testified that he leased one of several ground floor stores, that the second floor consisted of dwelling units. A few

days after he took possession a customer called attention to the fact that he was getting wet by stinking water, which was coming from the ceiling. Plaintiff told Peter Bertola (hereinafter called the defendant) who said "I fix." The leak was not fixed, but for about six months it stopped during the day. In the mornings plaintiff would find water that had leaked through during the night. When new tenants moved into the flat above, the leak started again. The leak occurred whenever the tenants above the store used certain wash trays. The leak was small intermittent drops. The leak was called to defendant's attention many times by plaintiff. Each time plaintiff called defendant's attention to the leak, defendant would take a rag, go upstairs and stuff the rag in the pipe. Defendant would also attempt to open up the pipe with a plumber's snake so the water would flow through the pipe. During the middle of May, 1947, when plaintiff saw that defendant was not going to do anything about the leak, plaintiff removed four stools, erected a partition, and kept a bucket behind the partition to catch the water.

Plaintiff testified the leak was not from any plumbing connected with his store, the demised premises.

August 5, 1949, plaintiff closed his shop and went on a vacation. He returned on August 15 and entered the store to see about the mail. At that time he did not notice anything unusual. He again returned August 18. This time there was water on the floor up past the middle of the room. The equipment was slimy and covered with residue. Water was running out the back door. The place had a foul odor. Merchandise in the basement was soaked.

All of this testimony of plaintiff was corroborated by his assistant, John Cole, who further testified that on that day when plaintiff called him in (August 18, 1949), there was water everywhere, running out the back door. Filth was coming down across the refrigerator. Paint on the refrigerator had been corroded and eaten away. The service counter was practically destroyed, so water marked that the metal was of no further value. The wooden

backing on the service counter was warped out of shape. The pie racks were warped out of shape. Many of the chairs in the dining room were damaged, and were all sitting in water. The paint on the side walls in many places was hanging out in big water blisters. There was a very foul and offensive odor. The basement was much the same as the store proper. The ceiling of a store-room in the basement had been loosened by water and a portion had come down. All the merchandise in the basement was water soaked. The books of record which plaintiff kept were water logged.

Emily Shaw, who lived in one of the upper flats and washed clothes in or at the rear of the flat above this store from February 1949 until the time of trial (March 1950), testified that she used the washing machine in the kitchen, and wash trays on a porch, situated directly over the rear of store and at one time about three weeks after she had moved in and was washing clothes, defendant walked into the kitchen, pulled the plug out of the socket of her washing machine and told her she could not wash, saying "it leaks down in restaurant." He also told her she could not use the laundry trays because the drainage was plugged. It was plugged with rags and she cleaned them out. The plugs were in the drain where the water went down. She did that so she could wash her clothes. She heard plaintiff ask defendant what he was to do about the leak and defendant said he did not want to be bothered with it, that he was tired of hearing about it. She heard such a conversation four or five times. She said her laundry trays never leaked over. Defendant told her it was the pipe that leaked, that he did not want her washing for that reason because when she pulled the water from the laundry trays, it would go through that pipe. The pipe leaked and defendant said the pipe was broken and that when she was washing there, all the water was going down into the restaurant; he did not want her washing her stairs, or to get water on the porch, because he said it would go down on the stairs and into the restaurant there. She further testified that between 10 and 11

o'clock on the morning of August 18, 1949, the trap on her porch was backed up with dirty water, that defendant was in the yard, so she called him. He came up, looked at it and she said "what are you going to do about this?" and he said: "Nothing. Nothing. You get the plumber. You did it." She replied that she did not do it, and defendant said "I'm not going to do nothing about it." To which she replied if he did not do something, she would call the Public Health, and then he said he would get a plumber's snake and he did get a long plumber's snake and put it in the trap, which had backed mucky water up into the laundry trays. He put the snake through the trap, got the dirty water all cleared out. It had gone down, and then he took water from the tray and kept filling water into the trap for about an hour and a half.

A city health inspector testified that he and another inspector visited the place August 22, 1949, and found the merchandise damaged by water. The ceilings were soaked. The kitchen was in a state of disrepair, evidently from dripping water. The floor, walls, and ceilings were damaged by water. There was a foul odor. The other inspector quarantined the damaged merchandise and the room where the cooking was done. The witness instructed plaintiff he could not operate as a restaurant under those conditions, and not to reopen the premises until fixed up to the satisfaction of the city health department. The place was not in a fit and proper condition to be operated as a restaurant.

[2] Defendants contend that nothing which happened prior to August 18, 1949, can be considered because prior to that time the damage was slight and plaintiff continued in business at a profit, and that shortly after the 18th defendant did repair the plumbing and replace the plaster. The trial court did not take such a view of the situation. The fact that plaintiff, prior to August 18, 1949, adjusted himself to a difficult situation by removing several stools near the leak and kept a pail under the leak, to minimize the damage, did not absolve defendants from the consequences of their acts. We would not undertake to

say, as a matter of law, that when the flooding occurred on the 18th of August plaintiff was under an obligation not to treat that as a culmination of acts which constituted an eviction. In this connection, it is significant to note that some time prior to the 18th of August, 1949, plaintiff offered to repair defendant's plumbing at his own expense but defendant refused to permit him to do so.

Defendants question a finding that after the incident of August 18, 1949, plaintiff's license to operate a restaurant was revoked. They argue, in effect, that the privilege to operate was merely suspended until the restoration of sanitary conditions suitable for operation. That is a distinction without a difference, in so far as it bears upon the finding that plaintiff was evicted.

Defendants place some reliance upon a clause of the lease by which plaintiff waived the right to make repairs at the expense of the landlord as provided in section 1942 of the Civil Code, and agreed at his own expense to make "all repairs necessary to the herein demised premises." That, obviously, had reference to repairs on or in the demised premises, not to needed repairs on or in portions of the building retained under defendants' control.

[3] (2) *The finding that plaintiff sustained a loss of profits in the amount of \$2,666.66* is sustained by plaintiff's testimony that his average net profits were \$4,000 a year, testimony given without objection. At that rate, deprived of the use of the property during the last eight months of the lease period, he lost precisely the amount found.

[4] Defendants erroneously claim that a certain clause of the lease (later discussed herein) exculpated them from liability for loss of profits. That clause, at most, exculpated them from liability for "damages to any goods, property or effects \* \* \* caused by gas, water, or other fluid." The loss of profits caused by the eviction is not in the nature of "damages to property" caused by gas, water or other fluid.



(3) *As to the \$600 refund*, the court found that, as security for faithful performance of the lease upon his part, plaintiff deposited \$600 with defendants on the express understanding and agreement that if he be not in default said sum was to apply on the monthly rental due for the last six months of the term, and that the defendants still retained the advance deposit of \$600.

These findings call for interpretation of the following provisions of the lease: "It is distinctly agreed and understood that in the event of the faithful performance by the Lessee of each and every, all and singular, the terms, covenants and conditions of this lease, and the prompt and faithful payment of all of the rent and all other sums herein provided to be paid, at the times and in the manner herein specified, and *only* in this event, the said Lessor will allow to the Lessee, free rent for the last six (6) months of this lease.

"It is distinctly [sic] agreed and understood that this allowance and rebate shall only be made by the Lessor in the event of the faithful performance by the Lessee of all and singular, each and every, of the terms, covenants and conditions hereof which is the sole consideration therefor, and that in the event of a termination of this lease at any time before the expiration of the term herein provided, for any cause or reason whatsoever, said Lessee shall have no claim against the Lessor for any allowance or rebate on account of the rent herein provided to be paid or on account of the sum of Six Hundred (\$600.00) dollars, paid to the Lessor by the Lessee, which is the consideration for the making of this lease and said Lessee agrees that the same is so paid as a consideration therefor, and for the purpose of obtaining this lease, and is an absolute payment to the Lessor for that purpose."

These provisions must, of course, be read in the light of another clause of the lease, wherein plaintiff agreed to pay a total rent of \$3,600, monthly in advance, in equal monthly payments of \$100.

Let us first read the quoted words literally, as defendants would have us do. By those words, defendants say they will

allow free rent for the last six months if plaintiff fully performs his obligations under the lease. (Plaintiff has fully performed; defendants have not. Plaintiff would seem to have six months "free rent" coming to him, of which he was deprived by the eviction.) The parties went on and said "this allowance and rebate" shall be made only if plaintiff fully performs his obligations under the lease, such performance being the sole consideration for the allowance and rebate. (That does not add anything. It is just another way of saying it.) Then they said: In the event of a termination of this lease at any time before the expiration of the term "for any cause or reason whatsoever" plaintiff will have no claim for any "allowance or rebate" on account of rent to be paid or on account of the \$600 paid. (At most, this says that if the lease is terminated plaintiff will not have a claim either for six months' free occupancy or for repayment of the \$600. It does call for interpretation of the scope of the expression "for any cause or reason whatsoever." The eviction of plaintiff by defendants was the cause of the termination which has occurred.) In their lease the parties proceeded further and said: The \$600 payment is the consideration for the making of this lease and for the purpose of obtaining the lease and is an absolute payment for that purpose. (In other words, plaintiff bought a three-year lease for \$600. Because of defendants' violation of their obligations, it turned out to be but a two years' and four months' tenure.)

The conclusion seems inescapable that defendants owe plaintiff six months of free use and occupancy of this store unless the termination exculpatory clause must be construed as if it concluded with the words: "for any cause or reason whatsoever, *including the wrongful eviction of the lessee by the lessors.*" It is difficult to believe that plaintiff read the italicized words into that clause when he examined and signed the lease. Yet it would be virtually necessary to read those italicized words in if we were to accept defendant's version of the words used. It is conceivable that a lessee might take the

chance of losing his six months of free occupancy should the building be destroyed by storm, earthquake or fire, or should some third person successfully assert a superior title and take the property over, if in any such case the loss occur without fault of the lessor. It would be quite another thing for a lessee to buy a lease on the express understanding that he would enjoy the last six months of the term rent free if he faithfully perform all of his obligations, but subject to a *power* in the lessor *at any time* to cancel that right by *affirmatively* violating one of his own obligations, that of according the lessee quiet enjoyment of the demised premises. The two concepts are so utterly repugnant it would require more explicit terms than we have here to find that the minds of the parties met and agreed that the defendants should have any such power.

We believe this is the correct interpretation. Giving the words their ordinary and customary meaning, we would have to read a good deal into this lease to find an agreement by the parties to treat the \$600 as an advance payment for rent or as security for the performance of plaintiff's obligation under the lease. In this respect it differs from such cases as *Walter H. Sullivan, Inc., v. Johnson*, 116 Cal.App. 591, 3 P.2d 72, which involved a lease containing a somewhat similar provision, but in which the parties specified in respect to the amount paid (\$2,500) that "the Lessor will pay the Lessee interest at the rate of six (6) per cent per annum upon the said sum of two thousand five hundred (\$2,500) \* \* \* which said interest shall be payable annually \* \* \* and the Lessor will credit the Lessee with the said sum \* \* \* upon the five (5) instalments of rent of the said premises last maturing, \* \* \* at the rate of five hundred dollars (\$500) upon each of the said instalments of rent." 116 Cal.App. at page 592, 3 P.2d at page 73. The court deemed the quoted provisions indicative of an intent not to treat the \$2,500 "as an absolute payment in consideration for the execution of the lease". 116 Cal.App. at page 593, 3 P.2d at page 73. We find no

such or similar words in the lease before us which indicate an intent to treat the \$600 payment other than as consideration for the lease, an absolute payment. Significant in this connection is a later decision by the court which decided the *Walter H. Sullivan, Inc.,* case. We refer to *A-1 Garage v. Lange Investment Co.*, 6 Cal.App.2d 593, 44 P.2d 681. The lease there involved characterized an advance payment as made in consideration for the making of the lease and as an absolute payment for that purpose. The court held that when the money is paid under such circumstances, the lessor is entitled to retain the fund on default of the lessee. In the course of its discussion the court referred to its decision in the *Walter H. Sullivan, Inc.,* case, directing attention to the fact that the lease there involved contained clauses which were rendered uncertain by the peculiar language used, and that examination of those clauses, in the light of the surrounding circumstances and the interpretation placed upon those clauses by the parties themselves, compelled the conclusion that the money there paid in advance was a security for faithful performance by the lessee and not otherwise.

Defendants cite a number of cases in which the advance payment was deemed absolute in nature and not returnable to the lessee upon termination of the lease. However, in those cases termination occurred because of a default by the lessee in the performance of one or another of his obligations. In *Curtis v. Arnold*, 43 Cal.App. 97, 184 P. 510, and *Anderson v. Julius Levin Co.*, 71 Cal.App. 73, 234 P. 442, the lessee relinquished possession after default by him in the payment of rent. In *Parigian v. Citizens Nat. Trust & Savings Bank*, 42 Cal.App.2d 773, 110 P.2d 117, cancellation was brought about by the conduct of a sub-lessee. In *Grand Central Public Market v. Kojima*, 11 Cal.App.2d 712, 717, 54 P.2d 786, the lessee unsuccessfully claimed that the lease had been terminated, in an action brought by the lessor for overdue rent. It does not follow therefrom that in the case before us

plaintiff was not entitled to damages for the loss of his right to six months' free use and occupancy, a loss caused by his wrongful eviction by the defendants.

[5] We conclude, therefore, that one of the elements of recoverable damages sustained by plaintiff upon his eviction was the value of his right to six months' free use and occupancy of these premises. That value, the trial court did not determine when it treated the \$600 as a "deposit" to secure faithful performance by plaintiff. That value might be the same as or greater or less than the amount of the stipulated rental. It is a question of fact yet to be determined by the trial court.

(4) *Concerning the injury to plaintiff's stock in trade, equipment and other personal property*, caused by the water from defendants' plumbing facilities, plaintiff's right to recovery depends upon the meaning and scope of a certain exculpatory clause of the lease.

That clause reads as follows: "It is agreed by the parties hereto, that said Lessor shall not be liable for damages to any goods, property, or effects in or upon said demised premises, caused by gas, water, or other fluid from any source whatsoever."

[6] Those words are all inclusive. They seem to preclude any possibility or recovery by the plaintiff. "Such broad language, however, is to be read in the light of the subject matter of the contract and the apparent intentions of the parties." *Eastman Oil, etc., Corp. v. Lane-Wells Co.*, 21 Cal.2d 872, 873, 136 P.2d 564, 565, and cases cited.

[7] In their application to the facts of this case, the words used in this clause involve a contract which has for its object the exemption of the defendants from responsibility for their own misconduct in knowingly maintaining defective sewerage facilities and in taking patently inadequate measures for the repair of those facilities, with knowledge of the injuries to plaintiff's property which would ensue. This misconduct was, at the very least, active or affirmative negligence, not mere ordinary negligence. It comes very close to being

wilful misconduct, for exemption from the consequences of which a person may not contract. Civ.Code, § 1668. Also this particular affirmative negligence of the defendants constituted a violation of their obligation to accord plaintiff quiet enjoyment of the very premises demised. We cannot, without more explicit and specific words in this clause conclude that the minds of the parties met and agreed to exempt the defendants from the consequences of their own wrongful acts when of the kind and nature of those here involved.

[8] Defendants have cited a number of decisions on exculpatory clauses which seemingly arrive at a different result. We are not persuaded. Each contract must be viewed in its own setting, and applied to the particular set of facts presented to a court for consideration.

One of the decisions upon which defendants rely is *Inglis v. Garland*, 19 Cal.App. Supp.2d 767, 64 P.2d 501. It stands, at most, for the doctrine that the lessor may by contract exempt himself from responsibility for injury to his lessee's property caused by the ordinary negligence of the lessor. It held that the following clause did that: "Tenant agrees that Tenant will not, and that agents, servants and others claiming the right under Tenants to be in the premises or in said building \* \* \* shall not make any claim against Landlord for any injury, loss or damage to person or property occurring therein from any cause." 19 Cal.App.Supp.2d at page 770, 64 P.2d at page 502. This clause was deemed a covenant not to sue, and the court placed some emphasis upon the fact that in it the tenant referred both to the premises leased and to the building of which those premises were but a part. The water which caused the damage came from a pipe which was embedded in an outer wall and carried rain water from the roof to an underground drain. Upon the occasion of the first leak, the tenant brought it to the attention of the landlord who "made *bona fide* efforts through competent agents to find and stop the leak, but apparently both plaintiff and defendant, influenced somewhat probably by their knowledge that the new roof had been



installed only a few months before, by a competent roofing agent, placed the blame for the leak upon the sign and failed to ascertain, as subsequent events suggest they easily could have done, that the earthenware drain pipe above mentioned had become clogged." 19 Cal.App.Supp.2d at page 769, 64 P.2d at page 502. Later, a further rain occurred and a further examination was promptly made, as a result of which the cause was discovered and repairs made. The trial court impliedly found the landlord negligent in not having discovered and remedied the condition prior to the last rain, but the reviewing court concluded that "the circumstances related, coupled with others appearing in the record, are clearly not insufficient as a matter of law to support such finding." 19 Cal.App.Supp.2d at page 770, 64 P.2d at page 502. We do not see that the decision in the Inglis case, viewed in the light of its facts, is persuasively applicable to the facts of the case now before us. Another case invoked by defendants is *Werner v. Knoll*, 89 Cal.App.2d 474, 201 P.2d 45. It involved an appeal from a judgment in favor of a landlord. The judgment was predicated upon a clause of the lease which stipulated that the defendant landlord "'shall not be liable for any damage arising from personal injuries sustained by any person \* \* \*, in, on or about said premises, from any cause whatsoever, and second party [plaintiff] agrees to save and keep first party free and harmless of and from any such liability, loss or damage.'" 89 Cal.App.2d at page 475, 201 P.2d at page 46. The appellant raised "but one question, the validity of said provision." 89 Cal.App.2d at page 475, 201 P.2d at page 46. The court found it valid, to the extent of relieving the landlord of the consequences of his own negligence. As we read the decision, the court was speaking of ordinary negligence, the want of ordinary care. That falls quite

short of affirmative negligence involved in the instant case.

Such decisions are not persuasive of a different view than that which we have expressed. We observe, also, that the trend of decisions is to exclude from such general clauses the exemption of a landlord from the consequences of his own affirmative negligence; i. e., a species of exemption not intended by the parties unless clearly and in more specific terms expressed. See cases collected in 175 A.L.R. 8, at 89-92, § 47.

Since the portion of the judgment which awards plaintiff damages is in a lump sum (\$3,266.63), that portion is reversed with instructions to the trial court (1) to set aside its finding and conclusion that the \$600 paid by plaintiff upon execution of the lease was a deposit to secure performance of his obligations under the lease, (2) to retry and determine the value of plaintiff's right to six months' free occupancy of the demised premises, (3) to set aside its conclusion that plaintiff is not entitled to damages sustained to his stock in trade, equipment, and other personal property, (4) to retry and determine the amount of damages sustained to plaintiff's equipment and other personal property, except the damages to the stock in trade which the court has already found and determined, and (5) then to make supplemental findings of fact and conclusions of law not inconsistent with this opinion, and to render judgment accordingly. The portion of the judgment which awards plaintiff his costs and disbursements incurred or expended in the action, is affirmed.

[9] The appeal from the order denying defendants' motion for a new trial, a non-appellable order, is dismissed.

Plaintiff is to recover his costs on all the appeals.

PETERS, P. J., and BRAY, J., concur.

**GROMEEOO v. GROMEEOO et al.**

Civ. 14854.

District Court of Appeal, First District,  
Division 1, California.

March 28, 1952.

As Corrected April 1, 1952.

Rehearing Denied April 26, 1952.

Hearing Denied May 26, 1952.

Action by a wife for a divorce from her husband and an accounting by him and other defendants. From orders of the Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., terminating an order requiring defendant husband to pay plaintiff for her support, counsel fees and court costs pending the action and denying plaintiff's motion to direct the husband to give his deposition and her motion for counsel fees and costs for taking such deposition, plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that plaintiff was entitled to tender issues as to whether she signed a dismissal of her earlier divorce action under circumstances negating her estoppel thereby from denying the validity of a previous Nevada decree granting the husband a divorce, whether he acquired a Nevada residence, and whether such decree was procured through collusion and fraud, on hearing of plaintiff's application for temporary alimony and defendant husband's motion to terminate the order granting such alimony.

Orders terminating order for temporary support, etc., and denying motion for cost of taking deposition reversed, and appeal from order denying motion to direct husband to give deposition dismissed.

**1. Divorce ⇨213**

In wife's divorce action, defendant's counsel's withdrawal of his objection to hearing of plaintiff's application for support money order on ground that parties were divorced by Nevada decree, alleged by plaintiff to be fraudulent, was not a stipulation conferring jurisdiction on court to hear application and did not prevent defendant from later interposing same objection, as party cannot confer jurisdiction to consider such an issue, which may be raised at any time. Civ.Code, § 137.

**2. Divorce ⇨214(3), 226**

In wife's divorce action, plaintiff's testimony as to parties' marriage and her residence in county of venue and evidence

of her financial need and defendant's ability to pay supported Superior Court's order directing defendant to pay specified sum monthly for plaintiff's support, counsel fees and costs, in absence of any evidence concerning Nevada divorce decree claimed by defendant to have terminated marriage. Civ.Code § 137.

**3. Divorce ⇨109**

In wife's divorce action, plaintiff's proof of parties' marriage shifted to defendant burden of showing what, if anything, prevented marriage ceremony from establishing relationship of husband and wife between parties or later occurred to terminate such relationship.

**4. Divorce ⇨214(3), 226, 286**

In wife's action for divorce and annulment of Nevada decree granting husband divorce, trial court erred in sustaining objections to questions asked plaintiff by her attorney to show that she never knew that she appointed attorney to appear for her in husband's divorce action, that husband falsely represented that he obtained divorce merely to marry another woman until birth of his child by her and would thereafter divorce her and remarry plaintiff, and that neither party resided in Nevada at time of such decree, so as to require reversal of order terminating order awarding plaintiff support money, counsel fees and costs pending action and denying her application for cost of taking husband's deposition. Civ.Code § 137.

**5. Divorce ⇨214(3)**

A wife, seeking to show, in her divorce action, that she did not authorize any attorney to appear for her in her husband's Nevada divorce action and that her seeming appearance therein by attorney was result of fraud practiced on her and Nevada court by husband, was entitled to tender, on hearing of her application for temporary alimony and husband's motion to terminate order granting such alimony, issues as to whether she signed dismissal of her previous divorce action under circumstances negating her estoppel thereby to deny validity of Nevada decree, whether husband acquired Nevada residence, and

whether such decree was procured through collusion and fraud. Civ.Code, § 137.

**6. Divorce** Ⓒ214(3), 226

To authorize order requiring husband to pay wife as alimony money necessary to enable her to support herself or to prosecute or defend pending divorce action, there must be proof that parties are husband and wife, but required decree of such proof is not as high as on trial on merits. Civ.Code, § 137.

**7. Divorce** Ⓒ211

When valid marriage between parties to divorce action is admitted and issue is validity of foreign decree granting one of parties a divorce, trial court has larger measure of discretion to grant wife's application for temporary support order than when fact of marriage itself is in issue. Civ.Code, § 137.

**8. Divorce** Ⓒ214(3)

The evidence received on hearing of wife's application for temporary support order in divorce action must be competent, unless its competency is waived by opposite party's failure to interpose appropriate objection. Civ.Code, § 137.

**9. Evidence** Ⓒ317(3)

In wife's action for divorce and annulment of Nevada decree granting husband a divorce, testimony sought to be elicited from plaintiff by her counsel as to what her psychiatrist told her concerning her physical and mental condition when she signed certain documents, including power of attorney to attorney appearing for her in husband's divorce action, was incompetent as hearsay, but not irrelevant.

**10. Divorce** Ⓒ177

In wife's divorce action, order denying plaintiff's motion to direct defendant to give his deposition was not appealable, though reviewable in appropriate mandamus proceeding or on appeal from final judgment.

---

Hyman & Hyman, San Francisco, for appellant.

Abraham Glicksberg, San Francisco, W. L. A. Calder, San Francisco, of counsel, for respondent.

FRED B. WOOD, Justice.

Plaintiff Helen Gromeeko has appealed from three orders made in this action for divorce: (1) an order terminating an order which required defendant Andrew S. Gromeeko to pay plaintiff for her support, counsel fees and court costs pending the action; (2) an order which denied plaintiff's motion for an order directing defendant to give and complete his deposition; and (3) an order which denied her motion for counsel fees and costs for the taking of defendant's deposition.

The appeal from the order terminating the temporary support order presents the question whether or not a certain Nevada decree of divorce between these parties deprives the trial court, in this action, of jurisdiction to award support money, counsel fees and costs, unless and until the Nevada decree shall have been annulled by a court of competent jurisdiction; and, if not, the degree of proof required, of the asserted invalidity of the Nevada decree, upon the hearing of a motion for support money, counsel fees and costs pending the action, or of a motion to terminate an order for the payment of such moneys.

April 3, 1950, plaintiff filed her complaint herein, asking for a divorce from Andrew, and for an accounting by Andrew and the other defendants as to certain properties. Among the acts of cruelty upon which she grounded her complaint for divorce, she alleged, concerning the Nevada decree: Since August 1, 1947, Andrew and defendant Elena S. Cronier had been living together representing themselves to be husband and wife; in December, 1947, Andrew falsely represented to the plaintiff that Elena was going to bear a child by him, that he loved plaintiff but intended to obtain a decree of divorce in Reno for the sole purpose of temporarily marrying Elena, thereafter to divorce Elena and remarry plaintiff; Andrew, while a resident of San Francisco, obtained a purported decree of divorce in Nevada, which decree was fraudulently obtained and is void.

[1] Plaintiff applied for an order for support money, counsel fees and costs pending the action. At the inception of the hearing of that application, counsel for



Andrew objected to any hearing thereof, on the asserted ground that plaintiff was not the wife of Andrew, that they were divorced in February, 1948, and that plaintiff was represented in court in the divorce action. Counsel for plaintiff replied that they had alleged that there was a fraudulent decree of divorce with no residence in Nevada of either party. The objection was overruled. Plaintiff then asked Andrew certain questions in respect to his residence in California. He testified that he had been a licensed real estate broker in California for 15 years, during which period he had never registered to vote except in San Francisco, and did vote in San Francisco and nowhere else. Thereupon Andrew's counsel said "in the interest of time I withdraw my objection and the court may proceed on the order to show cause; I think we can save a great deal of time." To which plaintiff's counsel responded, "I will address no further questions as to the jurisdiction of the Court, in view of that stipulation, your Honor."<sup>1</sup>

[2,3] Plaintiff was then called to the stand. She testified that she and Andrew were married in San Francisco in 1939 and that she resides in San Francisco. She then gave evidence tending to show her financial need and Andrew's ability to pay. April 21, 1950, the court ordered Andrew to pay \$150 monthly for support, \$300 on account of counsel fees, and \$20 on account of costs.

That evidence supported the order made. Plaintiff proved the marriage. That shifted to Andrew the burden of showing what, if anything, prevented that marriage ceremony from establishing the relationship of husband and wife between these parties, or what, if anything, later occurred to terminate that relationship. *Bernheimer v. Bernheimer*, 103 Cal.App.2d 643, 230 P.2d 17; *Thomas v. Thomas*, 66 Cal.App.2d 818, 153 P.2d 389; *Bancroft v. Bancroft*, 9 Cal.App.2d 464, 50 P.2d 465. Andrew did not meet that burden. Upon that hearing there was presented to the court no

evidence whatsoever concerning the Nevada divorce decree or any of its incidents.

Later, Andrew gave notice of motion to vacate the pendente lite order of April 21, 1950, upon the ground that the court lacked jurisdiction to make that order because these parties had not been husband and wife since February 2, 1948, when a Nevada court of competent jurisdiction divorced them by a decree in an action in which the plaintiff personally appeared.

August 30, 1950, upon motion of plaintiff, the hearing of defendant's motion was continued until October 10, 1950. As a condition of the continuation, the court ordered that support payments stop pending the hearing of defendant's motion.

At the inception of that hearing, plaintiff filed an amended complaint in which she sought annulment of the Nevada decree, a divorce from Andrew for extreme cruelty, and an accounting. As grounds for annulment of the decree she alleged: the same asserted misrepresentations as in the original complaint (summarized earlier in this opinion); Andrew never acquired a Nevada residence and went there for the sole purpose of getting a divorce; plaintiff was mentally incapacitated during that period; various documents, including a power of attorney to Gordon Rice, were executed by her while incapacitated and under the influence and control of Andrew; and Andrew caused perjured testimony to be given the Nevada court concerning his place of residence.

Defendant introduced in evidence a photostatic copy of a power of attorney bearing plaintiff's signature. By it, she purportedly appointed one Gordon Rice her attorney at law and in fact to represent her in any suit for divorce that might be brought against her in Nevada by her husband. Plaintiff testified the signature looked like hers but she could not say if it was hers. She was sure she never gave such a power of attorney.

Defendant then put in evidence the judgment roll and the transcript of testi-

1. That was not a stipulation conferring jurisdiction, nor did the withdrawal of the objection at that time prevent the defendant from later interposing it. A

party cannot confer jurisdiction of the kind in issue. Such an issue may be raised at any time. See *Colbert v. Colbert*, 28 Cal.2d 276, 279, 169 P.2d 633.

mony in the Nevada action. It appeared therefrom that Andrew brought the action; that plaintiff herein personally appeared therein by her attorney, Gordon Rice, filing an answer, and through him participated at the trial; that the Nevada court found, upon supporting evidence, that Andrew was and for more than six weeks prior to filing the complaint had been, a bona fide resident of Nevada and of Washoe County, and was corporally present and domiciled therein during all of that time; and that the decree had become final.

Defendant next put in evidence the file of an action for divorce, in the Superior Court, San Francisco, brought in 1947 by this plaintiff against this defendant. Included in the file was an instruction (dated April 14, 1948) to the clerk to dismiss that action for the reason that a decree of divorce had been theretofore obtained by the parties in Nevada. A certified copy of the Nevada findings and decree was attached thereto. Plaintiff testified she did not remember signing that instruction for dismissal but that it was her signature.

[4] The trial court sustained objections to a number of questions which plaintiff's attorney asked her concerning the power of attorney, questions such as these: Did she know the Gordon Rice mentioned in the document? Had she in any manner contacted or spoken to or written to or received anything from anyone by the name of Gordon Rice? Had she ever appointed anyone as her attorney to appear for her in the Reno divorce action? Her counsel said that by such questions he sought and offered to prove that plaintiff had no attorney named Gordon Rice and never knew what he was doing or what he had done. The court said, "I will stay by the ruling, objection sustained."

The same rulings were made as to these questions: Did she ever know whether she had appointed anyone to be her attorney in Nevada? Was she ever a resident of Nevada? As to papers presented to her by Andrew on or about January 29, 1948, the date of the power of attorney, did Andrew explain to her the nature of those papers? (She said he did not ask her to read it; was positive she did not read any document

he gave her to sign at that time.) Did she know whether Andrew ever lived in Nevada? Did Andrew ever notify her he was living in Nevada?

Upon the sustaining of an objection to the question whether shortly after the Reno divorce Andrew talked to plaintiff about Elena Cronier, plaintiff's counsel said he sought to show that for a period of time, about that time, Andrew told a story to plaintiff about Elena Cronier which terrified plaintiff concerning the fact, represented by Andrew, that his child was to be born of that party and that he represented that as a necessity for obtaining the decree of divorce in Reno; he represented a picture to plaintiff, which she believed, of a complete source of embarrassment, of "ostracization," of complete financial ruin to himself and plaintiff, and that was the cause of her becoming hysterical and of executing certain documents at his demand. Further, her counsel desired to show through this witness that Andrew represented that the Reno divorce was merely for a temporary marriage, so that a name would be given the child which he represented was to be born, and that he would thereafter come back to plaintiff, and live with her and be remarried; that the decree was obtained through collusion and fraud, at a time when his client was so mentally upset she did not know what was happening; that the Nevada decree was void because neither of the parties was a resident of Nevada; also, he sought to show the Nevada decree was void because fraud was practiced upon plaintiff and because of her state of mind. Defendant objected, characterizing it as an attack upon the Nevada decree, not a part of this proceeding even if permissible on the trial of the action. The court sustained the objection.

Those rulings of the trial court were erroneous. The order terminating the order awarding support moneys, counsel fees, and costs should be reversed and the proceeding remanded for rehearing.

[5] It is true that if plaintiff did appear and participate in the Nevada action, she could not later collaterally attack the decree rendered therein upon issues (such as Andrew's acquisition of residence in Neva-

da) litigated and decided therein. Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385; In re Estate of Schomaker, 93 Cal.App.2d 616, 209 P.2d 669; Daut v. Daut, 98 Cal.App.2d 375, 220 P.2d 63. In each of those cases, as in Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429, and Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451, the party who later unsuccessfully sought collaterally to attack a foreign divorce decree did in fact personally appear in the foreign divorce action. In contrast, in the present action, the plaintiff seeks to show that she did not authorize anyone to appear for her in the Nevada action, that her seeming appearance therein was the result of fraud practiced upon her and the Nevada Court by the defendant herein. If she proves those allegations she will be in a position to tender proof (1) that her signing of the dismissal of her earlier California divorce action was done under circumstances which negative that act as an estoppel against the position she takes in this action, (2) that Andrew did not acquire a Nevada residence, and (3) that the Nevada decree was procured through collusion and fraud. See Wolff v. Wolff, 134 N.J.Eq. 8, 34 A.2d 150.

That being so, upon the trial of this action, may she not tender the same issues upon the hearing of an application for temporary alimony and upon the hearing of defendant's motion to terminate the order for temporary alimony? We conclude that she may.

[6] The applicable statute declares that "When an action for divorce is pending," the court may, in its discretion, "require the husband \* \* \* to pay as alimony any money necessary to enable the wife \* \* \* to support herself \* \* \*, or to prosecute or defend the action." Civ.Code, sec. 137.

There must, of course, be proof that they are husband and wife. The required degree of proof is not as high as upon the trial upon the merits. The very provision for suit money indicates that. In Sharon v. Sharon, 75 Cal. 1, 16 P. 345, the court said that upon such an application, when the defendant denies the marriage, there must be "satisfactory evidence showing,

at least *prima facie*, a marriage, in fact", and "It has been said that it is not necessary to prove the marriage as fully \* \* \* on a preliminary application for a temporary allowance, as to sustain a final decree." 75 Cal. at page 43, 16 P. at page 364. In Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, the court rejected the *prima facie* rule and applied the preponderance of evidence requirement. The Hite case was distinguished in Bancroft v. Bancroft, 9 Cal.App.2d 464, 50 P.2d 465, upon the ground that the defendant in the Hite case denied the alleged common law marriage, whereas in the Bancroft case the plaintiff proved and defendant admitted that a ceremonial marriage had taken place and the parties had assumed the marital relation, which shifted to him the burden of proving the marriage invalid. The court indicated approval, in such a case, of a rule that if the putative wife makes out a reasonably plain case of the existence of marriage she should be furnished with temporary support and suit money, but found that in the case before it the wife had established her marriage by a preponderance of evidence.

In Thomas v. Thomas, 66 Cal.App.2d 818, 153 P.2d 389, the husband admitted the marriage and claimed it had been terminated by a foreign divorce but failed to offer evidence of the divorce proceeding. The evidence of the marriage and the presumption of its continuance supported the order for temporary support, counsel fees, and costs.

In Knox v. Knox, 88 Cal.App.2d 666, 199 P.2d 766, the court, in affirming an order disallowing temporary support and suit money (the wife had appeared and participated in the foreign divorce proceeding), expressed the rule in these words: "It therefore, became the duty of the court in the instant proceeding, to determine, as a matter of fact, in the exercise of a sound judicial discretion, whether there was reasonable probability of appellant herein successfully attacking the validity of the Nevada divorce, and whether the instant proceeding was instituted by appellant wife in good faith." 88 Cal.App.2d at page 676, 199 P.2d at page 772.



In *Kalmus v. Kalmus*, 103 Cal.App.2d 405, 230 P.2d 57, a denial of temporary alimony, counsel fees and costs was affirmed upon the ground, among others, that the wife's evidence in support of her challenge of a foreign divorce decree satisfied neither the preponderance of evidence rule nor the fair probability rule, whichever might be applied.

In *Bernheimer v. Bernheimer*, 103 Cal.App.2d 643, 230 P.2d 17, an order refusing a wife temporary support (upon the ground that a foreign decree divorcing the husband from his former wife was invalid) was reversed for the reason that his conduct in participating in the foreign divorce proceeding and procuring the decree therein precluded him from collaterally attacking that decree. Accordingly, the wife's testimony that a marriage ceremony took place between her and the defendant, was sufficient proof of marriage and shifted the burden of proof to him, a burden he did not meet.

In *Carbone v. Superior Court*, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260, an order refusing to award temporary support and suit money in a paternity suit brought under section 196a of the Civil Code was reversed because the trial court erroneously refused to permit the plaintiff to introduce any evidence of paternity. The Supreme Court held that proof of parentage is jurisdictional, just as proof of marriage is jurisdictional in a similar proceeding in a divorce action under section 137, and that in either case the party seeking the order for support or costs must establish the jurisdictional fact by a preponderance of evidence, but that "the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues of the case and the order therefore does not determine those issues nor affect the final judgment." 18 Cal.2d at page 772, 117 P.2d at page 874.

In *Colbert v. Colbert*, 28 Cal.2d 276, 169 P.2d 633, the requirement of proof of the marriage (upon a motion to vacate a temporary alimony order, the same as upon an original application for such alimony) is stated in these words: "\* \* \* the evidence necessary to prove a marriage

need not be as complete and satisfactory upon an application for temporary support as that required at the time of trial, to prove a marriage which is disputed by one of the parties." 28 Cal.2d at page 280, 169 P.2d at page 635.

In *Baldwin v. Baldwin*, 28 Cal.2d 406, 170 P.2d 670, the wife appealed from a judgment against her in her action for divorce and the husband appealed from an order requiring him to pay her attorney's fees and costs on appeal. The judgment was based upon findings that a prior Nevada divorce decree, which she questioned on jurisdictional grounds, was valid. Both the judgment and the order were affirmed. In respect to the latter, the court said, 28 Cal.2d at pages 416 and 417, 170 P.2d at page 676: "In support of his first contention [that, following a Nevada decree, plaintiff was no longer his wife, and only a wife can be awarded suit money] defendant relies upon statements contained in *Hite v. Hite* (1899), 124 Cal. 389, 57 P. 227, 45 L.R.A. 793; *Carbone v. Superior Court* (1941), 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; and *Ex parte Cook* (1941), 42 Cal.App.2d 1, 3, 108 P.2d 46, to the effect that before alimony or suit money can be awarded, the person seeking it must prove 'existence of the marriage' with the other party to the proceeding. In the *Hite* and the *Cook* cases, however, it was the fact or the validity of the original marriage which was in dispute, and in the *Carbone* case the holdings of the *Hite* and the *Cook* cases were discussed by the court in considering the application of an illegitimate child to enforce support pendente lite from her alleged father. In none of the three cases was an issue presented as to the validity of a divorce decree secured by one party following an admitted marriage to the other. Here the marriage relationship admittedly existed at the time of, and continued for several weeks following, the filing by plaintiff of her divorce complaint in this state, and the chief defense offered by defendant to plaintiff's requests for relief is that he thereafter secured in another state a decree of divorce from her. It is our view that under such circumstances, and upon a proper showing otherwise, plaintiff should not be denied the payment from defendant

of funds to enable her to properly prosecute an appeal from the judgment determining the fact and effect of the Nevada decree. (Cf. *Fisher v. Superior Court* (1930), 110 Cal.App. 565, 567, 294 P. 445; *Stewart v. Stewart* (1939), 32 Cal.App.2d 148, 150, 89 P.2d 404.) It is now the law of this state that it is only after such an appeal has been finally determined (or the judgment of a California trial court adjudicating such issue has become final) that the validity or lack thereof of the Nevada decree and its effect—and consequently the marital status and reciprocal obligations of the parties in this state—can be conclusively settled. *Crouch v. Crouch* (1946), 28 Cal.2d at page 243, 169 P.2d 897.” 28 Cal.2d at pages 416 and 417, 170 P.2d at page 676.

In *Kopasz v. Kopasz*, 34 Cal.2d 423, 210 P.2d 846, appeals in a separate maintenance action were pending from a judgment in favor of the wife and from an order directing the appellant to pay her costs and counsel fees on appeal. She moved to stay the appeal pending his compliance with that order. He resisted on the ground that he was relying on a foreign decree of divorce. In granting the motion, the court said: “When a valid marriage has been admitted and the issue before the court is the validity of a foreign divorce decree, the trial court may in a proper case grant costs and attorney’s fees on appeal until the effect of the foreign decree has been finally determined by the courts of this state. *Baldwin v. Baldwin*, 28 Cal.2d 406, 417, 170 P.2d 670.” 34 Cal.2d at page 424, 210 P.2d at page 847.

In *Fisher v. Superior Court*, 110 Cal.App. 565, 294 P. 445, cited with approval in the *Baldwin* case, the court denied an application of the husband for a writ to prohibit the trial court from proceeding to enforce an order requiring him to pay the wife temporary support and counsel fees, in an action brought by her for separate maintenance and to vacate an interlocutory decree of divorce he had obtained in another action. She alleged that he obtained the interlocutory decree through extrinsic fraud practiced upon her and upon the court. The writ was refused upon the ground that

the trial court had jurisdiction to proceed. In that regard, the appellate court said: “It becomes a matter of fact for the [trial] court to determine, in the exercise of a sound judicial discretion, whether the petitioner was guilty of perpetrating the kind of fraud which authorizes the judgment to be declared void and of no effect.” 110 Cal.App. at page 567, 294 P. at page 446.

[7] In this state of the decisions it is difficult to formulate a precise rule as to the degree of proof of marriage required upon an application for temporary support in an action for divorce or for separate maintenance. It is clear that the evidence need not be as complete and satisfactory as at the time of trial. When, as here, a valid marriage is admitted and the issue is the validity of a foreign divorce decree, it appears that the trial court has a larger measure of discretion to grant the application than when the fact of the marriage itself is in issue.

[8, 9] The evidence received upon such a hearing must, of course, be competent unless its competency is waived by failure of the opposite party to interpose an appropriate objection. We mention this because upon the hearing below plaintiff’s counsel sought to elicit from her a statement of what her psychiatrist told her concerning her physical and mental condition at the time she signed certain documents. An objection that such testimony would be incompetent and irrelevant was sustained on both grounds. As hearsay, it was incompetent but not irrelevant. If not hearsay (if the psychiatrist were the witness, for example) it would be admissible.

Our discussion of the appeal from the order terminating the order for temporary support, counsel fees and costs applies with equal force to the appeal from the order denying plaintiff’s application for the cost of taking defendant’s deposition, which order should be reversed and the proceeding remanded for rehearing. Each of those orders appealed from is reversed.

[10] The order refusing to direct defendant to give his deposition is not appealable, although reviewable in an appropriate mandamus proceeding or upon appeal from

a final judgment. See *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 159 P.2d 944. The appeal from that order is dismissed.

Appellant is to recover costs on all the appeals.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.



109 Cal.App.2d 874

**LEEDS v. GRAY et al.**

No. 14922.

District Court of Appeal, First District,  
Division 1, California.

March 24, 1952.

As Modified April 21, 1952.

Hearing Denied May 22, 1952.

Mandamus proceeding to compel the Personnel Board to restore petitioner to his former position as referee of the Unemployment Insurance Appeals Board. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Bray, J., held, *inter alia*, that the evidence supported the finding that petitioner was unfit for such position.

Affirmed.

**1. Administrative Law and Procedure** ⇨793  
**Officers** ⇨72(2)

In proceeding before State Personnel Board to determine fitness of certain referee of Unemployment Insurance Appeals Board, the weight of the evidence was for the determination of the Personnel Board.

**2. Mandamus** ⇨173

There is no trial *de novo* in Superior Court in mandamus proceeding to compel State Personnel Board to restore petitioner to his former position from which such Board removed petitioner for unfitness.

**3. Mandamus** ⇨168(4)

In mandamus proceeding to compel State Personnel Board to restore petitioner to his former position as referee of Unemployment Insurance Appeals Board evidence supported finding that petitioner was unfit for such position.

**4. Administrative Law and Procedure** ⇨764  
**Officers** ⇨72(2)

Although certain charges against referee of Unemployment Insurance Appeals Board were general and possibly did not give such referee fair notice of details of time, place, names, etc., of instances relied upon to show his unfitness, such referee was not prejudiced thereby where, at hearing before Personnel Board to determine his fitness it was pointed out that such general charges were to be proved only by the proving of the specific charges and items which were set forth in detail in the accusation.

**5. Officers** ⇨72(1)

Modification upward by Personnel Board regarding items of report of performance of referee of Unemployment Insurance Appeals Board relating to quantity of work, work habits, initiative, and analytical ability, was not inconsistent with Personnel Board's finding that such referee was unfit for his position.

**6. Officers** ⇨72(1)

Neither the maintaining of "black book" by a superior of referee of Unemployment Insurance Appeals Board nor the writing of 43 corrective letters by such superior to such referee denied him a fair and full hearing as to his fitness before Personnel Board, even if such letters were not well based and their character was subject to criticism that they were a device to keep constant pressure on such referee.

**7. Officers** ⇨72(1)

Failure to "transfer" referee of Unemployment Insurance Appeals Board because of his civil service status, rather than bringing charges of unfitness against him, did not constitute unfairness at the trial on charges preferred.

**8. Officers** ⇨72(1)

Alleged fact that persons representing the Department of Unemployment made investigations of conduct of referee of Unemployment Insurance Appeals Board did not deprive such referee of a later fair hearing on charges of unfitness.

**9. Officers** ⇨72(1)

Unemployment Insurance Appeals Board referee was not entitled to inspect



records of conferences, *ex parte* hearings and investigations which allegedly occurred prior to filing of charges of unfitness against him before Personnel Board.

#### 10. Officers ⇨72(1)

Civil service employee, against whom charges of unfitness had been filed, was not entitled to go upon state property and to interview prospective witnesses on state time.

#### 11. Administrative Law and Procedure

⇨473

##### Officers ⇨72(1)

Although hearing officer made no findings or recommendation and Personnel Board heard no witnesses as to civil service employee's fitness for his position, such employee was not deprived of a full and fair hearing and Board order demoting such employee was valid. Const. art. 24, § 2; Government Code, §§ 11501, 11517; Government Code, §§ 19578, 19582, 19585.

#### 12. Administrative Law and Procedure

⇨473

The fact that a fact finding tribunal does not see or hear witnesses does not in every instance constitute a denial of a fair and full hearing, but such hearing is given where fact finder fully reviews record and an opportunity is given parties to argue their contentions as to credibility of witnesses and other matters involved in the proceeding.

#### 13. Administrative Law and Procedure

⇨744

##### Officers ⇨72(2)

Determination of facts by the Personnel Board are not subject to re-examination in Superior Court by trial *de novo*.

#### 14. Officers ⇨69.13

Where referee of Unemployment Insurance Appeal Board was unfit for his position, Personnel Board did not abuse its discretion in demoting such referee.

---

Norman Stiller, Harold Wattenberg, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Petitioner appeals from an order of the superior court denying his petition for a writ of mandate to compel the California State Personnel Board to restore him to his former position.

#### Questions Presented.

1. Sufficiency of evidence. 2. Did petitioner have a full and fair hearing before the board? 3. Where the hearing officer made no findings and the board heard no witnesses, is the board's order valid? 4. Is the punitive action excessive?

#### Record.

Petitioner was a referee of the Unemployment Insurance Appeals Board, Department of Employment. Charges were preferred against him before the State Personnel Board. Petitioner had a hearing before a hearing officer. However, no member of the board was present. The hearing officer made no findings, decision or recommendation. The Personnel Board reviewed the transcript of the proceedings and made certain findings in his favor and certain against him. It then ordered him demoted from his position to that of Employment Security Officer, Grade 2. Heard with these charges was petitioner's appeal from the factor ratings of his performance report. The Personnel Board adjusted his record upward in certain respects. Petitioner then applied to the superior court for a writ of mandate as above mentioned. The matter was heard on the transcript of the proceedings before the board and denied.

#### Charges and findings.

After a probationary period of six months during which he received good performance reports, petitioner acquired permanent status as referee. At the time the charges were filed his overall period of service in that capacity was approximately 15 months. (He had over 9 years service with State Civil Service.) His superior, Healy, had become dissatisfied with petitioner's work, kept a record in a book of his shortcomings, and had called a meeting of the reporters who had reported his hearings to discuss his behavior in them. Healy

then caused charges to be filed against petitioner.

The charges which the board found to be true follow: Generally, incompetency, inefficiency, inexcusable neglect of duty, physical or mental disability, insubordination, discourteous treatment of the public or other employees and other failure of good behavior or acts which are incompatible with or inimical to the public service; that his temperament, personality and disposition are such that as referee, he was rude, intolerant, argumentative, brusque, discourteous easily annoyed and is now unable to consistently conduct hearings in a judicial, impartial, objective, dispassionate, calm, fair and courteous manner. Specifically he conducted certain named hearings in a rude, unfair, discourteous and insulting manner, frequently ridiculed the claimants, causing them to become excited and upset causing some to be reduced to tears, manifested his anger by raising his voice and getting red in the face.

1. Sufficiency of the evidence.

[1-3] Petitioner attacks the sufficiency of the evidence from many corners. He contends that his superior, Healy, became angry at him because one day in his absence petitioner took from Healy's desk a box of candy which he intended to replace, and from then on Healy started to build up a case against him and for that purpose kept entries in a black book; that the 43 letters written by Healy to him before the charges were brought, and which appear to be attempting to correct his conduct, were intended to upset him and to enable a case to be built against him. Again, he attacks the credibility of the witnesses against him: the claimants were all persons of whose claims he had recommended denials; the department reporters who testified against him were "very much alike, ostentatious, pompous, definite and enjoying the cynosure of being a witness." Petitioner points out that his testimony and that of witnesses called in his behalf was contrary to that of the witnesses called against him. All these and the many other criticisms of the evidence against him were matters affecting the weight of the evidence and for the determination of the

board. (There is no trial de novo in the superior court in this character of proceeding.) It would serve no purpose to detail the evidence concerning the charges which the board found true. Suffice it to say that there is ample evidence to support their findings. This is true, even though, as claimed, approximately two-thirds of the transcript of the evidence before the board contains evidence concerning charges on which the board found in favor of petitioner. Actually, the most damning evidence against petitioner is the transcripts of various hearings he conducted, which definitely show that because of lack of a judicial, impartial, objective temperament and a fair and courteous manner, he is unfit to be a referee.

[4] Petitioner contends that the general charges above mentioned were too general and did not give him a fair notice of details of time, place, names, etc. Possibly this contention has merit. However, at the hearing it was pointed out that these charges were to be proved only by the proving of the specific charges and items which were set forth in detail in the accusation. Actually they are not independent of those charges and items and are merely conclusions as to the manner in which the specified hearings were conducted, and petitioner's conduct therein. We fail to see how petitioner is injured by what is at most a general summing up of his conduct and manner in the particular hearings.

[5] Petitioner contends that the modification upward by the board in some respects of his "Report of Performance" is inconsistent with their findings against him on certain charges. The original report was made by his superior, Healy. With the exception of "quality of work" which was rated "Improvement needed to reach standard" it rated all other "Performance Factors" as "Unacceptable." The board changed these factor ratings as follows: "Quantity of Work," "Work Habits," "Initiative," from "Unacceptable" to "Improvement needed;" "Analytical Ability" from "Unacceptable" to "Standard Outstanding." They left "Relationships with People," "Dependability" and "Overall Rating" "Unacceptable," and "Quality of

Work," "Improvement needed." Obviously this change of rating is in nowise inconsistent with their finding that he was unfit to act as a referee. In fact it supports such conclusion.

## 2. Fair hearing.

[6-10] Petitioner contends that he was denied a fair and full hearing, first, because the pattern of action followed by the department prior to trial hampered and prejudiced his defense. (a) The maintaining of a "black book" by Healy, setting forth petitioner's derelictions, constitutes an unfair means of supervisory control. Merely to state this contention shows its absurdity. (b) The 43 corrective letters written petitioner by Healy were "a device to keep constant pressure" on petitioner. Even though the board found untrue Healy's charges that petitioner was incompetent and inefficient, we find no reason why the head of a department may not write letters to his subordinates criticizing their conduct. Even if the letters were not well based and their character was subject to the criticism which defendant makes of them, that fact would not affect the fairness of the hearing where the question was the proof of specific charges. (c) Petitioner contends that because of his civil service status charges should not have been brought against him. Petitioner should have been given "a transfer" or Healy should have endeavored to correct petitioner's deficiencies. The latter was what Healy claimed he was trying to do by the letters, and their purport supports that contention. It would appear that a superior who writes 43 corrective letters to a subordinate before preferring charges is not overly anxious to prefer them. Just what is meant by "a transfer" does not appear, but we know of no requirement that the failure to give "a transfer" constitutes unfairness at a trial on charges preferred. (d) Healy, prior to bringing charges, conferred with reporters who had reported hearings wherein petitioner was referee, asking them how petitioner conducted those hearings. It is contended that persons representing the department made investigations of petitioner's conduct. How these deprived petitioner of a later fair hearing we fail to understand. (e) Petitioner con-

tends that he should have been permitted to inspect the records of the conferences, ex parte hearings and investigations, which he claims occurred prior to the filing of charges against him, the request for which was denied. We know of no requirement that these matters be submitted to him. (f) Petitioner requested permission to interview certain department employees who might be prospective witnesses for either side *on state time*. He was informed that he would not be permitted so to do either on state time or state property. We know, and have been cited to, no requirement that a civil service employee against whom charges have been filed, is entitled as a matter of law to go on state property and interview state employees at state expense.

## 3. The board did not see the witnesses.

The most serious question is based on petitioner's contention that "he who decides must hear" and thereby petitioner was denied due process. The hearing officer made no findings or recommendation. The board came to its determination from an examination of the proceedings before that officer, no member of the board having heard the testimony of the witnesses. The Morgan cases, *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 912, 80 L.Ed. 1088, and *Id.*, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, held that in order to constitute due process "the one who decides must hear." Is the rule of those cases applicable to administrative proceedings in this state? *California Shipbuilding Corp. v. Industrial Accident Commission*, 27 Cal.2d 536, 165 P.2d 669, certiorari denied 324 U.S. 843, 65 S.Ct. 675, 89 L.Ed. 1405, held that there had been no denial of due process where the commission denied a rehearing without reading the petition for rehearing or the transcript of the evidence, but based their denial on the referee's "report which briefly states the contentions of petitioner, the general facts (in the form of findings rather than a summary of the evidence) interspersed with his conclusions, and his recommendation that rehearing be denied." 27 Cal.2d at pages 543-544, 165 P.2d at page 673. In *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 246, 217 P.2d 630, 633, 18 A.L.R.2d 593, the court said: "If



the hearing is held before a hearing officer alone, the agency may adopt the officer's 'proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision' (Govt. Code, § 11517(b)), without reading the record (*Hohreiter v. Garrison* (1947), *supra*, 81 Cal.App.2d 384, 397, 184 P.2d 323); or may adopt a different decision 'upon the record, including the transcript, with or without taking additional evidence' (Govt. Code, § 11517(c)). It thus seems that the Legislature simply intends that an agency member who exercises his own independent judgment on the case, as distinguished from adopting a hearing officer's decision either in its entirety or with a reduced penalty, must be acquainted with the record but need not be physically present when the evidence is produced."

Article XXIV, section 2 of the Constitution provides for a State Personnel Board. "\* \* \* the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective." Thus the final determination of proceedings for demotion initiated by a particular agency is the duty of the board solely. Can the board perform this duty without seeing the witnesses, particularly where the hearing officer who did see the witnesses makes no report or recommendation? As pointed out heretofore, it was held in *California Shipbuilding Co. v. Industrial Accident Commission*, *supra*, 27 Cal.2d 536, 165 P.2d 669, that due process was not denied where the commission on application for rehearing, without reading the report or transcript of the evidence, adopted the recommendation of a referee who had not heard the evidence, but had acted merely on the written record. That court said: "There is nothing inconsistent in such procedure with the doctrine that 'he who decides must hear,' announced" in the *Morgan* cases. The situation in the *Cal. Shipbuilding* case, *supra*, differs somewhat from that in our case in that there

the commission had already acted in making its award and the proceedings now were for a rehearing. However, it is significant that so far as the rehearing was concerned, neither the referee who recommended nor the commission which acted, actually saw or heard the witnesses.

It is interesting to note the comment and recommendations of the Judicial Council concerning administrative procedure in its Tenth Biennial Report. It states (p. 23) that at first it concluded "that an initial decision should be made in all cases by the person or body which heard the evidence. This was an adaptation of the rule of the *Morgan* cases. \* \* \* It has never been clear whether the *Morgan* cases state a rule of due-process or merely involve the interpretation of a particular statute. Whether or not the *Morgan* cases actually impose restrictions upon State administrative agencies, however, the principle announced was thought sound. \* \* \* The tentative proposals of the Council, therefore, provided that the initial decision should be made by the agency if the agency members heard the case and by a hearing officer if he sat alone. \* \* \*

"The tentative Council proposal met with considerable objection upon the ground that the full power of decision should remain with the agency in each case. \* \* \*

"The proposals were modified considerably, therefore, with respect to the decision process. \* \* \* If the agency itself hears the case, it decides it. If a hearing officer alone hears the case he prepares a proposed decision in the form required for the final decision. The agency may adopt this proposed decision or it may reduce the penalty and adopt the balance. If the agency does not so adopt the proposed decision, it must furnish the parties with copies of the proposed decision and must allow them to argue either orally or by brief. It may then decide the case itself on the basis of the record before the hearing officer and the arguments. If new evidence is to be taken, the agency may hear it itself or it may assign the case to a hearing officer. He also prepares a proposed decision but this time the parties must be given a chance to argue to the agency before the agency decides.

"\* \* \* The result of the Council proposal is that, in fact, the decision is made in every case by someone familiar with the proceedings *and before whom an opportunity to argue the case is afforded*: the hearing officer if his decision is adopted; the agency itself if it does not adopt the proposed decision." (Emphasis added.)

It will be noted that it is suggested that if the agency does not adopt the decision proposed by the hearing officer it may make a new or different decision, provided only that the parties are given an opportunity to argue, either orally or by brief. This suggestion, coupled with the decision in *Cooper v. State Bd. of Medical Examiners*, supra, 35 Cal.2d 242, 217 P.2d 630, to the effect that a board member who has read only the transcript may participate in a decision, and also coupled with the ruling in the above-mentioned Cal. Shipbuilding case to the effect that on rehearing neither the referee nor the board need have heard the witnesses, indicates that the important matter, where the hearing officer has not made a recommendation, is that the persons affected be given an opportunity to *argue* before the agency which finally determines the matter. In our case the matter was submitted on briefs. In *Hohreiter v. Garrison*, 81 Cal.App.2d 384, 184 P.2d 323, a proceeding was brought to revoke an insurance agent's license. The hearing was had under the Administrative Procedure Act, and conducted by a hearing officer. He prepared and delivered to the Insurance Commissioner a proposed recommendation and decision. Without reading the record of the hearing the commissioner adopted his decision *in toto*. In holding that this procedure was proper, the court pointed out that section 11517 of the Government Code, which provides the "Method of decision in contested cases" under the Administrative Procedure Act, provides, in effect, that where the hearing officer proposes a decision or makes a recommendation and the board desires to overrule or reverse that decision, it is not necessary that any member of the board have seen the witnesses or heard them testify; it is sufficient if they examine the record and permit argument.

Cal.Rep. 241-242 P.2d-33

We can see no practical difference between a situation where the board, by an examination of the record and the permitting of argument, may disregard entirely the decision of the hearing officer who passes on the credibility of the witnesses, and one where in the same manner the board makes its determination without any prior opinion of the officer. It is neither reasonable nor logical to hold that the board can, by review of the record, disregard the officer's determination of the credibility of witnesses, but that it may not review such record where the hearing officer has not given his opinion.

[11] So far we have been discussing the case as if the Administrative Procedure Act applied to these proceedings. But it does not apply. As said in the Judicial Council's Tenth Biennial Report, page 29, "Thus, no attempt was made to cover preliminary investigatory proceedings, routine examination procedure, informal adjudications, or the formal adjudications of such agencies as the Industrial Accident Commission, the Railroad Commission, the State Personnel Board, the California Employment Stabilization Commission and many others." Neither the Department of Employment nor the State Personnel Board is one of the agencies which section 11501 of the Government Code includes as subject to the provisions of that act. The act under which petitioner was tried is the Civil Service Act. It then provided that the hearing be held by "the board or its duly authorized representative". (Gov.Code, § 19578.) "The board shall consider carefully the evidence submitted in the hearing and render a decision which in its judgment is just and proper." (Gov.Code, § 19582.) "Hearings may be held by the board, or any member or any authorized representative or referee *but the decision shall be rendered by the board after careful consideration of the evidence submitted in the hearing.*" (Gov.Code, § 19585.) (Emphasis added.) Section 19587 provides that rehearings, if granted, may be heard by the board "or its authorized representative." There is no requirement, as under the Administrative Procedure Act and the act providing for

hearings by the Industrial Accident Commission that the authorized representative make any findings or recommendation or proposed decision. Nor is there any requirement that the board see and hear the witnesses. Therefore, the situation is even stronger than in the Hohreiter case, supra, 81 Cal.App.2d 384, 184 P.2d 323, where it was held not to violate due process for the agency, without seeing or hearing the witnesses, to reverse the hearing officer merely from a review of the record.

[12] Petitioner, of course, was entitled to a fair and full hearing. The fact that a fact finding tribunal does not see or hear the witnesses does not in every instance constitute a denial of such hearing. For example, many court proceedings are determined upon affidavits. There the court neither sees nor hears the witnesses. A fair and full hearing is given where the fact finder fully reviews the record and an opportunity is given the parties to argue their contentions as to the credibility of the witnesses and the other matters involved in the proceeding. This was done in our case by briefs. It is true that no proposed findings or decision were submitted to the parties and no opportunity given to argue concerning them, but where the board itself is passing on the record, fully considers it and the arguments presented, on the merits, there is no requirement that the board permit further argument on its proposed findings and decision, and no logical reason therefor.

[13] Petitioner contends that the fact that the review permitted to the superior court in this case does not include a trial de novo,<sup>1</sup> requires, in order to constitute due process, that either the hearing officer should pass on the credibility of the witnesses or the board should hear them. We fail to find in any of the cases any distinction between the duties of the agencies or their representatives in cases where a trial de novo review in the superior court is permitted and one where it is not permitted.

The Industrial Accident Commission, involved in the Cal. Shipbuilding case, supra, is a constitutional agency which, like the Personnel Board, is not subject to the de novo trial method of review. The distinction urged by petitioner is one without a difference in effect. In *Bandini Estate Co. v. Los Angeles County*, 28 Cal.App.2d 224, 82 P.2d 185, it was held that the board of supervisors, sitting as a board of equalization, could not, *in view of constitutional and statutory requirements*, delegate the hearing of petitions for reduction of assessments to one member, is not in point. In our case, the Constitution provides only that the ultimate determination of demotions shall be the duty of the board by a vote of a majority of its members. The statute, as pointed out, authorizes the hearing to be conducted by "an authorized representative." Petitioner contends that in ruling on the admissibility of evidence, determining motions and in performing the other functions of a hearing officer, this representative was exercising powers which the Personnel Board had no right, under the Constitution, to delegate to him. No authority is cited for this proposition. The Constitution does not prohibit this action. Moreover, it did not constitute a delegation of the powers or authority of the board for the reason that the final action is that of the board, which on a review of the record either approves or disapproves of the rulings made by its representative.

4. Is the punitive action excessive?

[14] Petitioner contends that the board's action in demoting him as referee was too drastic, and asks that we send the matter back to the board to reconsider the penalty. The actions of the petitioner at the various hearings at which he was referee, as disclosed by the transcripts in evidence, along with the other evidence in the case, support the conclusion that petitioner is not temperamentally fit to act as referee. Such being the case, the board might have been derelict in its duty had it not demoted

1. The Personnel Board is a statewide agency, specifically given quasi-judicial or adjudicatory power by the Constitution. Hence, its determinations of fact are not subject to reexamination in a

superior court trial de novo. See *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545; *Boren v. State Personnel Board*, 37 Cal.2d 634, 234 P.2d 981.



him from that position. We fail to see any abuse of discretion here.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



110 Cal.App.2d 175

**VEYNA v. VEYNA.**

**Civ. 18726.**

District Court of Appeal, Second District,  
Division 2, California.

March 31, 1952.

Action by Margarito G. Veyna against Taddy Mesas Veyna for divorce wherein defendant filed a cross-complaint. From an order entered in the Superior Court of Los Angeles County, Mildred L. Lillie, J., allowing defendant temporary alimony, the plaintiff appealed. The District Court of Appeal, McComb, J., held that substantial evidence sustained finding that plaintiff was father of a child born to the defendant.

Affirmed.

**1. Divorce ☞291**

Existence of a child as result of a marriage need not be pleaded to give the court jurisdiction in divorce action to award its custody or to order payment for its support.

**2. Divorce ☞291**

In divorce action, the trial court has jurisdiction to make an award for support of the alleged child of the parties *pendente lite* though neither the complaint nor cross-complaint alleged the existence thereof as a result of a marriage of the parties.

**3. Divorce ☞307**

Substantial evidence sustained finding that plaintiff was father of a child born to the defendant as respects jurisdiction of a trial court to make an award for the support of the child in divorce action.

A. J. O'Connor and George J. Hider, Los Angeles, for appellant.

C. E. Clough, Visalia, and Richard M. Durall, Bellflower, for respondent.

McCOMB, Justice.

From an order allowing defendant temporary alimony for the benefit of herself and an alleged minor child, plaintiff appeals.

*Facts:* Plaintiff filed a complaint for divorce from defendant on September 21, 1949. April 28, 1950, he filed a supplemental complaint which differed only from the original complaint as to the date of separation of the parties. Both pleadings alleged there were no children of the parties.

On May 12, 1950, defendant filed an answer and also a cross-complaint in which she alleged "that there were no children of the parties." May 29, 1950, defendant filed an amended cross-complaint in which she alleged there were no children of her marriage to plaintiff.

February 13, 1951, defendant filed an application for an order to show cause why plaintiff should not be required to give her an allowance for the support of an alleged minor child of the parties which had been born to her. At the time of the hearing she introduced a birth certificate obtained in Mexico, in which plaintiff was named as the father of the child which she claimed had been born to her on October 6, 1950.

[1,2] The trial court allowed defendant alimony for the support of the child pending the trial of the divorce action.

*Questions:* First: *Did the trial court have jurisdiction to make the award for the support of the alleged child of the parties pendente lite since neither the complaint nor cross-complaint alleged the existence of a child as a result of the marriage of the parties?*

*Yes.* The existence of the child as a result of a marriage need not be pleaded to give the court jurisdiction to award its custody or to order payment of money for its support. (Cf. *Krog v. Krog*, 32 Cal.2d 812, 816 [1] et seq., 198 P.2d 510.)

[3] Second: *Was there substantial evidence to sustain the trial court's finding*

*that plaintiff was the father of the child which defendant testified was born to her October 6, 1950?*

*Yes.* Defendant's testimony that plaintiff was the father of the child and the birth certificate constituted substantial evidence to sustain the trial court's finding that plaintiff was for the purpose of the order the father of the baby to which defendant stated she had given birth. (*Arais v. Kalensnikoff*, 10 Cal.2d 428, 433 [3] et seq., 74 P.2d 1043, 115 A.L.R. 163; *Potasz v. Potasz*, 68 Cal.App.2d 20, 21 [1] et seq., 155 P.2d 895.) We must on appeal disregard contrary evidence.

It is to be noted that the trial court's finding was solely a tentative one for the purpose of awarding support money pending the trial of the divorce action. The final determination as to the paternity of the child must await the finding of the trial court predicated upon evidence to be introduced at the time of the trial, and this opinion is not to be construed as an indication that this court is of the view that plaintiff is the father of the child in question.

Affirmed.

MOORE, P. J., and FOX, J., concur.



110 Cal.App.2d 27

**In re COCHEMS' ESTATE.**

**COCHEMS et al. v. COCHEMS et al.**

**Civ. 18919.**

District Court of Appeal, Second District,  
Division 1, California.

March 25, 1952.

Proceeding in the matter of the estate of Annie Cochems, deceased, wherein a petition to determine the heirship of minors in the estate was filed by Paul Charles Cochems, and others, opposed by Walter Anthony Cochems, and others. The Superior Court, Los Angeles County, John Gee Clark, J., en-

tered a judgment decreeing that under terms of the will the two minors, along with their sister, were each entitled to only one dollar and petitioners appealed. The District Court of Appeal, Hanson, J. pro tem., held that where counsel for appellants inadvertently failed to file notice with clerk requesting a clerk's and reporter's transcript within ten days after the appeal was taken, but instead filed notice on the eleventh day, the court, in absence of showing of prejudice to respondents, would exercise its discretion by relieving appellants of default of their counsel.

Motion to dismiss denied.

### 1. Appeal and Error ⇨607(1)

Where counsel for minors, in proceeding to determine heirship of minors in decedent's estate, inadvertently failed to file notice with clerk requesting a clerk's and reporter's transcript within ten days after an appeal was taken, but instead filed notice on the 11th day, District Court of Appeal, in absence of showing of prejudice to respondents, would exercise its discretion by relieving minors of default of their counsel. Rules on Appeal, rules 5, 40(d), 53(b).

### 2. Infants ⇨77

A guardian ad litem does not act in his own behalf when he seeks to have it established that minors he represents are entitled to share in an estate, but acts strictly in minors' behalf and as a representative of the court.

### 3. Infants ⇨77

A guardian ad litem is not a party to an action, but merely the representative of record of a party.

### 4. Infants ⇨105, 115

A judgment may not be rendered for or against a guardian ad litem, but only for or against party he represents, and an appeal by guardian ad litem is ineffective unless it can be classed as being the appeal of a party represented by the guardian.

### 5. Infants ⇨115

Appeal from judgment in proceeding to determine heirship of minors in decedent's estate was not subject to dismissal on ground that appeal was taken in names of minors and not in name of guardian ad litem who represented minors in court below.

Nathan Kates and Gerald B. Tannen, San Fernando, for appellants.

C. C. Dillavou, Los Angeles, for respondents.

HANSON, Justice pro tem.

Respondents move to dismiss the appeal upon two grounds: (1) that the appeal is taken in the names of two minors and not in the name of the guardian *ad litem* who represented them below and (2) that the notice given to the clerk requesting a clerk's and reporter's transcript was not filed with the clerk within ten days after the appeal was taken, but instead on the eleventh day.

In the court below a petition to determine the heirship of the minors in the estate as above entitled was filed by Pauline Cochems as their guardian *ad litem* and upon the allegations thereof issue was joined. A trial having been had the court entered a judgment decreeing that under the terms of the will the two minors, along with their adult sister, were each entitled to only one dollar.

Thereupon counsel who represented the guardian *ad litem*—and through her the minor children—along with the latter's adult sister duly served and filed a notice of appeal. The notice signed by counsel recites that the minors and the adult sister appeal from the judgment rendered in favor of the coexecutors and against appellants. Within ten days after the appeal was filed counsel for appellants prepared and mailed to the clerk the notice above mentioned requesting the transcripts and likewise mailed a copy of such notice to counsel for respondent coexecutors. The notice, however, did not reach the clerk until the morning of the eleventh day after the notice of appeal had been taken whereupon he promptly filed it.

In response to the motion to dismiss counsel for appellants filed his affidavit stating that through inadvertence in computation he concluded he had until October 26, 1951, instead of October 25th to file with the clerk the notice he prepared and mailed on October 25, 1951. Upon the basis of this affidavit appellants pray they may be relieved for the failure of their counsel to

file the notice within the time limited by Rule 5 of the Rules on Appeal.

[1] It is true as respondents contend that Rule 5 expressly provides that any notice pertaining to the preparation of the record *shall* be served on the respondent and filed with the clerk within ten days after the filing of the notice of appeal and that by Rule 40(d) the word "shall" in Rule 5 is made mandatory. Nevertheless, Rule 53(b) provides that the "reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal." As there is no showing of prejudice to respondents, we have concluded that under the circumstances of this case, we should exercise our discretion by relieving appellants of the default.

[2-5] The further contention made by respondents that the appeal is taken in the name of the minors rather than in the name of the guardian *ad litem*, and hence, is ineffective is without merit. A guardian *ad litem* acts not in his own behalf when he seeks to have it established that the minors he represents are entitled to share in an estate, but strictly in their behalf and what is more as a representative of the court. *Cole v. Superior Court*, 63 Cal. 86, 89; *Serway v. Galentine*, 75 Cal.App.2d 86, 170 P.2d 32. A guardian *ad litem* is not a party to an action, but merely the representative of record of a party. As was said in *Emeric v. Alvarado*, 64 Cal. 529, 593, 2 P. 418, 459: "There is no change of parties by the appointment of the guardian *ad litem*. The guardian does not become a party. The infant is the party, and he only appears by the guardian. \* \* \* The guardian \* \* is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance." Accordingly, a judgment may not be rendered for or against a guardian *ad litem*, but only for or against the party he represents. Hence, an appeal by the guardian *ad litem* is ineffective unless it can be classed as being the appeal of a party represented by the guardian *ad litem*. 3 C.J., 1033, sec. 1012, 4 C.J.S., Appeal and Error,



§ 416. Moreover, contrary to the contention of the respondents the proceedings below were not conducted in the name of the guardian *ad litem*, but in the names of the minors as appears by the petition reciting "Comes now, Paul Charles Cochems, Jr., and Mary Martha Cochems, by their Guardian Ad Litem, Pauline Cochems \* \* \*."

The motion to dismiss is denied.

WHITE, P. J., and DORAN, J., concur.



110 Cal.App.2d 207

**HALLAIAN et al. v. COLLINS et al.**

Civ. 4360.

District Court of Appeal, Fourth District,  
California.

April 1, 1952.

Rehearing Denied April 24, 1952.

Hearing Denied May 29, 1952.

Leon M. Hallaian and another brought action against Herman L. Collins and another to fix and determine boundary line, and defendants filed a cross-complaint. The Superior Court of Fresno County, Milo Popovich, J., entered a judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding of Superior Court that boundary line was located as contended by plaintiffs.

Judgment affirmed.

### 1. Boundaries ⇐37(3)

In action to fix and determine boundary line between farm land of plaintiffs and adjacent land of defendants, evidence sustained finding of trial court that boundary line was located as contended by plaintiffs.

### 2. Boundaries ⇐54(4)

Where a survey was made by a proper official of the United States government and confirmed by the Department of the Interior, it is not open to challenge by a collateral attack in court in action to fix boundary line.

### 3. Boundaries ⇐8

Where section line between sections was boundary line in dispute, and northeast and southeast corners of section were established without question, section line was required to be ascertained by running a straight line between the two established corners.

C. W. Tackaberry, Reedley, for appellants.

Chester E. Shepard and John E. Shepard, Selma, for respondents.

MUSSELL, Justice.

This is an action brought to fix and determine the boundary line between farm land owned by plaintiffs in section 5 and adjacent land owned by defendants in section 4, all in township 15 south, range 23 east, M.D.B. & M. All property here involved lies north of the Kings River, which flows in an easterly direction across these sections. The section line between the sections is the boundary line in dispute. Plaintiffs and defendants claim their respective lands through instruments describing their property by reference to United States government township plats. A copy of the government plat of said township and the field notes of the government survey thereof in 1853 were introduced in evidence and relied on by the parties and it is from these documents that the location of the north and south section line between sections 4 and 5 must be determined.

The township plat shows that the section line involved is a straight line from the northeast corner of section 5 to the southeast corner thereof; that said line extends northward from the southeast corner of section 5 to the south bank of the Kings River and commences again on the north bank on a direct line between the northeast and southeast corners of said section. The uncontradicted evidence is that the northeast and southeast corners of section 5 were found and established by surveys made by both parties and are as shown on the township plat. It appears from this plat that the north section lines of sections

4 and 5 are each 80 chains in length; that the south section line of section 5 is 81.06 chains and that the south section line of section 4 is unmeasured as it crosses the Kings River. The southeast corner of section 5 was located on the ground by a surveyor who measured from the west line of township 15 easterly a distance of 82.32 and 81.06 chains, the given length of the south section lines of sections 5 and 6.

The contention of defendants is that the east and west lines of section 4 are parallel and that the southwest corner of the property claimed and owned by them is located at a point approximately 124 feet west of a straight line drawn by the northeast and southeast corners of section 5. This contention is without merit. The township plat shows that the east and west township lines of township 15 are not parallel, the north line being 480 chains in length and the south line 483.5 chains. All corners of sections 4 and 5 are fixed and the distances to the township lines are given. The distance from the west township line to the southeast corner of section 5 is 3.38 chains longer than the distance from said township line to the northeast corner of said section. Obviously, the east line and west line of section 4 are not parallel. Since defendants in their answer and cross-complaint described their property as being within section 4, as shown on the township map, there was no evidence upon which the trial court could base a finding that the property owned by them extended a distance of 124 feet into section 5.

The evidence shows that for many years a fence was maintained between the properties of the parties hereto and that such fence was approximately on the section line shown on the township map and was regarded by the parties and their predecessors in interest as the true boundary line between their properties. However, none of the parties to this action claim title by adverse possession and the only question involved is whether the evidence is sufficient to support the trial court's finding as to the true location of the disputed section line.

[1] The trial court found that the east boundary line of section 5 in township 15

south, range 23 east, N.D.B. & M. is a straight line running from the northeast corner of said section 5 to the southeast corner thereof, according to the United States government township plat and that the east boundary of plaintiffs' property runs to and is on the east boundary line of said section 5, according to the United States government township plats. These findings are amply supported by the evidence.

[2, 3] Where, as here, a survey was made by a proper official of the United States government and confirmed by the Department of the Interior, it is not open to challenge by a collateral attack in the courts. *Weaver v. Howatt*, 171 Cal. 302, 306, 152 P. 925. The northeast and southeast corners of section 5 having been established without question, the section line in dispute must be ascertained by running a straight line between the two established corners. *Chapman v. Polack*, 70 Cal. 487, 491, 11 P. 764.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



109 Cal.App.2d 903

HERNANDEZ v. HERNANDEZ.

Civ. 18648.

District Court of Appeal, Second District,  
Division 3, California.

March 24, 1952.

Rehearing Denied April 9, 1952.

Hearing Denied May 22, 1952.

Action by Sotero Hernandez against Refugio Hernandez to quiet title, wherein defendant filed a cross-complaint. The Superior Court, Los Angeles County, William S. Baird, J., rendered judgment for plaintiff, denied defendant's motion for a new trial and rendered an amended judgment for plaintiff and defendant appealed. The District Court of Appeal, Vickers, J. pro tem., held that the evidence supported the findings

that the plaintiff was the legal owner of the property and that defendant had no claim thereto as a joint tenant.

Amended judgment affirmed and appeals from original judgment and from orders denying defendant's motion for new trial and from other orders and rulings dismissed.

### 1. Appeal and Error ◌790(3)

Action of trial court in entering an amended judgment at time of denying motion for new trial in effect eliminated original judgment, and therefore appeal from the original judgment would be dismissed by the District Court of Appeal. Code Civ. Proc. § 662.

### 2. Joint Tenancy ◌3

In action to quiet title, evidence supported findings that plaintiff was the legal owner of the property and that defendant had no right in such property as a joint tenant.

### 3. Equity ◌39(1)

A court of equity, having once acquired jurisdiction, will adjust all differences between parties arising from cause of action in order to do complete justice and prevent further litigation, regardless of whether the particular relief was requested.

### 4. Quieting Title ◌50

In action to quiet title, complaint which prayed that defendant be required to set forth nature of his claim, that court determine such claim and declare that defendant had no estate in property, that defendant be enjoined and debarred from asserting any claim thereto, and for such further relief as court may seem fit, was sufficient to give court authority to order a cancellation of a joint tenancy deed which was first established during trial by defendant.

### 5. Evidence ◌213(1)

Offers of compromise and all negotiations in relation thereto are inadmissible in evidence.

### 6. Appeal and Error ◌1170(7)

#### Evidence ◌213(1)

#### Witnesses ◌330(1)

In action to quiet title, action of trial court in receiving in evidence an unexecuted compromise agreement and in permitting counsel for plaintiff to question de-

fendant and his witness in relation thereto for the asserted purpose of showing the credibility of the witness, was error, but was of such slight importance as not to justify a reversal of judgment. Const. art. 6, § 4½.

Jacque Boyle, Los Angeles, for appellant.

A. Moresby White, Los Angeles, for respondent.

VICKERS, Justice pro tem.

The plaintiff (respondent herein) filed this action to quiet title against his son, the defendant (appellant herein). The defendant filed an answer and cross-complaint. By the answer the defendant denied the allegations of the complaint and alleged as a separate defense that he and the plaintiff were the owners of the property in question as joint tenants and that the possession of the plaintiff and the payment by him of taxes and assessments had been pursuant to the joint tenancy and not under a claim hostile to defendant's rights. By the amendment to his answer the defendant alleged that on or about January 24, 1944, the parties had entered into an agreement to purchase the property in question as joint owners; that pursuant to the agreement the defendant had advanced \$1,000 to the plaintiff and that the plaintiff had added an additional \$1,000 and had made the down payment upon the property with that \$2,000; that the parties had agreed that the payments on the trust deed, given to the seller of the property, would be made from the rents and profits received from the property and that such payments had been so made; further, that whatever right, title, interest or estate the plaintiff had in the property was held in trust for the defendant to the extent of a one-half interest.

By the first cause of action of his cross-complaint the defendant alleged that the parties were seized in fee as joint tenants of the property, that the plaintiff asserted an estate adverse to the defendant's estate and that the same was without any right whatsoever. By his second cause of action in the cross-complaint the defendant alleged that the plaintiff had collected and re-



ceived rents from the real estate in question as a joint tenant and that the defendant was entitled to an accounting therefor. By his answer to the cross-complaint the plaintiff denied each and all of the allegations thereof, pleaded statutes of limitations, alleged that the defendant was estopped from making any claim to the property, and alleged that the alleged right of the defendant as a joint tenant had been obtained by undue influence exercised upon the plaintiff by the defendant or his agent, the defendant's brother, Jose Hernandez.

[1] The trial court made its findings of fact and conclusions of law and signed its judgment in favor of plaintiff and the same were filed and entered. Defendant served and filed his notice of appeal therefrom and also served and filed his notice of motion for a new trial. At the time of denying the motion for new trial the court ordered the plaintiff to draw up a new judgment to conform to the findings. Thereafter amended findings of fact and conclusions of law and an amended judgment were signed by the trial court and were filed and entered. As stated by the defendant in his opening brief the amended findings contain some matters not in the original findings and the amended judgment and original judgment are essentially the same. It appears to have been done under the power conferred by Code of Civil Procedure, section 662, see *Estate of Coffin*, 44 Cal.App.2d 178, 180, 112 P.2d 34. No attack is made by the defendant on the procedure so followed. The effect of the court's action was to eliminate the original findings and judgment. The appeal from that judgment must therefore be dismissed.

By its amended findings the court found that the plaintiff had purchased the property on January 24, 1944, paying \$2,000 in cash and executing a \$4,000 promissory note and trust deed; that on January 15, 1945, the plaintiff had executed a deed of grant purporting to grant the property involved to the plaintiff and the defendant as joint tenants, but that the same was procured from the plaintiff by false and fraudulent representations then made to him by his son, Jose Hernandez, to the effect that said deed was necessary to protect the

rights of the plaintiff; that these representations were false and untrue, but were believed and relied upon by the plaintiff; that there was no consideration for the deed and that the same was made without the knowledge or consent of the defendant and the same was never delivered to him, and that in all of these matters the said Jose used undue influence upon the plaintiff. The court further found that the plaintiff had been in possession ever since January 24, 1944, had paid all monies due under the note and trust deed as well as all taxes and assessments and that he was the legal owner of said real estate. The court further found that the defendant had never been a joint tenant with the plaintiff in the real estate; that the plaintiff had not paid taxes and assessments on the property in pursuance of a joint tenancy with the defendant, and that the defendant had never made any claim upon the plaintiff, as to the property, until the filing of this action. The court further found that it was not true that the parties had entered into an agreement to purchase the property as joint owners or that the defendant had given the plaintiff \$1,000 to pay on the purchase price or that the parties had agreed that the payments under the trust deed would be made from the rents and profits.

By its amended judgment the court declared the plaintiff to be the legal owner of the property; that the joint tenancy deed was a cloud upon his title; that the same should be set aside and cancelled; and that the title of the plaintiff was forever quieted against all claims, etc., of the defendant. The defendant appeals "\* \* \* from the whole of said judgment \* \* \* from the Court's denial of defendant's motion for a new trial, and from all the orders and rulings of the trial court in the above entitled action."

It appears from the reporter's transcript that while 17 and 18 years old the defendant was gainfully employed and earned from \$31 to \$44 a week; that he retained \$10 per week of these earnings and deposited the rest with his mother. During this period defendant was living with his mother and the plaintiff and did not pay any board or room rent except such as may have been

deducted by the mother from his earnings. He testified that he thereafter entered the armed forces and at that time that his mother held \$800 of his money, which he was going to use to buy an automobile upon his return from the Service. On January 24, 1944, while the defendant was overseas the plaintiff entered into and consummated negotiations to purchase the property in question from one Rose Segale for \$6,000, making a down payment of \$2,000 and executing a note and trust deed for \$4,000. For some unexplained reason the deed executed by Mrs. Segale named David and Catherine Hernandez as the grantees. There is no evidence that they advanced any portion of the consideration and neither of them testified in this action. Mrs. Segale testified that the only person she dealt with in regard to the property, from the time of its purchase by the plaintiff to the date of the final payment, was the plaintiff. During the spring of 1944 defendant's mother died. On November 14, 1944, David and Catherine Hernandez deeded the property to the plaintiff.

On January 15, 1945, the plaintiff executed a joint tenancy deed of the property in favor of himself and the defendant. The plaintiff, who could neither talk, understand nor read English, said he signed this document not knowing what it was solely because his son Jose told him to do so. Jose testified that he took his father to the bank at the time the joint tenancy deed was executed; that it was done "Because we had some money invested in this property and I told my father, explained to him that he should be protected, and he agreed, and [interruption] \* \* \*." He also testified that it was to protect the defendant's interest. However, both he and the defendant testified that they had no communication with one another in regard to the matter until after defendant's discharge from the army and that defendant had never authorized Jose to represent him. Plaintiff testified that the \$2,000 down payment on the property was the product of his earnings and savings; that all of the subsequent payments were made by him from his own funds and that the defendant on no occasion gave him any money; further that the

defendant made no claim to having an interest in the property until shortly before the complaint was filed. The defendant admitted that he had had no conversations nor agreement with the plaintiff, about January, 1944, or any other time, for the purchase of the property by them jointly as alleged in his verified amendment to the answer.

[2] Defendant contends that the amended judgment is not supported by the findings in that the latter do not find the necessary facts to establish title to the property in plaintiff by adverse possession. Defendant misconceives the theory under which plaintiff prosecuted his action to quiet title. It is apparent from the record that plaintiff's title was not based upon adverse possession but was derived from his purchase of the property, the deed thereto from Mrs. Segale to David and Catherine Hernandez in January, 1944, and the deed from the latter to plaintiff in November, 1944.

Defendant also contends that the evidence does not support the findings. In addition to the evidence recited above there was considerable testimony received which cast doubt upon the defendant's claim that his mother held \$800 or any large sum belonging to him. There was also additional testimony which reflected upon the credibility of both the defendant and his principal witness Jose Hernandez. In any event there was substantial evidence to support the findings and we are therefor bound thereby. In this connection the defendant urges that it was not established that the property referred to during the trial as 653 Moulton Street, was the same property legally described in the complaint. It is apparent from a reading of the reporter's transcript that this was a fact conceded by all parties. Any lack of such proof as may have existed at the time of the denial of the motion for nonsuit was thereafter cured by the implied admission of the defendant.

[3, 4] Defendant also contends that the court was without authority to order a cancellation of the joint tenancy deed of January, 1945, because there was no reference thereto in the body of the complaint nor a prayer for such cancellation. The existence of this deed was first established dur-



ing the trial and by the defendant. While he alleged by his answer and cross-complaint that the parties were joint tenants he did not plead the existence of the deed. Both parties by their respective pleadings sought equitable relief of quiet title from the court. “\* \* \* a court of equity, having once acquired jurisdiction, will adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief was requested.” *Sears v. Rule*, 27 Cal.2d 131, 149, 163 P.2d 443, 452. It was the duty of the court to determine, insofar as it was able, the respective rights of the parties to the property, from the evidence received. The defendant having raised the issue of the effect of the deed cannot complain that the plaintiff by the evidence introduced made such defenses thereto as were available to him. Neither can he “\* \* \* permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded.” *Vaughn v. Jonas*, 31 Cal.2d 586, 605, 191 P.2d 432, 444. The court could not determine the respective rights of the parties in the property without determining the effect and validity of the deed. Having found that the deed was procured from the plaintiff by fraud and undue influence and that there was no consideration therefor from the defendant, the court properly ordered its cancellation. The prayer of the complaint was sufficient for this purpose since it prayed that the defendant be required to set forth the nature of his claim; that the court determine the same and declare that the defendant had no estate or interest in the property; that the defendant be enjoined and debarred from asserting any claim thereto; “And for such further relief as to the Court may seem fit.” See *Angus v. Craven*, 132 Cal. 691, 697, 698, 64 P. 1091. The defendant does not claim that he was taken by surprise or did not have an opportunity to offer all evidence available to him in regard to the effect and validity of the joint deed.

[5,6] The defendant further contends that the court erred in receiving in evidence over objection an unexecuted compromise

agreement and in permitting counsel for plaintiff to question the defendant and his witness Jose Hernandez in relation to it. Offers of compromise are inadmissible in evidence, *Dennis v. Belt*, 30 Cal. 247; *H. D. Taylor Co. v. J. H. Jonas & Sons*, 118 Cal.App. 208, 211, 4 P.2d 797, and the rule excludes all negotiations in relation thereto. *Boyes v. Evans*, 14 Cal.App.2d 472, 479, 58 P.2d 922. The trial court therefore committed error in receiving this evidence. However we do not believe under the circumstances here involved that the evidence received by reason of the error could reasonably have affected the result of the action. The error was of such slight importance as not to alone justify a reversal of the judgment. See *Earle v. DeBesa*, 109 Cal.App. 619, 621, 622, 293 P. 885. Before the evidence was received the court stated it was “\* \* \* only to show the credibility of the witness.” The unexecuted agreement provided for the payment of \$1,000 by the plaintiff to the defendant. The letter of transmittal from defendant's attorney to plaintiff's attorney did not indicate who initiated the negotiations and stated: “I believe it represents the agreement discussed by the parties.” The defendant testified he made the offer to his father. Thereupon he and plaintiff's counsel engaged in an argumentative discussion as to whether or not Jose Hernandez had made such an offer in the office of plaintiff's counsel. At the conclusion of this discussion the court said: “That is as far as you need to go on that. This is just to test his credibility, that's all.” Later plaintiff's counsel questioned the witness Jose Hernandez in regard to the proposed compromise. Defendant made no objection to these questions and did not move to strike the answers. The gist of the answers given by Jose was that he and the defendant went to the office of plaintiff's counsel at the latter's request, that neither defendant or Jose suggested the compromise and that it was plaintiff's counsel who made the suggestion. Plaintiff's counsel closed this portion of the examination by saying: “All right. If you say I did it, all right.” From an examination of the entire cause, including the evidence, we are of the opinion that



the error did not result in a miscarriage of justice. Therefore the judgment should not be set aside. Art. VI, sec. 4½, Constitution of California.

The appeal from the original judgment is dismissed. The order denying the motion for new trial and the other "orders and rulings" referred to in the Notice of Appeal are not appealable. The appeals therefrom are therefore dismissed. The amended judgment is affirmed.

WOOD, Acting P. J., and VALLÉE, J., concur.



110 Cal.App.2d 218

**PEOPLE v. CREWS.**

**Cr. 2768.**

District Court of Appeal, First District,  
Division 2, California.

April 2, 1952.

Defendant was convicted in the Superior Court of the State of California, in and for the City and County of San Francisco, William T. Sweigert, J., of the unlawful possession of heroin, and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported conviction.

Affirmed.

**1. Poisons ☞9**

Evidence supported finding of joint possession of heroin by husband and wife, as against husband's contention that wife had complete and exclusive possession and control. Health and Safety Codes, § 11500.

**2. Criminal Law ☞683(1), 1168(2), 1170½(5)  
Witnesses ☞274(1)**

In prosecution on charge of unlawful possession of heroin, prosecution's witness should not have been permitted to testify, in rebuttal of defendant's testimony, that defendant and his wife had been arrested at same place and charged with possession of narcotics about 11 months prior thereto, and denial of defendants' request to cross-examine witness to show that defendant

had either been acquitted or the charge had been dismissed was also improper, but the errors were not prejudicial, in view of fact that defendant's counsel got full story before jury through his questions and statements of facts in arguing propriety of inquiry with trial court. Health and Safety Codes, § 11500.

**3. Criminal Law ☞786(2), 1172(2)**

Quoted portion in instruction that jurors must take into consideration testimony of defendants "but are not bound by such testimony" was improper, but did not constitute prejudicial error.

Nathan C. Coghlan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy, for respondent.

NOURSE, Presiding Justice.

Harold and Ruth Crews, husband and wife, were tried and convicted of the unlawful possession of heroin in violation of section 11500 of the Health and Safety Code. Harold was sentenced to the state penitentiary and Ruth to the state institution for women. Harold alone appeals from the judgment and from the order denying his motion for a new trial.

Two police officers broke into the living quarters of the defendants at about 3:45 A.M. after they had failed to get a reply to their knocks on the door. Mrs. Crews ran to a window which she opened and then made a "tossing" motion of the hand which the officers interpreted as having been for the purpose of casting something out of the window. One of them went down to the street and found a bundle of heroin on the sidewalk. At the same time she screamed to her husband for help. Both officers were in regulation uniform. Mr. Crews was on the street in front of the building in and about his parked automobile. He followed the officer who found the drug back into the rooms of the defendants. In the presence of the defendants they searched the rooms and found two more bindles of heroin on the floor near a waste basket, two spoons blackened by fire, with cotton filters saturated with heroin, and a can of pow-

ered milk commonly used in taking heroin. One of the spoons was in a drawer of a bureau used by the husband and wife jointly; the other was lying in plain sight on top of the bureau.

[1] The evidence was sufficient to support the finding of joint possession of husband and wife. See *People v. Chan Chaun*, 41 Cal.App.2d 586, 107 P.2d 455; *People v. Wong Fun*, 39 Cal.App.2d 211, 102 P.2d 774; *People v. Physioc*, 86 Cal.App.2d 650, 195 P.2d 23. In his attack upon the verdict appellant founds his argument on his attempt to show that though he lived in constant association with his wife in a small three room abode he had no possession or control over the narcotics or paraphernalia found there in open sight, but that his wife had and exercised complete and exclusive possession and control. Unfortunately for him there were six married women and two spinsters on the jury who were not impressed with his contention.

[2] The prosecution put a witness on the stand, in rebuttal, who testified that about eleven months prior thereto the same parties were arrested at the same place charged with possession of narcotics. This defendant made timely objection and when his objection was overruled he sought to cross-examine the witness to show that he had either been acquitted or that the charge had been dismissed. He was denied this right. There was double error. The evidence was not rebuttal under any theory, but having been admitted the appellant should have been permitted to cross-examine the witness. However the error cannot be deemed prejudicial because appellant's counsel got the full story before the jury through his questions and statements of the facts in arguing the propriety of the inquiry with the court. See *People v. Rodriguez*, 58 Cal. App.2d 415, 136 P.2d 626.

The trial court correctly instructed the jury that "possession" within the meaning of the statute is "when knowingly the person has both physical control over the narcotic and the intent to exercise the right to such control." The following instruction covering the same question of "possession" was also proper: "The narcotic need not be actually carried or kept upon the person nor need the narcotic be in the immediate

presence of the person; if the narcotic is put, kept or left by a person at some place where it is so immediately and exclusively accessible to him as to be under his dominion and control, such person is in possession of a narcotic within the meaning of our law."

[3] Criticism is made of the portion of the instruction that the jurors must take into consideration the testimony of the defendants "but are not bound by such testimony." The portion of the instruction should have been omitted. The court should never point the finger to a particular witness and tell the jury how his testimony should be treated. However, the statement that the jury was not bound by the testimony of the defendants was a mere commonplace which every juror must have known. If this were not true no one could be convicted of a criminal offense if he took the witness stand and denied commission of the offense.

The record discloses a fair and impartial trial with no substantial error.

Judgment and order affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



110 Cal.App.2d 62

**KILSTROM v. BRONNENBERG et al.**

Civ. 18625.

District Court of Appeal, Second District,  
Division 1, California.

March 26, 1952.

Rehearing Denied April 14, 1952.

Hearing Denied May 22, 1952.

Valdene L. Kilstrom sued Rex A. Bronnemberg, as administrator of the estate of George Marion Fuller, deceased, and executor under the will of Jemima Fuller, deceased, and others, to recover money alleged to have been turned over by plaintiff to intestate in trust for plaintiff. From a judgment of the Superior Court of Los Angeles County, Paul Nourse, J., for defendants, plaintiff appealed. The District Court of Appeal,

Doran, J., held that the evidence supported the trial court's conclusions that the money rightly belonged to intestate, that plaintiff's delivery thereof to intestate as the proceeds of a sale of realty previously conveyed to plaintiff by intestate was not made with the understanding that the money was to be held by intestate in trust for plaintiff, and that intestate was not in possession of the money at the time of his death.

Judgment affirmed.

#### 1. Appeal and Error ⇨994(3), 1012(1)

The trier of facts is sole judge of weight of evidence and witnesses' credibility.

#### 2. Evidence ⇨588

A trial judge, sitting without jury, may accept as true any part of competent evidence before him and reject any part thereof as untrue or given in honest mistake.

#### 3. Evidence ⇨588

The weight and credibility of testimony is affected, not only by other directly contradictory evidence, but also by pertinent circumstances and witnesses' demeanor.

#### 4. Trusts ⇨372(3)

In daughter's action against administrator of her deceased father's estate to recover money alleged to have been turned over by plaintiff to intestate in trust as proceeds of sale of realty previously conveyed to plaintiff by intestate, mere fact that record title to realty was in plaintiff's name did not preclude court from believing that beneficial interest remained in intestate, especially where similar dealings were had by him in plaintiff's name on other occasions and he retained rental income of property and handled all details of sale and proceeds of sale thereof.

#### 5. Executors and Administrators ⇨451(4)

Whether intestate had possession of money, claimed to have been turned over to him by his daughter to hold in trust for her, at time of his death, was immaterial in daughter's action to recover money from administrator of intestate's estate, in view of trial court's findings, supported by evidence, as to intestate's ownership of money.

#### 6. Executors and Administrators ⇨450 Trusts ⇨372(3)

In daughter's action against administrator of her deceased father's estate to recover money alleged to have been turned over to father by plaintiff in trust for her as proceeds of sale of realty previously conveyed to her by father, evidence supported trial court's conclusions that money rightly belonged to father, that it was not delivered to him with understanding that it was to be held in trust for plaintiff, that beneficial interest in realty remained in father, and that he was not in possession of money at time of his death.

#### 7. Appeal and Error ⇨1010(1)

A reviewing court cannot disturb trial court's fact findings, supported by evidence, and judgment thereon.

Oscar M. Gipson, David P. Hatch, Los Angeles, for appellant.

Fred W. Chase, Glendale, for respondents.

DORAN, Justice.

The appellant's brief states that "on or about March 13, 1948, plaintiff turned over to her father (George Marion Fuller) money belonging to her amounting to \$7,193.30 in cash on the understanding between them that he was to hold it in trust for her pending the investment thereof. \* \* \* before it was invested he died intestate on April 5, 1948, possessed with the money".

It is also claimed that "the money has been turned over to or has come into the possession of Jemima Fuller", George Fuller's widow, who died in March, 1950. The respondent Bronnenberg, Mrs. Fuller's son, is administrator of Mr. Fuller's estate, and executor under the will of Jemima Fuller. Appellant's claim for the money was rejected in the George Fuller estate; no claim was filed in the estate of Jemima Fuller.

Respondents admit that Mr. Fuller received the money in question but claim that the money rightly belonged not to the



daughter but to the father. The trial court sustained respondents' contentions and concluded that the appellant daughter was entitled to take nothing.

The record discloses that in August, 1947, George Marion Fuller conveyed to appellant daughter certain property in Long Beach. In March, 1948 the property was sold for \$7,193.30, and paid for by an escrow check made out to the daughter, Valdene Kilstrom. The father and daughter took this check to the drawee bank and received \$500 in cash on account, which sum was immediately turned over by Valdene to Mr. Fuller. Appellant now claims that this \$500 was by way of a gift to the father. The balance of the purchase price, received shortly thereafter, was likewise at once delivered by Valdene to Mr. Fuller, who, appellant claims, was to hold the money as a trustee pending a purposed purchase of Oregon property by appellant.

There was evidence that on other occasions Mr. Fuller had transferred property into the daughter's name and that the latter had signed papers in connection therewith without claiming any interest in such property, and without being fully informed as to the facts. Evidence was also introduced to show that the father continued to collect rent from the Long Beach property after transferring title to the appellant; that no gift tax return in reference thereto was filed, and that no report of the sale was made in appellant's income tax report.

Rex Bronnenberg, administrator, testified that Mr. Fuller left no assets; that Bronnenberg, a broker, handled the sale of the property for Mr. Fuller, and that aside from acknowledging Valdene's deed as a notary, no conversation was had with the daughter concerning the sale. Bronnenberg also stated that after Fuller's death, Jemima Fuller "told me that Mr. Fuller had given her the money he got from his property at Long Beach".

One of appellant's main contentions is that the trial court "erred in disregarding certain uncontradicted testimony", namely, that of plaintiff and plaintiff's husband, to the effect that proceeds of the Long Beach sale were delivered to George Marion Ful-

ler with the understanding "that the money was to be held in trust by him for her use and benefit". The trial court's findings were to the contrary. In this connection appellant argues that "the deed from Fuller to his daughter establishes conclusively as a matter of law that the property and money belonged to plaintiff, and the findings to the contrary are not supported by evidence and are against law".

[1-3] As said in *Foshee v. Wolters*, 86 Cal.App.2d 766, 770, 195 P.2d 930, 932: "That the trier of fact is the sole judge of the weight of the evidence and the credibility of the witnesses is too well established to need citation of authority. The trial judge sitting without a jury may accept as true any part of the competent evidence before him and may reject any part of it as either untrue or given in honest mistake." That the weight and credibility of testimony is affected not only by other evidence which is directly contradictory, but also by pertinent circumstances and the demeanor of witnesses, is well known. Such seems to have been the situation in the instant case.

The trial court set forth specific reasons for disregarding plaintiff's evidence, as follows: "The evidence, to say the least, that was offered by the plaintiff was not convincing. As to the testimony that she turned over the \$7,193.30 to her father I have no doubt. That it was her money, I have grave doubt. Everything in her actions as well as those of her husband point to the fact that claim on that money was an after-thought, and that the thought came considerably after death".

Referring to the presumption of Section 1963(7) of the Code of Civil Procedure, "That money paid by one to another was due to the latter", the trial court further said: "And she did not treat it (the money) as hers. She delivered it to him because it was due to him. The whole manner in which the sale was handled and the fact that the \$500 which she got in escrow was immediately turned over to her father, well, everything shows just what I found, that the money paid to him was due to him. And that is the presumption laid down by Subdivision 7 of 1963. \* \* \* Of course, if the recital in the deed that the

property was her separate property is conclusive, then my finding on that is error".

Appellant's brief lays considerable stress on the fact that Mr. Fuller had conveyed the property to appellant, claiming that the deed "is conclusive in its effect and cannot be limited in its operation as to the estate conveyed, by oral evidence", citing *Hebert v. Miller*, 94 Cal.App.2d 211, 210 P.2d 251. A reading of the *Hebert* case, however, discloses little similarity to the present situation.

[4] As noted by respondents, "It must be remembered that we are not in this action trying the title to the real property". And as further stated in respondents' brief, "The mere fact that record title was in the name of the daughter does not preclude the court from believing that the beneficial interest remained in the father as between the two of them, especially in view of the fact that on other occasions similar dealings were had in the name of the daughter, and further in view of the fact that the father here retained the rental income and handled all details of the sale and proceeds of the sale, even down to the last 30 cents".

[5] It is also claimed that the "Finding that Fuller was not in possession of the money at the time of his death is not supported by evidence and is against law". Rex Bronnenberg, however, "testified directly that as administrator of the Estate of Mr. Fuller, he found no money among his effects". Moreover, as respondents state, "whether or not he had it in his possession at the time of his death would be immaterial as appellant's claim is defeated by the finding as to the ownership of the money".

[6, 7] The entire record discloses that the trial judge, confronted with questions of credibility of witnesses and weight of evidence, elected to disbelieve appellant's version of the transaction. Such, indeed is the peculiar function of a trial court. In view of the evidence which was before that court, reasonable inferences to be drawn from the various circumstances connected with the sale, and previous transactions between father and daughter, the conclusions reached by the trial court cannot

be deemed unsupported. Under such circumstances it is not within the province of a reviewing court to disturb the findings and judgment. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 67

**BLOCK et al. v. BOARD OF POLICE COMMISSIONERS OF CITY OF LOS ANGELES et al.**

Civ. 18521.

District Court of Appeal, Second District,  
Division 2, California.

March 26, 1952.

Rehearing Denied April 15, 1952.

Hearing Denied May 22, 1952.

Application for writ of mandate to annul action of Board of Police Commissioners of the City of Los Angeles revoking petitioners' junk dealer's permit. The Superior Court of Los Angeles County, William S. Baird, J., denied petition and petitioners appealed. The District Court of Appeal, Fox, J., held that failure of petitioners to report purchase of used lead to police department as required by Municipal Code was sufficient to give the Board of Police Commissioners power to revoke and suspend their junk dealer's permit.

Affirmed.

**I. Constitutional Law** ⇨275(1)

**Licenses** ⇨38

Where junk dealers admitted that they had failed to report to the police purchase of used lead as required by Municipal Code, which fixed the penalty for such failure at revocation of permit of junk dealers, failure of the Board of Police Commissioners hearing charges against dealers to fully read and consider dealers' affidavits in which dealers denied attempted bribery of police or that they had suggested to seller that a higher price would be paid for the lead melted down, as testified by witnesses appearing before Board, was

immaterial in determining the penalty for the junk dealers' admitted violation, and hence such failure did not deprive dealers whose permit was revoked by Board of a fair hearing before the Board and did not constitute a denial of due process.

## 2. Licenses $\S$ 38

Where city in exercise of its police power determined that junk dealers' business required constant police supervision since such business furnished market where thieves frequently sought to turn into cash their ill-gotten plunder and enacted ordinance providing for revocation of permit of dealer for failure of dealer to report purchase of used lead to the police department, such failure was not a mere technical matter not justifying revocation of permit.

## 3. Licenses $\S$ 38

The credibility of the witnesses and the weight to be given evidence were matters for the determination of Board of Police Commissioners in proceedings to show cause why junk dealers' permit should not be revoked on ground that junk dealers had failed to report purchase of used lead to the police department as required by Municipal Code.

## 4. Constitutional Law $\S$ 230(2)

Where it was stipulated at outset of the trial that in all proceedings for revocation of junk dealers' permits because of failure to report purchases of used materials to police as required by municipal ordinance the property involved was allegedly stolen, junk dealers who admitted not reporting purchase of used lead to the police and who had their permit revoked by Board of Police Commissioners were not in position to contend they had been discriminated against or denied equal protection of the law on the theory that Board took no action against permittees who failed to report unless the property purchased was claimed to have been stolen.

---

Wood, Crump, Rogers, Arndt & Evans  
and Morris W. Young, Los Angeles, for  
appellants.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Philip E. Grey, Deputy City Atty., Los Angeles, for respondents.

FOX, Justice.

In this mandate proceeding petitioners seek to annul the action of the Board of Police Commissioners of the City of Los Angeles revoking their junk dealer's permit, which authorized them to carry on the scrap metal business. The trial court denied them any relief. They appeal from that judgment.

On June 12, 1950, the Board cited petitioners to show cause why said permit should not be revoked upon the ground that they had violated the provisions of section 24.01(g)(1)(2)(3) of the Los Angeles Municipal Code by reason of their alleged wilful and unlawful failure to report to the police department, as required by said section of the Municipal Code, the purchase of 1,100 pounds of lead from one Ahrens, a Chief Petty Officer of the Navy. The material was alleged in the order to show cause to have been stolen from the Naval Base on Terminal Island. It was further alleged that as a consequence of said theft the navy officer had been held for court-martial by the naval authorities.

Hearings were held by the Board on June 21, July 19, September 27 and October 4, all in 1950. At these hearings it was developed that Ahrens came into petitioners' place of business in a navy truck and that he was dressed in the navy fatigue uniform. Mr. Block, one of petitioners, told the Board that he asked Ahrens if the lead was stolen and was advised by him that it was not; that "he got it from a blacksmith shop of surplus material; \* \* \* from a blacksmith shop in the navy." The officer, however, testified that Ahrens admitted the theft. Ahrens used the name "Gray" in this transaction with petitioners. He did not furnish any identification. Mr. Block further stated to the Board that Mr. Whitney, an investigator for the office of the United States Naval Intelligence, "asked me if I would return the lead to the Navy. I said 'Yes' and we returned the



lead." It was stipulated that although Ahrens was ordered to stand trial before the United States Navy general court-martial at San Diego on certain charges, nevertheless the specifications involving this lead were voluntarily withdrawn and no prosecution on account of said specifications was conducted.

There was testimony before the Board that petitioners had suggested to Ahrens that if the lead were melted down a higher price would be paid for it; also, testimony of an alleged bribery attempt of the police officers by one of them.

Affidavits were filed by petitioners denying both charges. However, the "Board did not read or consider all of said affidavits and the evidence therein set forth before making its order of revocation."

Petitioners admit that they did not make any report of the purchase of said lead to the Los Angeles Police Department as required by the Municipal Code.

Petitioners contend that they did not have a fair hearing before the Board; that they were denied due process of law; that the Board acted arbitrarily in revoking their permit, and that the Board discriminated against them and thereby denied them the equal protection of the law.

Petitioners base their charge of an unfair hearing on the part of the Board and lack of due process on the failure of the Board to fully read and consider the affidavits which they filed denying the alleged suggestion to Ahrens that if the lead were melted down a higher price would be paid therefor and the alleged attempted bribery. It is obvious that the failure to read these affidavits could not prejudice petitioners' position with respect to the charge that they had failed to report the purchase of the lead to the police department, as required by the Municipal Code. They repeatedly admitted such failure. They claim, however, that the failure to read and consider these affidavits operated to their prejudice in the determination of the penalty, namely: that their permit should be revoked. This argument is based on sections 24.01(f) and 24.01(f)(1) which read:

"(f) Revocation of Permits. Any permit issued under the provisions of this Section may be revoked or suspended upon the grounds provided for in this Section:

"(1) Grounds. If persons holding permits under the provisions of this Section shall violate any of the provisions of this Section or any provision of any other ordinance, or any law relating to or regulating any such business, or shall conduct or carry on such business in an unlawful manner, the Board, in addition to any other penalties provided by this Code, shall revoke such permit issued to such person; \* \* \*." They contend that the Board was not required to revoke their permit upon their admitted violation of the section and argued to the Board that they should only be subject to a reprimand. They point out that under subdivision (f) the Board is granted discretion to revoke or suspend upon the grounds specified in the section, and that subparagraph (1), which states the grounds, provides only for revocation for violation of any of the provisions of the section; hence there are no stated grounds for suspension of a permit, with the result that the words "may be revoked or suspended" in subdivision (f) have no meaning or application. They further point out that some meaning should be given to each word or phrase in an ordinance and that this purpose can be accomplished by construing the penalty provision in subparagraph (1) as discretionary rather than mandatory.

[1] The complete answer to this argument is found in the further reading of said section 24.01. Subsection (p), subparagraph (1) provides that "In all cases where a claim is made to property \* \* \* sold to a person holding a permit issued pursuant to this section, by a person claiming to be the owner thereof and asserting that the property was stolen, the Board shall, after a hearing upon notice, determine the validity of such claim and the immediate disposition which should be made as to the possession of the claimed property, \* \* \*." Subparagraph 2 provides that "If the Board shall determine that such property was

stolen, that the claimant is the owner thereof, and that there is no collusion between the claimant and the person by whom such property was stolen, the Board shall direct that such property be returned forthwith to the claimant without compensation" to him. Subparagraph 3 provides that in the event such direction to return the property to the rightful owner is disobeyed by the permittee the permit under which the party is conducting his business "may be revoked or suspended" by the Board. It is thus apparent that this provision authorizes the exercise of discretion by the Board in the particular situation. Meaning is thus given to the words "may be revoked or suspended" found in subdivision (f). The section first gives the general power to the Board to revoke or suspend a permit for designated misconduct. It then expressly provides for revocation for certain offenses which include failure to report to the police purchases such as here involved, and for suspension or revocation if a permittee refuses to return property to the rightful owner. The language of the section is clear. There is no problem of construction. The section must be understood to mean exactly what it says. Consequently, when it was established by petitioners' admissions that they had violated the section by failing to make the required report to the police department, the penalty of revocation of their permit necessarily followed. So the denials of petitioners in their affidavits, that they were guilty of attempted bribery or that any of them had suggested that if the lead were melted down a higher price would be paid therefor, would be wholly immaterial in determining the penalty for their admitted violation because the Municipal Code fixes the penalty at revocation.

[2] Petitioners contend the order revoking their permit must be annulled because it was "based upon both a technical violation and the erroneous belief that the lead was stolen." The failure to report purchases of used material to the police department as required by the ordinance is not just a technical matter. The city in the exercise of its police power had determined that the class of business in which

petitioners were engaged "is one which requires constant police supervision" since such business furnishes "a market where thieves frequently seek to turn into cash their ill-gotten plunder." *Co-operative Junk Co. v. Police Com'rs*, 38 Cal.App. 676, 679, 177 P. 308. The seriousness with which such failure to report is regarded is indicated by the fact that the ordinance provides not only for the revocation of the permit but that a new permit may not be issued for six months.

[3] Although the Board made no express finding that the lead had been stolen such a "belief" would not necessarily have been "erroneous." Sargeant Waterman was asked by Mr. Young: "Did he (Ahrens) tell you he stole the material? A. Yes." It is true that Sargeant Waterman testified that this was his interpretation "of what Mr. Ahrens said or wrote." However, Ahrens' written statement, which was supposed to cover what he had stated orally, did not contain a specific admission of the theft of this lead. It is also significant in this connection that Ahrens used the name of Gray in making the sale to petitioners. There does not appear to be any reason for his using a fictitious name if he had acquired the lead honestly. This circumstance would justify an inference that it had been stolen. Furthermore, after the officers questioned petitioners regarding the purchase of the lead they returned it to the Navy. This conduct justifies an inference that petitioners came to the conclusion that Ahrens did not have a legal right to dispose of it. The credibility of the witnesses and the weight to be given the evidence were matters for the determination of the Board. *Southern Calif. Jockey Club v. Calif. etc. Racing Bd.*, 36 Cal.2d 167, 177, 223 P.2d 1. It is thus apparent that if the Board did believe the lead was stolen, such belief would not be without substantial support.

[4] Petitioners further contend that the Board discriminated against them and denied them the equal protection of the law. They base this contention on the theory that the Board takes no action against permittees who fail to report unless the property purchased is claimed to be stolen.

Petitioners are in no position to raise this proposition. At the outset of the trial it was stipulated that "In all proceedings since August 25, 1948, (the date of petitioners' permit) for the revocation of permits under section 24.01 of the Los Angeles Municipal Code, for the failure to report transactions, as required in said section, the property involved was allegedly stolen property." From the foregoing discussion it is plain that petitioners' case comes squarely within the policy and practice of the Board, and that the manner of their treatment was not different from that of others similarly involved.

Petitioners also point out certain alleged irregularities in the proceeding before the Board. None of these could possibly justify a reversal in view of petitioners' admissions and the express provisions of the ordinance.

From an examination of the entire record it is clear that petitioners had a fair hearing before the Board and the trial court and that there is substantial evidence to support the findings essential to sustain the order and judgment.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.



109 Cal.App.2d 888

**CROCKER FIRST NAT. BANK OF SAN FRANCISCO v. CENTRAL AUTOMOTIVE MAINTENANCE CO. et al.**

Civ. 15262.

District Court of Appeal, First District,  
Division 2, California.

March 24, 1952.

Rehearing Denied April 23, 1952.

Hearing Denied May 22, 1952.

Action by Crocker First National Bank of San Francisco, a national banking association, against Central Automotive Maintenance Company and others. The Superior

Court, City and County of San Francisco, George W. Schonfeld, J., rendered judgment in favor of plaintiff, and defendants appealed. Plaintiff moved to dismiss the appeal for failure to secure preparation of any record on appeal, and defendants moved to be relieved from default. The District Court of Appeal, Dooling, J., held that there was a disputable presumption that the clerk's letter, informing one of the appellants that his personal check for the estimated cost of the clerk's and reporter's transcripts had been returned by the drawee bank, had been received by such appellant, since the letter had been addressed and mailed to such appellant at the place where he resided, and held that in the absence of a showing that such letter had not been received the court would be justified in accepting the presumption.

Motion for relief from default denied and motion to dismiss appeal granted.

#### Evidence ¶71

There was disputable presumption that clerk's letter informing one of appellants that his personal check for estimated cost of clerk's and reporter's transcripts had been returned by drawee bank, had been received by such appellant, where such letter was addressed and mailed to such appellant at place where he resided; and in absence of showing that letter had not been received, appellate court, hearing respondent's motion to dismiss appeal and appellants' motion to be relieved from default, would be justified in accepting presumption. Code Civ.Proc. § 1963, subd. 24.

Cathcart & Orr, Palo Alto, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, for respondent.

DOOLING, Justice.

Respondent's motion to dismiss the appeal from a judgment in its favor is based upon appellants' failure to secure the preparation of any record on appeal. The clerk's certificate shows that appellants' time to make arrangements for the preparation of the record expired on April 30, 1951. It further shows that on April 26,



1951 appellant Henry C. Pitman delivered to the clerk his personal check for the estimated cost of the clerk's and reporter's transcripts, that on May 7, 1951 this check was returned to the clerk by the bank with the notation "refer to maker", and that on May 9, 1951 the clerk addressed and mailed a letter to said Pitman at his residence in Palo Alto, California, and to Dudley Harkleroad who was appellants' attorney in the trial court notifying them of the return of the check.

Significantly the affidavit of appellant Pitman is silent as to whether or not he received this letter from the clerk. He asks to be relieved from the default on the grounds that he has been suffering from the vestigial effects of a cerebral hemorrhage suffered in January, 1949, which he alleges resulted in his being "unable to \* \* \* appreciate the significance of the procedural steps required by the rules on appeal", and the fact that due to the withdrawal of his attorneys he had no legal advice. He further states in his affidavit: "That affiant at the time he tendered his check in payment of the Clerk's estimate had funds on deposit with the (bank on which it was drawn) \* \* \* that he had requested said bank to notify him when the said check was presented \* \* \* but that said bank did not so notify him; that had said bank so notified him, he would then have made arrangements for honoring said check."

There is a disputable presumption that the clerk's letter of May 9, 1951 which was addressed and mailed to appellant Pitman "at Palo Alto, California, which is the place where he resides" was received by him. Code Civ.Proc. sec. 1963, subd. 24; 10 Cal.Jur., Evidence, sec. 81, p. 773. If he did not receive this letter it was open to him to make that showing in his affidavit. Absent such showing we are justified in accepting the presumption which compels the conclusion that shortly after May 9, 1951 appellant Pitman was advised by the clerk's letter that his check had been returned to the clerk by the bank. Under such circumstances the failure of his bank to notify him of the presentment of his check for payment loses significance.

The motion for relief from default is denied and the motion to dismiss the appeal is granted.

NOURSE, P. J., and GOODELL, J., concur.



110 Cal.App.2d 41

**YOST v. MAY et al.**  
Civ. 8057.

District Court of Appeal, Third District,  
California.

March 25, 1952.

Action by Bert Yost against Robert F. May and wife, Mary M. Ives and others to recover balance due on a conditional sales contract. The Superior Court, Sacramento County, Malcolm C. Glenn & Warren Steel, JJ., rendered judgment for plaintiff, denying, however, relief sought against defendant Ives, and plaintiff appealed. The District Court of Appeal, Peek, J., held that seller had elected to follow the remedy specifically contracted for in conditional sales contract and was not entitled to personal judgment for any deficiency against innocent purchaser for value from conditional buyer.

Judgment affirmed.

**1. Sales ☞479(1)**

On buyer's breach of conditional sales contract, seller, in absence of contractual obligation to the contrary, may either disaffirm contract and retake property, or affirm contract and sue for purchase price.

**2. Sales ☞479(1)**

On buyer's breach of conditional sales contract, seller's exercise of either option to disaffirm contract and retake property, or to affirm contract and sue for purchase price constitutes abandonment of right under other option.

**3. Sales ☞479(1)**

What constitutes affirmation by seller of conditional sales contract following breach thereof by buyer and what con-

stitutes disaffirmance of contract must be determined from the facts of the particular case.

#### 4. Sales ⇨479(1)

Commencement of any litigation by conditional seller that can proceed only on theory that title has passed to buyer generally constitutes election which seller may not revoke.

#### 5. Sales ⇨480(6)

Where seller elected to follow remedy specifically contracted for in contract for conditional sale of personalty by obtaining a judgment against buyer for unpaid balance of purchase price, which judgment directed sheriff to take possession of property specified in contract, sell it and apply net proceeds to satisfaction of judgment, seller was bound by limits of the rights for which he had so contracted and was not entitled to personal judgment for any deficiency against innocent purchaser for value from conditional buyer.

#### 6. Sales ⇨480(6)

Where lessee of real and personal property used in operation of restaurant business sold other personal property under conditional sales contract to assignee of lease and assignee, having defaulted on sales contract, sold such property to innocent purchaser for value, who gave required notice of sale, obtained a new lease of premises and purchased new equipment, such equipment and lease were not subject to execution under judgment against conditional buyer for unpaid balance of purchase price under contract provision that any equipment or accessories placed on the property should become a component part thereof, though good will of business was gone and conditional buyer was bankrupt. Civ.Code, § 3440.

---

Thomas B. Leeper, Sacramento, for appellant.

Downey, Brand, Seymour & Rohwer, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in his favor in an action to re-

cover the balance due on a conditional sales contract.

Although the appeal is on the judgment roll alone the following facts appear to be conceded by the parties. R. L. and Virginia Allred, husband and wife, as the owners of certain real and personal property, leased the same to the plaintiff Yost, who thereafter conducted a restaurant business on the premises. Subsequently Yost assigned his lease to the defendants Robert F. and Dorothy L. May. In addition he sold to them, by a conditional sales contract, certain personal property used in the conduct of the business. The contract, among other things, provided that if the Mays failed to make any of the payments on time, the sellers might, without demand or notice, retake possession of the property and resell the same at public or private sale and credit the net proceeds on the balance due, the purchaser agreeing to pay the seller for any deficiency remaining under the contract. A further provision prohibited the buyer assigning his interest without the consent of the seller. Shortly after the Mays went into possession they defaulted on their contract with Yost and closed the doors of the restaurant. Approximately two months thereafter Mary M. Ives, for a valuable consideration and without knowledge of the existence of the conditional sales agreement between Yost and the Mays, purchased from the latter by bill of sale certain personal property itemized therein. Notice of the sale as provided in section 3440 of the Civil Code was given by Ives. The Mays surrendered the lease to the Allreds who in turn executed a new lease in favor of Ives. Ives renovated the premises, bought new equipment and went into possession thereof. Some time thereafter Yost instituted this proceeding to recover the balance alleged to be due under his conditional sales contract with the Mays. The trial resulted in a nonsuit as to the Allreds and a judgment in favor of Yost against the Mays for the unpaid balance due under said contract, to-wit, the sum of \$1,700, plus accrued interest, attorney fees and court costs. The judgment further directed the sheriff of Sacramento county to take-

possession of certain designated personal property which was substantially the same as that set forth in said sales agreement and sell the same, applying the proceeds to the satisfaction of the judgment against the Mays. Yost gave notice of appeal and Ives filed a motion for a new trial. The appeal was dismissed and the motion for a new trial was granted as to Ives alone.

At the conclusion of the second trial in which only Yost and Ives participated, the court again ordered that the personal property received by Ives from the Mays (which was the same as set forth in the first judgment) be sold by the sheriff to satisfy the judgment recovered by Yost against the Mays. Yost has again appealed contending that he is entitled to execute on the new lease and on all of the personal property owned by Ives and used in the business, and if the proceeds thereof are insufficient to pay off the balance found to be due under the conditional sales agreement with Mays, he is entitled to a personal judgment against Ives for any balance so remaining. We find no merit in such contention.

[1-4] As a general rule it may be said that in the absence of any contractual obligation to the contrary, a seller, under a conditional sales contract, may either disaffirm the contract and retake the property or he may affirm the contract, declare the subsequent payment due and sue for the balance of the purchase price. But, as the court stated in *Martin Music Co. v. Robb*, 115 Cal.App. 414, 419, 1 P.2d 1000, 1002, "since these remedies are inconsistent, he cannot have both and an assertion of one of them is an abandonment of and bars any right under the other." Such a rule necessarily poses a further question of what constitutes affirmance and what constitutes disaffirmance, and since no hard and fast rule can be enunciated to cover the many circumstances which may arise each case must be determined on its own facts. However, it has been held that "the commencement of any litigation that can proceed only on the theory that title has passed to the purchaser on waiver by the seller generally constitutes an election which the seller may not revoke." *Martin*

*v. Robb*, supra, 115 Cal.App. at page 419, 1 P.2d at page 1002.

[5] Thus it is apparent that plaintiff by his action herein has brought himself squarely within the stated rule. By the allegations of his complaint he seeks to retake the property and resell the same, crediting the sum recovered less costs to the balance due, and since he has elected to follow the remedy specifically contracted for in the sales agreement he is bound by the limits of the rights for which he has so contracted. See *General Motors Accept. Corp. v. Brown*, 2 Cal.App.2d 646, 649, 38 P.2d 482.

The sole question remaining relates to the determination of what property in the possession of Ives is subject to appellant's contractual right of repossession and execution thereon in satisfaction of the judgment against the Mays for the balance due under the contract between Yost and the Mays. It is appellant's contention that he should be able to execute on the new lease and on all of the personal property now on the premises, whether or not the same was included in the property originally sold. His argument is that this is so (1) because of a provision in the contract to the effect that any equipment, repairs or accessories placed on the property shall become a component part thereof; (2) because the good will of the business is gone and only a small amount of worthless dishes and equipment remain; (3) because the judgment which he obtained against the Mays in the first action has been wiped out by the Mays' bankruptcy, and (4) because by the time this case is finally determined "both Mrs. Ives and the business will probably be gone" and therefore he concludes that under such circumstances he is entitled to a judgment as contended.

[6] The extent of the interest Yost retained in the personal property sold to the Mays was clearly defined in the contract. The Mays could not defeat his interest in the specific property described therein. Furthermore, they could not, by their agreement with Ives, give him a greater interest in said property than was provided for in the contract. Nor could they



give him an interest in any other property afterwards acquired independently by Ives, whom the court found to be an innocent purchaser for value. No privity of contract existed between Yost and Ives. Yost in no way was a party to the second contract. And certainly the Mays' bankruptcy could not in any way implicate Ives so as to bring her within the terms and conditions of the Yost-Mays' contract. There is no need to consider the remaining arguments made by appellant in support of such contention since they are wholly without merit.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J.  
pro tem., concur.



110 Cal.App.2d 106

**BROGDON v. GRAHAM et al.**

Civ. 18640.

District Court of Appeal, Second District,  
Division 3, California.

March 27, 1952.

Action by James W. Brogdon against William M. Graham, etc., and wife to recover on a note. The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment against named defendant and he appealed. The District Court of Appeal, Vickers, J. pro tem., held that the evidence sustained findings and judgment in favor of plaintiff.

Judgment affirmed.

#### 1. Bills and Notes ☞517

Evidence sustained findings and judgment for plaintiff in action on a note, as against defendant's contentions that he and plaintiff had entered into a partnership and that note had been executed solely to protect plaintiff's interest in the partnership and had been delivered conditionally.

#### 2. Appeal and Error ☞994(3), 1011(1)

Where the testimony was conflicting, trial court, as trier of the facts, had the sole function to determine the credibility of the witnesses and, from all the evidence, the factual issues involved.

#### 3. Trial ☞397(2)

Findings that note sued on had been executed and delivered by defendant for a valuable consideration, that no part of note had been paid, though demand therefor had been made, that at no time had the parties entered into a partnership agreement or engaged in business as general or limited partners as contended by defendant, and that transactions in which the parties had engaged involving purchase and sale of individual automobiles had been consummated and terminated before note was executed necessarily implied a finding that note was delivered unconditionally and express finding to that effect was not necessary to support judgment for plaintiff.

#### 4. Appeal and Error ☞1071(6)

Appellant cannot complain of failure to find upon an issue where a finding, if made, must necessarily have been adverse to him.

Cannady & Freeman, Los Angeles, for appellant.

N. E. Youngblood, Beverly Hills, for respondent.

VICKERS, Justice pro tem.

Appeal by defendant William M. Graham, also known as William R. J. Graham, from a judgment on a promissory note in favor of plaintiff.

The complaint was divided into three causes of action. The first named only the appellant as a defendant and alleged the execution of a \$6,000 promissory note by that defendant, and its delivery by him to the plaintiff, on November 15, 1949; that by its terms it was due January 2, 1950; that nothing had been paid thereon; and that the principal, interest and attorney fees were due and payable. The second and third causes of action were in the form of common counts and joined the appellant.

and his wife as defendants. The judgment was in favor of the defendant wife and no appeal was taken therefrom by the plaintiff.

By his answer the appellant denied each and all of the allegations of the complaint and pleaded the following facts as a separate defense thereto: That on June 1, 1942, the parties entered into an oral partnership to buy and sell automobiles, the plaintiff to be a silent partner; that said partnership continued to January 1, 1950, had not been dissolved and that any money advanced by the respondent was in pursuance of the partnership; that the promissory note in question was executed by the appellant at respondent's request solely to protect the respondent's interest in the partnership; that the \$6,000 consideration mentioned in the note was the estimated value of the respondent's interest in the partnership; that the consideration for the note did not represent a record of any money owed respondent by the appellant; that the appellant was not indebted to the respondent in any amount.

Appellant urges only two grounds for reversal of the judgment. One, that the " \* \* \* judgment is unsupported with sufficient evidence \* \* \*." Two, that the judgment is " \* \* \* not supported by sufficient findings of fact." Appellant can prevail on neither ground.

[1,2] In support of his first ground appellant contends that there is no evidence in the record of an unconditional delivery of the promissory note, and refers to his testimony and that of his secretary to the effect that the note was given only to protect the respondent's interest in the partnership business and that it was to be destroyed after " \* \* \* we had liquidated our business and found out what we had left." However the respondent denied that there ever was a partnership and denied that in any of the conversations between the parties anything was said about a conditional delivery of the note. Respondent also testified that the sole consideration for the note was for money loaned prior to its execution and delivery; that in 1948 the appellant had given him a short term note for money loaned and that, upon being unable to pay it when

due, appellant had given respondent a new note and respondent had returned the original note; that thereafter this procedure was repeated until November 15, 1949, when the note in question was executed and delivered. Respondent also testified that he had entered into single car deals with the appellant over a period of years whereby, on each occasion, each of them would advance a sum of money with which an automobile would be purchased; that when sold the proceeds would be divided between them; and that these deals had all been completed and terminated several months before November 15, 1949. Such evidence was substantial and supports the findings. The judgment is not subject to attack on the ground of insufficiency of the evidence. From the appellant's brief on appeal it appears that his real complaint is that the trial court did not believe the testimony of the appellant or the supporting testimony of his secretary. We must assume that the court considered all of the testimony received. It then became its sole function to determine the credibility of the witnesses and, from all of the evidence, the factual issues involved.

[3,4] In support of his second point appellant asserts there is no finding as to the conditional delivery of the note. The court's findings in substance are as follows: That the defendant, for a valuable consideration, made, executed and delivered the promissory note in question; that no part had been paid, although demand therefor had been made; that attorney fees had been incurred in a certain amount; that at no time had the parties entered into a partnership agreement or engaged in business as general or limited partners; that between 1943 and September 5, 1949, the plaintiff advanced and loaned money to defendant, on various occasions, for the purchase and sale of automobiles on a single car basis and a division of the net profits; that all of such transactions were " \* \* \* consummated and terminated fully and completely on or before September 5, 1949, after which the plaintiff did not own or claim any interest whatsoever in and to said transactions or any part thereof." The court thus found the ulti-

mate facts on each of the material issues joined by the pleadings including those raised by the defendant's affirmative defense. This was all that was required. Clearly there could have been no conditional delivery of the note depending on the liquidation of a partnership if as the court found there was never a partnership. Neither could the delivery of the note have been conditioned upon the determination of the financial interests of the parties in the single car transactions, since the court found that they had been fully completed and terminated before the note was executed and delivered, and that at that time the plaintiff did not own or claim any interest therein. Therefore a finding that the promissory note was delivered "unconditionally" would be necessarily implied if such a finding was deemed necessary. It would thus have been adverse to appellant and he cannot complain of a failure to find upon an issue where a finding, if made, must necessarily have been adverse to him. *Staudigl v. Harper*, 76 Cal.App.2d 439, 448, 173 P.2d 343.

The judgment is affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.



# **WHALEN v. RUIZ et al.**

Civ. 7921.

District Court of Appeal,  
Third District, California.

March 28, 1952.

Rehearing Denied April 23, 1952.

See 242 P.2d 940.\*

Thomas S. Whalen sued Al Ruiz and others for injuries he sustained when bus in which he was riding plunged through guard rail of double deck bridge built by defendant railroad with upper deck for automobile traffic, and repaired, operated and policed by railroad. The Superior Court, Sacramento County, B. F. Van Dyke, J., en-

tered judgment in favor of all of defendants and Whalen appealed from that portion of judgment which decreed that he take nothing against defendant railroad. The District Court of Appeal, Schottky, J. pro tem., held that railroad's retention of right to control and operate bridge, in order to serve its own purposes, obligated it to repair and maintain said bridge in such a manner that it would be safe for modern automobile traffic, and that evidence did not as matter of law compel finding that negligence of bus driver was sole proximate cause of accident.

Portion of judgment appealed from reversed.

## **1. Automobiles ⇐290**

Where railroad built double deck bridge across river with upper deck constructed for automobile traffic, granted to counties which bridge connected an easement for use of deck as public highway and assumed for a consideration the counties' duty to repair, operate and police the deck and approaches thereto, railroad's retention of control in order to serve its own purposes obligated it to make such repairs or additions or reinforcements of bridge as were necessitated by modern automobile traffic, and, therefore, railroad was liable to bus passenger injured when bus ran off bridge because guard-railings were not sufficient to turn it aside when it struck them.

## **2. Automobiles ⇐290**

Where railroad built double deck bridge constructing upper deck for automobile traffic, gave easement to counties for said traffic, but assumed, for consideration, counties' duty to repair, operate and police deck and its approaches, possibility that plaintiff, who was injured when bus in which he was passenger plunged through improper guard rails on bridge, might have basis for holding State liable under its statutory duty to maintain and improve highways, did not free railroad from its liability. Streets and Highways Code, § 100.

## **3. Appeal and Error ⇐1122(1)**

Code of Civil Procedure provision that in all cases where trial by jury has been waived, District Court of Appeal may make findings of fact contrary to, or in addition to, those made by trial court, did not allow

\* Subsequent opinion 253 P.2d 457.



appellate court to amend trial court's finding that injury to plaintiff who had been in bus which crashed through guard rail of bridge repaired, operated, and policed by railroad was proximately caused by failure of railroad to provide proper guard rails, to the end that it be found that the negligence of the driver of bus was sole proximate cause of plaintiff's injuries. Code of Civ.Proc. § 956a.

**4. Appeal and Error** ⇨879

Parties who have not appealed cannot attack the findings and the only objections thereto which can be received are those urged by appellant.

**5. Appeal and Error** ⇨695(1)

Where appellee was granted permission to file, as part of record on appeal, such portions of the record as it desired but brought up only a portion of the testimony relative to an issue of negligence which it challenged, it was precluded from challenging sufficiency of evidence since appellate court will not consider question of sufficiency of evidence unless all of evidence is included in record on appeal.

**6. Automobiles** ⇨308(10)

In action for injuries sustained by passenger when bus being driven at excessive rate of speed by driver who had been drinking plunged through improperly constructed guard rail of bridge repaired, operated and policed by defendant railroad, evidence did not as matter of law compel finding that negligence of driver of bus was sole proximate cause of accident.

---

Fred Pierce, Sacramento, for appellant.

Devlin, Devlin & Diepenbrock, Sacramento, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiff commenced an action to recover damages for injuries sustained by him when an auto-bus in which he was riding ran off the I Street bridge over the Sacramento River. It was alleged that the driver of the bus was negligent and that he was the employee of defendant Ruiz, an uninsured labor contractor; and that defendant King was liable under section 402 of the Vehicle

Code in permitting Ruiz to operate the vehicle owned by King. It was alleged, also, that the defendant railroad company negligently and carelessly constructed and maintained the bridge. Issues were joined, and following a trial before the court, without a jury, the court found as follows: (1) That the driver of the auto-bus, as the employee of defendant Frank King, "so negligently operated said auto-bus that as a proximate and contributing result thereof, said auto-bus was caused to, and same did, run off of said bridge and plunge to the ground below"; (2) that the overhead structure of the bridge was negligently maintained; that as a proximate and contributing result of said negligent maintenance, the automobile in which plaintiff was riding ran off of the bridge and plunged to the ground below; (3) that defendant railroad is the owner and operator of the I Street Bridge; (4) that construction of the overhead or roadway portion of the bridge is controlled by an agreement dated September 6, 1910, executed by the defendant railroad and the counties of Sacramento and Yolo; that by such agreement the defendant railroad "leased to said two counties the right to use said overhead structure of said bridge and approaches thereto for highway purposes for a term ending on September 13, 1916, and from and after said last mentioned date, said Railroad Company agreed to grant to said counties, and did grant to said counties, a right, easement and privilege of using the overhead structure and approaches thereto for highway purposes and for the life of said bridge for railroad purposes"; and that by the agreement the defendant railroad "agreed to repair, police and operate said overhead structure and approaches thereto"; (5) that the agreement "does not include any obligation on the behalf of said Southern Pacific Railroad Company, or any other defendant herein, to do more than to maintain said structure according to the design and plan under which said bridge was originally built and that there was no obligation \* \* \* to make structural changes to meet changing traffic conditions"; (6) that the overhead structure and approaches thereto are a part of the State

Highway System; (7) that plaintiff was not an employee of defendant Al Ruiz but was an employee of defendant Frank King and was engaged in the course of such employment when injured, and that at the time of the accident defendant Frank King and plaintiff were subject to the Workmen's Compensation Act of the State of California, Labor Code, § 3201 et seq.; and (8) that by reason of the injuries received in said accident plaintiff suffered damages in the sum of \$26,871.75.

From the foregoing findings the court concluded that the sole remedy of plaintiff against defendant Frank King was within the jurisdiction of the Industrial Accident Commission and that the court had no jurisdiction; and further that plaintiff take nothing by his complaint. Judgment was accordingly entered in favor of all defendants, and plaintiff has appealed upon the judgment roll from that portion of the judgment which decreed that plaintiff take nothing against defendant railroad.

The theory of appellant's case is that respondent railroad failed to maintain an adequate guard rail and curbing along the edge of the pavement on the overhead deck of the bridge. At the time of the accident, September 6, 1947, the bridge was equipped with an eight inch curb and an iron railing, as provided in the original specifications. The bridge was completed in 1912. Appellant contends that where a railroad company constructs a bridge over its tracks which is used by the traveling public at the express or implied invitation of the railroad company, the latter owes a duty to members of the public using the bridge to construct and maintain it in a reasonably safe condition. Appellant cites *Comstock v. Great Northern Railway Co.*, 157 Minn. 345, 196 N.W. 177. In that case the car in which plaintiff was riding crashed through the railing of a bridge which the railroad maintained over its tracks. The court stated, 196 N.W. at page 177: "It may be conceded, for the purposes of this appeal, that no negligence could be found in the grade, the curve, or the ordinary railing or its maintenance, or in an alleged ridge in the floor. But there was ample evidence that, since the advent of the automobile, it is custom-

ary to provide bridges with guard rails or wheel guards."

In *Calley v. Boston & Maine Railroad Co.*, 93 N.H. 359, 42 A.2d 329, 330, 159 A. L.R. 115, the bridge maintained by the railroad had a nine inch wooden wheel guard. An expert testified that a twelve inch wheel guard was necessary to provide adequate safety. The court said that assuming this evidence to be true, the consulting engineer "testified that a 12-inch curb, even if converted into a ramp by ice and snow, would have prevented the accident, and that the 9-inch wheel guard, though free from ice or snow, would not have stopped the car."

[1] Respondent railroad argues that no negligence can be charged against the railroad for failure to reconstruct the highway deck of the bridge to conform to modern traffic standards. It is argued that the railroad's obligations to the traveling public are fixed by the contract of September 6, 1910. This agreement provided for a bridge connecting the counties of Sacramento and Yolo, extending over the Sacramento River. It recited that the existing bridge which had been used in part for highway purposes was out of repair, and it was to be replaced by a new structure. The cost of the entire bridge was specified at \$786,000. The overhead deck and approaches thereto cost \$160,671. The contract provided that respondent railroad lease the overhead deck to Sacramento County for a period from the completion of the bridge until December 15, 1916, for a rent of \$90,503.25, payable in yearly payments. For the portion of the bridge located in Yolo County, the respondent granted an easement to that county for the life of the bridge for a consideration of \$33,039.89. The agreement then provided that until December 15, 1916 (the termination of the lease) the railroad "agrees to keep in repair, operate and police at its own expense, the said bridge, including the floor of the overhead structure and the walks and railings thereon, and including the approaches to the said overhead structure."

As to repairs of the overhead structure after the termination of the lease the contract provided: "Whereas, it is recognized

that after December 15th, 1916, the keeping in repair, operation and policing of the overhead structure, and approaches thereto, is properly chargeable to the said Counties of Sacramento and Yolo, and said Counties desire that the said 'Company' should agree to keep in repair and operate and police the same, as it is more convenient for the 'Company' to do so, Now, Therefore, the said 'Company' agrees to keep in repair, operate and police the said overhead structure, and approaches thereto, after December 15th, 1916, and during the life of said bridge for railroad purposes, and in consideration thereof, it is agreed as follows: [Sacramento County to pay \$1500 per year and Yolo County \$500 per year.]

Appellant contends that the promise "to keep in repair, operate and police the said overhead structure, and approaches thereto" after the termination of the lease was also an assumption of a duty upon the part of respondent railroad to maintain the overhead structure in a reasonably safe condition. It is argued that the proper construction of the agreement is that the respondent agreed to maintain the overhead structure in a safe condition under modern traffic demands, and that the trial court's finding that respondent did not agree "to do more than to maintain said structure according to the design and plan under which the bridge was originally built" is not a logical construction of the contract.

Respondent argues that under common-law principles, the owner of the servient tenement (the railroad) is not obligated to maintain the easement in a safe condition for the use of those using the easement at the request of the easement owners (Sacramento and Yolo Counties). Respondent cites Restatement of Torts, section 349: "A possessor of land over which there is a public highway or private right of way is not subject to liability for bodily harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in safe condition for their use. \* \* \*"

Respondent argues that the curb and railings on the overhead deck of the bridge formed a part of the subject matter of the

easement and that it was not the responsibility of respondent as owner of the servient tenement to alter the curbs and railings to conform to modern traffic conditions. Respondent contends further that its obligation to "keep in repair, operate and police the said overhead structure" which it assumed after the grant of the easement does not obligate it to make structural changes in the bridge, and argues that the word "repair" does not include reconstruction or alteration.

Respondent also contends that since the overhead structure and approaches thereto were designated as a traversable state highway, the statutes of California place upon the Department of Public Works the duty to keep such highway in a safe and usable condition. At the date of the accident in controversy, section 100 of the Streets and Highways Code provides: "The department shall have full possession and control of all State highways. The department is authorized and directed to lay out and construct all State highways between the termini designated by law and on the most direct and practicable locations as determined by the commission, and to improve and maintain such highways as provided in this code. The department shall maintain any existing traversable highway which is between the termini of, and approximately on, any route included in the State highway system. The department may do any act necessary or proper for the construction, improvement, maintenance or control of all highways and properties which are under its control, including the construction, improvement, and maintenance of detours."

There is no dispute as to the correctness of the principles of law cited by appellant and respondent. If the instant case were one in which an ordinary easement or right of way had been granted and respondent, as the owner of the servient tenement, retained no duty or obligation as to the control and operation of the bridge, we could readily decide that respondent could not be held liable for the accident which resulted in plaintiff's injuries. But under the finding of the trial court and the undisputed facts of the case, respondent railroad was the owner and operator of the bridge; and



while it did grant the counties a "right, easement and privilege of using the overhead structure and approaches thereto for highway purposes," in the same agreement respondent railroad "agreed to repair, police and operate said overhead structure and approaches thereto." The court found that the overhead structure was negligently maintained and that as a proximate and contributing result of said negligent maintenance the automobile in which plaintiff was riding ran off of the bridge and plunged to the ground below.

Under this factual situation we are unable to agree that the respondent railroad was free from liability. We are also unable to agree with the conclusion of the learned trial judge that the agreement did not include any obligation on its part to do more than maintain said structure according to the design and plan under which said bridge was originally built and that there was no obligation to make structural changes to meet changing traffic conditions.

The bridge was built as a double track railroad bridge across the Sacramento River, with a second or highway deck and approaches thereto. The central portion of said bridge was necessarily operated as a drawbridge to permit the passing of boats up and down the Sacramento River. While an easement was granted to the counties as hereinbefore pointed out, it is apparent throughout the agreement that the respondent railroad company intended to and did retain control of the operation of said bridge and the structure thereof, and it is not difficult to understand why it should desire to retain said control, because as the builder and owner of all of said bridge, and because its railroad tracks ran across the lower portion of said bridge, it had a very vital interest in the safe operation and repair of the upper or highway deck of said bridge. And, as hereinbefore pointed out, respondent railroad company agreed "to keep in repair, operate and police the said overhead structure, and approaches thereto, after December 15, 1916," for an annual consideration of \$2,000 paid by the counties of Sacramento and Yolo.

[2] Even though, as found by the trial court, "said overhead structure of said

bridge and the approaches thereto have been, and still are, a part of the State Highway System," and even though there might be some basis for holding the State and the counties (who are not parties to the action) also liable, we are satisfied that the trial court erred in its conclusion that respondent company was not liable under the facts and findings of the instant case. As we view the matter, said company was the owner and operator of the overhead structure of the bridge and had agreed for a monetary consideration to keep it in repair and operate it. The overhead structure was built for highway traffic across the Sacramento River and was intended to be used and was used for such traffic. And as stated in the quotation in respondent's brief from the case of *Hamilton v. Southern Railway Co.*, 4 Cir., 162 F.2d 884, at page 890: "There is no hard and fast rule as to the kind, character, and strength of the fence, or railing, or guard rails or other obstructions which must be erected and maintained; but they must be sufficient to protect a person driving an automobile on the highway at the point at which the bridge is located in the exercise of ordinary care against ordinary contingencies or those which may be reasonably apprehended. The requirement calls for more than a warning of the danger and a guide to the eye in keeping to the roadway; and the duty of the railroad company is not discharged by the erection and maintaining of a flimsy or rotten fence, or railing presenting a visible warning and guide to the eye, and a guard rail along the floor of insufficient height to deflect the wheels of an automobile which may come in contact with it when being driven over the bridge with ordinary care. *Comstock v. Great Northern Railway Co.*, 157 Minn. 345, 196 N.W. 177; *Hardin v. Southern Railway Co.*, 36 Ga.App. 427, 136 S.E. 802; *Bond v. Bilerica*, 235 Mass. 119, 126 N.E. 281; *Kelsea v. Stratford*, 80 N.H. 148, 118 A. 9; *Medema v. Hines* [8 Cir.], 273 F. 52."

The keeping in repair and operating such a bridge for such traffic necessarily means keeping it in a safe condition for the passage of such traffic and if this required repairs or additions or reinforcements of the

curbs and railings of said bridge, respondent company, as the owner and operator of said bridge, and under the agreement hereinbefore referred to, was required to make them. And in view of the findings of the trial court that the overhead structure of the bridge was negligently maintained and such negligent maintenance was a proximate cause of the accident, we believe that the court erred in rendering judgment in favor of respondent railroad company.

[3] As its final answer to the arguments of appellant for a reversal of the judgment, respondent makes the contention that the evidence shows as a matter of law that negligence of the driver of the auto-bus was the sole proximate cause of the accident and urges that, if this court should determine that respondent railroad was obligated to make structural changes to meet changing traffic conditions, then this court should amend the trial court's findings, to the end that it be found that the negligence of the driver of the auto-bus was the sole proximate cause of appellant's injuries.

As hereinbefore stated the appeal of appellant was upon the judgment roll. Thereafter respondent company made a motion for an order allowing the augmentation of the record on appeal by the addition of the entire reporter's transcript of the trial, or if such motion be denied, for an order allowing augmentation by the addition of the testimony of W. P. Hargrove, given at the trial. This court granted respondent permission to file, at its own expense, such portions of the record as it desired to file. Accordingly, respondent filed a reporter's transcript containing the testimony of a number of witnesses, but not of all of them, it being entitled "Reporter's Transcript of Excerpt of Testimony Given Upon Trial."

The trial court found that the negligent maintenance of the overhead structure of the bridge was a proximate and contributing result of the accident. Respondent argues that under section 956a of the Code of Civil Procedure this appellate court may make findings of fact contrary to those made by the trial court. Directly contrary to respondent's contention is the case of *Isenberg v. Sherman*, 212 Cal. 454, at page 461, 298 P. 1004, 1007, 299 P. 528, in which

the court said: "Appellants in their opening briefs took the position that since the addition of section 956a to the Code of Civil Procedure, in 1927, this court could pass upon the weight of the evidence and, in a proper case, make new findings, contrary to the findings of the trial court, in reversing a case. The position of appellants in this regard is unsound. In the case of *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, it was specifically held that the rule that this court is bound by the findings of the trial court based upon substantial evidence was in no way changed by the addition of section 956a to the Code of Civil Procedure. This position was reaffirmed by this court in *Davis v. Chipman* [210 Cal. 609], 293 P. 40."

Respondent also contends, contrary to the court's findings, that the negligence of the driver of the auto-bus was the sole proximate cause of the accident. This contention is based upon evidence that the auto-bus was operated at an excessive rate of speed, and that the driver had been drinking. It is argued that the eight-inch curb affords ample protection to a person driving an automobile in the exercise of ordinary care.

[4, 5] Appellant contends that respondent railroad, not having appealed, may not challenge adverse findings nor urge error, and cites *Henigson v. Bank of America Nat. Trust & Savings Ass'n*, 32 Cal.2d 240, 244, 195 P.2d 777, 779, holding that "it is well settled that parties who have not appealed cannot attack the findings; the only objections thereto which can be received being those urged by appellant." Appellant also contends that respondent is precluded from challenging the insufficiency of the evidence since it has failed to bring all the material evidence before the appellate court. The appeal is on the judgment roll. Respondent's motion to augment the record was granted by this court, but, as appellant points out correctly, only a portion of the testimony relative to the issue of negligence was brought up. Appellant cites 2 Cal.Jur., p. 697: "The appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal."

[6] We have read the transcript of the testimony as filed by respondent, and even assuming, as respondent contends, that we have a right to make a finding contrary to the finding of the trial court, we are convinced that we could not find that the evidence as a matter of law compels a finding that the negligence of the driver of the auto-bus was the sole proximate cause of the accident.

No other points raised require discussion.

In view of the foregoing, that portion of the judgment which decreed that plaintiff take nothing against defendant railroad is reversed.

ADAMS, P. J., and PEEK, J., concur.



110 Cal.App.2d 101

**MILLER v. CORTESE et al.**

Civ. 18560.

District Court of Appeal, Second District,  
Division 3, California.

March 27, 1952.

Rehearing Denied April 8, 1952.

Hearing Denied May 22, 1952.

John E. Miller brought action against Ross W. Cortese, Mike E. Dinow, and others to recover real estate broker's commission. The trial court, William B. McKesson, J., entered an order setting aside a default and judgment entered thereon against Mike E. Dinow, and an order refusing to vacate order setting aside default and judgment, and plaintiff appealed. Mike E. Dinow died, and Celia A. Dinow, as administratrix of estate of Meyer Ernest Dinow, also known as Mike E. Dinow, deceased, was substituted as defendant. The District Court of Appeal, Parker Wood, J., held that as there was an answer of Mike E. Dinow on file, act of clerk in entering a default was a nullity, and could be attacked more than 60 days after entry of default.

Orders affirmed.

## 1. Judgment ⇐153(1)

Statutory provision limiting power of court to relieve party from default to pe-

riod not exceeding 6 months from entry of default, has no application where a clerk exceeds limited power conferred on him by statute to enter default, since clerk's action is a nullity and open to attack at any time. Code Civ.Proc. § 473.

## 2. Judgment ⇐120, 153(1)

Where at time of request for entry of default was made on clerk, file in action and register of actions showed that answer of defendant was on file, and answer was captioned or titled, "answer to complaint" by defendant, and it was not labeled a proposed answer, and there was nothing in minutes or other record as to whether judge ordered, or intended to order, that answer should stand as answer of defendant, action of clerk in entering default was a nullity, and default was open to attack more than six months after entry of default. Code Civ.Proc. § 473.

Jerrell Babb, Los Angeles, for appellant.

Benjamin J. Goodman and T. B. Knight,  
Los Angeles, for respondent.

PARKER WOOD, Justice.

Appeal from an order setting aside a default and the judgment entered thereon, and from an order refusing to vacate the order setting aside the default and judgment.

This action to recover \$20,000 as a real estate broker's commission was commenced on July 1, 1948. Plaintiff is the assignee of the broker, Alden B. Coyne. The defendants named in the complaint were Ross W. Cortese, M. H. Bershin, Doe One, Doe Two and Doe Three. A return of service of summons and complaint shows that the summons and complaint were served on "Mike E. Dinow, sued herein as Doe One," on August 31, 1948. On September 16, 1948, an amendment to the complaint was filed naming Mike E. Dinow as defendant in place of Doe One. On September 17, 1948, the plaintiff caused the default of Dinow to be entered. On September 23, 1948, plaintiff dismissed the action as to defendants Cortese and Bershin. On October 11, 1948, a default judgment for the amount prayed for was entered. On November 15, 1948, Dinow filed a notice of motion to set aside



the entry of default and the default judgment, and in support of said motion he filed his affidavit, an affidavit of his attorney, Louis Warren, and an affidavit of Bershin. Also on November 15, 1948, Dinow filed his verified answer in which he denied the material allegations of the complaint. At the time of filing said documents (said November 15th), Dinow paid the county clerk's filing fee of \$5. The answer was not attached to the notice of motion but was a document separate therefrom. The filing stamp of the county clerk, appearing on the front page of the answer, states in part: "Filed Nov 15 1948." Another stamp of the county clerk, also appearing on the front page of the answer, states: "Paid Nov 15 1948 W. G. Sharp County Clerk 5." The register of actions in the county clerk's office shows, with respect to the filing of the answer, as follows: "1948 Nov. 15 Ans. of deft. Mike E Dinow to comp. filed Louis Warren 5-." On November 30, 1948, Dinow filed an amended notice of motion to set aside the entry of default and the default judgment, which notice stated that the motion would be made upon the grounds of mistake, inadvertence, surprise and excusable neglect. The notice also stated that the amended motion would be based upon Dinow's answer which had been served and filed. (The answer was filed at the time the original notice of motion was filed.) On December 2, 1948, the "Amended motion" to vacate the entry of default and the default judgment was granted. The minute entry on said date states in part: "Amended motion is granted." No order was made as to whether Dinow should file another answer after the amended motion was granted or as to whether his answer which had been filed should stand as his answer. Dinow did not file another answer. Plaintiff appealed from said order granting said amended motion. On April 27, 1949, while plaintiff's appeal was pending, plaintiff filed another request for entry of default of defendant, stating in said request that no stipulation or order had been made that the "proposed pleading" filed with said motion should be considered the answer of defendant Dinow. A default was not entered upon that request. The or-

der appealed from was affirmed, *Miller v. Cortese*, 94 Cal.App.2d 848, 211 P.2d 602, and the remittitur was filed on January 31, 1950.

On February 10, 1950, plaintiff filed another request for entry of default of defendant, and on that same date the default of defendant was entered by the clerk. On August 21, 1950, judgment upon said default was entered by the clerk. Three days thereafter plaintiff caused a writ of execution to be issued, and the writ was returned unsatisfied on September 6, 1950. On the following day plaintiff caused a second writ of execution to be issued, and caused an order to be served upon the judgment debtor Dinow for his appearance on supplementary proceedings. On September 12th defendant filed a notice of motion to set aside said entry of default and said default judgment. The notice also stated that a motion would be made for an order that the answer of Dinow on file therein be deemed his answer. The motion was made upon the grounds of mistake, inadvertence, surprise and excusable neglect, and that the purported entry of default was void. On September 18, 1950, the motion was granted. On November 8, 1950, plaintiff appealed from that order, and also from an order refusing to vacate that order. Defendant Mike E. Dinow died on November 16, 1950, and Celia A. Dinow, administratrix of his estate, was substituted as defendant.

[1, 2] Appellant contends that the court had no jurisdiction to vacate the entry of default after the expiration of six months from the date of the entry of default. As above shown, the motion to vacate the default was made more than six months after the default was entered (default entered February 10, 1950, and motion filed September 18, 1950). Section 473 of the Code of Civil Procedure provides, in part, that a court may relieve a party "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief \* \* \* must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken." As

above shown, the motion for relief from default was made not only upon the grounds of mistake, inadvertence, surprise and excusable neglect, under Code Civ.Proc., sec. 473, but also upon the ground that the entry of the default by the clerk was void. Respondent (defendant) contends that the entry of the default by the clerk was void for the reason that the verified answer of defendant was on file at the time the clerk entered the default. She argues that the entry of the default by the clerk, under the circumstances herein wherein an answer was on file, was not a ministerial act which the clerk could perform but it was a judicial act which was in excess of the power conferred by statute on the clerk; and that, under such circumstances, the limitation of six months stated in said section 473, as the time within which relief from default may be granted, is not applicable. As above shown, the answer was a document separate from the motion to vacate default. The county clerk's filing stamp, and his stamp and writing showing that the filing fee of \$5 was paid, appear on the answer which is in the original file in the clerk's office. Upon the register of actions there is an individual item or separate entry showing that Dinow's answer was filed on November 15, 1948, by Louis Warren and that a fee of \$5 was paid. It thus appears that when the request for entry of default by clerk was made on February 10, 1950, the file in the action and the register of actions showed that Dinow's answer was on file. The answer was captioned or titled "Answer to Complaint by Mike E. Dinow." It was not labeled a proposed answer, and the register of actions did not recite that it was a proposed answer. There was nothing in the minutes or other record as to whether or not the judge ordered, or intended to order, that the answer on file should stand as the answer of said defendant. In *Merchants' Co. v. Los Angeles, etc., Co.*, 128 Cal. 619, 61 P. 277, the court made an order vacating the default of defendants and setting aside the judgment. Plaintiff therein claimed that the order was erroneous, in that, the notice of motion did not state that defendants would ask for permission

to file an answer and that the order did not give such permission. The court therein held that the defendant had a right to answer, and it stated in 128 Cal. at page 622, 61 P. at page 278: "Whether this right be recognized by silence in allowing the *answer on file to stand*, or by a formal application to the court for leave to file, it can make no difference to plaintiff. *If there were no answer on file at the time the order was made*, and the defendants did not within proper time file or ask permission to file one, the plaintiff could have applied for default, and his rights would no doubt have been protected." (Emphasis added.) The answer in the present case was on file, and the clerk was not authorized to decide whether or not it had been filed properly or whether or not it should stand, or be regarded, as the answer of defendant after relief from default had been granted. The question as to the propriety of filing the answer in the first instance, or as to the sufficiency or legal effect of the answer on file was for the determination of the court. The provisions of section 473 of the Code of Civil Procedure, which limit the power of the court to relieve a party from his default to a period of not exceeding six months from the entry of the default, have no application "where a clerk exceeds the limited power conferred upon him by statute, in which event the clerk's action is a nullity and open to attack at any time." *Crofton v. Young*, 48 Cal.App.2d 452, 457, 119 P.2d 1003, 1007. The clerk, in entering the default in the present case, exceeded the power conferred upon him by statute, and his action in entering the default was void.

The case of *James A. Clay & Co. v. Shafer*, 140 Cal.App. 625, 35 P.2d 572, cited by appellant, is distinguishable from the present case in that the default therein was ordered by the court.

Although the order in the present case granting relief from the default did not state whether the answer on file should stand in lieu of filing another answer, it appears that the defendant and his attorney (Mr. Knight) believed that the answer on file was deemed by the parties to

be the answer of defendant. After the remittitur in the first appeal was filed, the attorney for plaintiff asked the attorney for defendant if he would permit plaintiff to pay the costs on appeal in installments, and the request was granted. During the six months following the entry of the default on February 10, 1950, the attorneys for the parties had various telephone conversations regarding the merits of the case. On one of those occasions, about two months before judgment was entered upon the default, the attorney for defendant gave the attorney for plaintiff certain information regarding evidence on behalf of defendant. The attorney for plaintiff said that he would check into the matter. The attorney for the defendant heard nothing further about this from the attorney for plaintiff. The default judgment was entered about ten days after the expiration of the six months.

The orders are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



110 Cal.App.2d 30

COVELY et al. v. C. A. B. CONST. CO. et al.  
Civ. 18523.

District Court of Appeal, Second District,  
Division 2, California.

March 25, 1952.

Rehearing Denied April 15, 1952.

Hearing Denied May 22, 1952.

Action by William Franklin Covely and others, minors, etc., and another against C. A. B. Construction Company, a copartnership, and others for wrongful death of a workman when boom of a crane collapsed and fell upon him. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment on a verdict in favor of defendants and plaintiffs appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to sustain verdict and judgment for defendants.

Judgment affirmed.

## 1. Customs and Usages ⇨10

Evidence of a general custom and usage in the trade was admissible to show the extent of lessee's control over operator of equipment leased on a wholly equipped, operated and maintained basis. Code Civ. Proc. § 1870, subd. 12.

## 2. Customs and Usages ⇨10

A contract may be interpreted in accordance with the usage of the place of its performance. Code Civ. Proc. § 1870, subd. 12.

## 3. Customs and Usages ⇨12(2)

Knowledge of a custom by contracting parties is presumed from the fact that they are in the business or trade in which the custom exists. Code Civ. Proc. § 1870, subd. 12.

## 4. Customs and Usages ⇨18

A custom or usage which is so general that it is presumed to have been known by the parties to a contract need not be pleaded. Code Civ. Proc. § 1870, subd. 12.

## 5. Appeal and Error ⇨1066

Instructing jury in wrongful death action as to assumption of risk was not prejudicial error, where questions as to extent of deceased's knowledge of danger, whether deceased was unreasonable in encountering the risk, and whether he failed to exercise due care under existing conditions were left for determination of jury.

## 6. Death ⇨104(1)

Where defense of contributory negligence was pleaded in wrongful death action, instructing jury on doctrine of assumption of risk was not error, though doctrine was not pleaded in a special defense.

## 7. Negligence ⇨119(2), 138(3)

Where defense of contributory negligence is pleaded, evidence of assumption of risk and instructions relative thereto are proper.

## 8. Negligence ⇨138(3)

Where defendants in wrongful death action denied negligence, giving an instruction on doctrine of unavoidable accident was not error.

## 9. Trial ⇨260(8)

Refusal to give requested instruction in wrongful death action as to nonassump-



tion of risk of injury through unanticipated negligence of another was not error, since the substance of such instruction was given in instruction as to right to rely on assumption that others will perform their duty under the law.

#### 10. Trial $\S$ 260(8)

Refusal to instruct jury, as requested in wrongful death action, not to assume that deceased contributed to his own injuries in the doing of that which his employment required him to do was not error, since such instruction was covered by instruction as to assumption of risk.

#### 11. Appeal and Error $\S$ 978(2)

Denial of a motion for new trial based on alleged misconduct of counsel in improperly bringing the question of insurance into a case will be deemed a determination by trial court of counsel's good faith and that prejudice did not result to opposing party, and such determination is binding upon appellate court in absence of a clear showing of prejudice.

#### 12. Appeal and Error $\S$ 1060(1)

Remark by defendants' counsel in argument to jury in wrongful death action that fortunately it was an industrial accident and that the law provides for taking care of such accidents did not constitute prejudicial misconduct in absence of showing that trial court abused its discretion in denying motion for new trial on ground of such alleged misconduct.

#### 13. Negligence $\S$ 121(2)

"Res ipsa loquitur" doctrine merely justifies an inference of negligence and does not create a presumption of negligence or compel a finding of negligence, if defendant's explanatory evidence has, to the satisfaction of the trier of facts, overcome the inference of negligence arising from application of the doctrine.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

#### 14. Negligence $\S$ 134(4, 11)

In action for wrongful death of workman when boom of a crane collapsed and fell upon him, evidence from which jury could infer either that inference of negli-

gence arising from application of res ipsa loquitur doctrine had been overcome by defendants' evidence or that accident was unavoidable was sufficient to sustain verdict and judgment for defendants.

Arnerich, del Valle & Sinatra, Los Angeles, for appellants.

Spray, Gould & Bowers, Los Angeles, for Barney J. Bryce d. b. a. Bryce Trucking & Construction Co.

Parker, Stanbury, Reese & McGee, Los Angeles, for C. A. B. Const. Co. and William B. Hale.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants after trial before a jury in an action to recover for wrongful death.

*Facts:* On October 21, 1947, Fred Covely died as the result of a boom on a crane collapsing and falling upon him. The crane, of which the boom was a part, was leased by defendant Bryce to defendant C. A. B. Construction Company, hereinafter referred to as C. A. B., on a wholly equipped "operated and maintained" basis which means the charge for maintenance and the operator's wages were paid by C. A. B. and ultimately charged back to defendant Bryce.

C. A. B. was a partnership engaged in excavating and moving dirt. It had secured a subcontract from Mr. Barnes for all the excavating and dirt moving work on the Hollywood Freeway. C. A. B. subcontracted to defendant Bryce part of the dirt excavating work which it had agreed to do for Mr. Barnes. By this agreement defendant Bryce was paid by C. A. B. for each hour the equipment was used. He was on the job every day to furnish the equipment and see that everything "went all right with it."

At the time of the accident C. A. B. was using the equipment which it had leased from Bryce in connection with some dirt excavating it was doing, particularly the stacking of beams. Decedent was on a pile of beams that had already been moved when another load was picked up and moved toward the stock pile. As the boom swung over it broke, with the resulting accident.

*Questions: First: Did the trial court err in admitting evidence relative to the custom and usage with reference to the right of control of an employee where a crane is leased under an agreement that it is to be wholly equipped and "operated and maintained" by the lessor?*

[1-4] *No.* In the present case evidence was admitted pertaining to the custom and usage relative to who had control of the operator of the crane where it was leased under a contract similar to the one involved in this case. Testimony was admitted showing that the lessee had the right under such a contract to discharge the operator of the crane if he was not operating it in a manner satisfactory to the lessee. This testimony was admissible under the following rules:

(1) A contract may be interpreted in accordance with the usage of the place of its performance (Code of Civ.Proc. sec. 1870, subsec. 12);\*

(2) Knowledge of the custom on the part of the contracting parties is presumed from the fact that they are in the business or trade in which the custom exists (Watson Land Co. v. Rio Grande Oil Co., 61 Cal. App.2d 269, 272 [2], 142 P.2d 950; Hind v. Oriental Products Co., 195 Cal. 655, 667 [11], 235 P. 438);

(3) It is not necessary to plead a custom or usage where it is so general that it is presumed to have been known by the parties to a contract. (Todd v. Meserve, 93 Cal.App. 370, 381 [5], 269 P. 710.)

Applying the foregoing rules to the facts in the present case the evidence which was admitted was of a general custom and usage in the trade. Therefore it was properly admitted for the purpose of determining the extent and control of the lessee over the operator of the equipment leased upon a wholly equipped "operated and maintained" basis.

Second: *Did the trial court commit prejudicial error in:*

(a) *Instructing the jury as follows?*

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage caused him without intention and which resulted from the dangerous condition or conduct to which he thus exposed himself."

[5] *No.* First, plaintiffs urge the instructions were erroneous under the ruling in Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382. The instructions in the cited case were held to be erroneous because the facts as to the extent of plaintiff's knowledge of the danger, as to whether plaintiff was unreasonable in encountering the risk and as to whether he failed to exercise due care under the existing conditions, were matters which were not left to the jury for their determination and consideration. (See Hedding v. Pearson, supra, 76 Cal. App.2d 485 [2a], 173 P.2d 382.)

In the instant case the instructions left the foregoing questions for the determination of the jury.

[6, 7] Second, plaintiffs contend it was error to give an instruction on assumption of risk in the absence of a pleading of such doctrine in a special defense. Such is not the law. Where the defense of plaintiff's contributory negligence is pleaded, as in the instant case, evidence of assumption of risk by the injured party and instructions relative thereto are proper. (Ury v. Fred-

\* The Code of Civil Procedure, section 1870, subsection 12, reads in part as follows: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: \* \* \* 12.

Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation".

kin's Markets, Inc., 26 Cal.App.2d 501, 502 [1], 79 P.2d 749.)

(b) *Giving an instruction on the doctrine of unavoidable accident?*

[8] *No.* The trial court correctly gave an instruction upon the doctrine of unavoidable accident. Whenever, as in the instant case, defendant by its answer denies negligence it is not error for the trial court to give an instruction on the doctrine of unavoidable accident. (*Sitkei v. Ralphs Grocery Co.*, 25 Cal.App.2d 294, 297 [4], 77 P.2d 311 (hearing denied by the Supreme Court); *Wertheim v. Mears*, 104 Cal.App.2d 120, 121 [1], 231 P.2d 89.)

Third: *Did the trial court err in refusing to give the following instructions requested by plaintiffs?*

(a) "One may not be said to assume a risk that can come to him only through the negligence of another that he does not anticipate and which would not be anticipated by a person of ordinary prudence in like situation."

[9] *No.* The substance of this instruction was given by the court in the following:

"A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus, it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.  
\* \* \*

(b) "If, at the time of the accident in question, the deceased, Fred Covely, was in the performance of a duty enjoined upon him by his employer, Barnes Construction Company, to wit, the unloading and piling of steel H-beams, the deceased had the right to assume that the boom of the mobile crane operated by the defendant William B. Hale would not collapse and fall without warning, and you should not find that said deceased contributed to his own injuries in the doing of that which his employment required that he should do."

"You are instructed that where a person must work in a position of possible danger the amount of care which he is bound to ex-

ercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. Whether or not the decedent, Fred Covely, was guilty of contributory negligence in assisting in the unloading and the piling of the steel H-beams on the date of said accident, all as disclosed by the evidence, is a question for your decision.

"You are reminded, however, that it was the duty of the deceased to exercise at all times the care of an ordinary prudent man."

[10] *No.* These instructions were covered by the following instruction:

"You are instructed that the mere fact that the deceased worked in and about the mobile crane, knowing that there was an element of danger in so working, does not necessitate the conclusions that he thereby assumed the risk of any injury that might be sustained by him."

Fourth: *Was defendants' counsel guilty of prejudicial misconduct in addressing the jury?*

*No.* During the course of defendants' argument to the jury the following occurred:

"Now, this unfortunate accident, of course, occurred, but we must look at it in an abstract manner in determining the issues in this case. Fortunately it is an industrial accident and the law provides for taking care of industrial accidents.

"Mr. Arnerich: Just a minute. If your Honor please, I object to that statement and cite it as prejudicial misconduct. It is no part of the issues of this case.

"The Court: Objection sustained. Jury disregard the remark."

[11] Where counsel is charged with misconduct in improperly bringing the question of insurance into a case the denial of a motion for a new trial on that ground will be deemed a determination by the trial court of counsel's good faith and that prejudice did not result to the opposing party. Such a determination in the absence of a clear showing of prejudice is binding upon an appellate court. (*Walling v. Kimball*, 17 Cal.2d 364, 368 [1], 110 P.2d 58; *Brown v. McCuan*, 56 Cal.App.2d 35, 40 [4], 132 P.2d 838.)



[12] In the present case one of the grounds of the motion for a new trial was the alleged improper remark of counsel. It does not appear that the trial court has abused its discretion, hence the foregoing rule is applicable.

Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111, and Ferrario v. Conyes, 19 Cal.App. 2d 58, 64 P.2d 975, are in accord with the above stated rule. In each of the cited cases the court held, in granting the motion for a new trial, that counsel's conduct constituted prejudicial error and such ruling being supported by a reasonable inference from the record, was affirmed on appeal.

Fifth: *Was there substantial evidence to sustain the verdict of the jury and the judgment predicated thereon that (a) plaintiff had not sustained the burden of proof of establishing defendants' negligence, or (b) the accident was unavoidable?*

[13] *Yes.* Assuming for the purpose of this opinion only that the doctrine of res ipsa loquitur was applicable, the following rule applies: The doctrine of res ipsa loquitur merely warrants or justifies the drawing of an inference of negligence. It does not create a presumption of negligence or compel a finding of negligence if the defendant's explanatory evidence has, to the satisfaction of the trier of fact, overcome the inference of negligence arising from the application of the doctrine. (Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 64 et seq., 59 P.2d 962; Ward v. Silveria, 102 Cal.App.2d 114, 119 [3], 226 P.2d 732; Hinds v. Wheadon, 67 Cal.App.2d 456, 464 [2], 154 P.2d 720; Holt v. Henry, 58 Cal. App.2d 168, 171 [3], 136 P.2d 97.)

In the present case there was testimony that the crane was in good working condition before the accident and there was a total absence of any testimony of any defect either in the crane or in its operation. Also, there was testimony that it was not customary for a pile butt man, which decedent was, to walk under a swinging boom which was loaded. In the instant case the swinging boom was loaded and decedent had placed himself under it.

[14] In the light of the above stated rules and the facts, the trial jury may have

inferred either that (1) the inference of negligence arising from the application of the doctrine of res ipsa loquitur had been overcome by the evidence introduced by defendants or (2) the accident was an unavoidable one. Therefore, under the above stated rule, we find the evidence was conflicting and we are bound by the determination of the trier of facts that the inference of negligence arising from the application of the doctrine of res ipsa loquitur had been overcome by defendants' evidence and there was sufficient evidence to sustain the verdict and judgment in favor of defendants. Likewise, since the evidence would have justified a finding that the accident was unavoidable, we are bound by the implied finding of the jury to such effect.

In view of our conclusions it is unnecessary to discuss other points presented by counsel.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.



110 Cal.App.2d 141

MOTZER et al. v. PAOLI.

Civ. 14846.

District Court of Appeal, First District,  
Division 2, California.

March 28, 1952.

Rehearing Denied April 26, 1952.

Hearing Denied May 26, 1952.

Fred C. Motzer and Frances H. Motzer sued R. P. Paoli for damages resulting from the bursting of a culverted fill made by Paoli across natural water course which ran through his property and thence through that of Motzers, and from bursting of water main laid in fill by local water district. The Superior Court, Marin County, Jordan L. Martinnelli, J., gave judgment for Motzers and Paoli appealed. The District Court of Appeals, Jones, J., pro tem., held that it was the bursting of the fill that pulled the water main with it and, therefore, liability for damage done to plaintiffs' property did not rest

on water district since failure of water main was not result of negligence or wrongful misconduct of water district in laying it.

Judgment affirmed.

### 1. Waters and Water Courses ☞63, 263

In action for damages sustained when plaintiffs' land was spread with debris and detritus by the washing out of culverted fill made by defendant across natural water course running from defendant's property through plaintiffs' property, and by the breaking of water main laid in the fill by local water district, evidence supported finding that it was the washing out of fill that pulled water main with it and, therefore, liability for damage to plaintiffs' land did not rest on water district since no part of failure of water main resulted from negligence or wrongful misconduct of water district in laying it.

### 2. Torts ☞1

The doctrine of absolute liability or liability without fault is predicated upon theory that actor realizing hazard of his undertaking nevertheless assumes risk connected therewith and, notwithstanding he is free from all negligence or wrong and has used utmost care, he nevertheless is liable for any invasion of the person or property rights of another.

### 3. Waters and Water Courses ☞60

Where culverted fill made by defendant in natural water course gave way and spread debris and detritus on plaintiffs' land below, suit for damages tried on theory that defendant did not use any care at all in use of his property but intentionally, or at least with utter disregard, damaged property of plaintiffs did not involve application of doctrine of absolute liability and, therefore, judgment for plaintiffs was not reversible on ground that said doctrine was erroneously applied.

### 4. Waters and Water Courses ☞63

Where culverted fill placed by defendant across natural water course burst and spread debris and detritus on plaintiff's land below, law defined rights and duties existing between parties with regard to such a trespass and they did not have to be alleged in complaint in suit for damages.

Roos & Jennings, Leslie L. Roos, and Russell Westover, Jr., all of San Francisco, for appellant.

Gardiner & Riede, San Rafael, for respondents.

JONES, Justice pro tem.

This appeal is from a judgment awarding damages for injury to plaintiffs' property as the result of flooding and the deposit of detritus and debris thereon.

Plaintiffs' lands are situate in the City of San Rafael and comprise about three acres highly improved with drives, gardens, swimming pool and a dwelling. They had lived in this home for seventeen years prior to the flooding. The lands of Paoli lie adjacent to and above those of plaintiffs. The Paoli lands were unimproved and for the seventeen years that the plaintiffs had occupied their property the water from the Paoli lands had drained down into a natural water course and across the property of the plaintiffs. In January 1948, Paoli commenced the construction of roads and streets on his property in the process of developing it into a subdivision. In the course of the construction work he created a fill twelve or fourteen feet deep across the water course draining the lands of the parties. In the bottom of the fill he installed a drain or culvert. After the fill was made the utility district supplying water to residents in that area laid an eight inch pipe line across the fill under a right-of-way agreement with Paoli. The fill was made up of loose materials and was dumped without compacting and was in no way reinforced. The roads and drains above the fill were so constructed as to drain areas into the water course which under natural conditions did not drain into it. Roadways connected with the fill at each end sloping upgrade away from it in both directions.

In September 1948, Motzer, by letter, called the attention of Paoli to the fact that the culvert under the fill was too small to carry the normal run off of the water from behind the fill, and that the whole fill would probably wash out. He asked that the situation be corrected. Nothing came

of this letter and in January 1949, Motzer had his attorney send letters to both Paoli and his engineer in charge of construction calling attention to the drainage situation and demanding that something be done to eliminate the danger. On March 11, 1949, during a rain storm of normal seasonal intensity the fill went out releasing the water behind it. When the fill went out the water main broke adding its water to the general flood. The property of plaintiffs was deluged and there was left upon it a residue of rocks, sticks, mud and other detritus.

What happened to the fill was described at the trial by Mr. Lux, an eyewitness to the incident, and who was construction superintendent for Paoli. He testified that he was standing near the fill at about 12:30 p. m. on March 11, 1949, and observed the waters flowing there at that time; that he saw the fill wash out, and that at that time there was no break in the pipe line; that the water which was washing out the fill was rain water coming down the road from both directions; that he saw the fill washing out and about ten feet of the pipe line was exposed at the time he arrived; that the fill continued to wash out until a full length, or joint, of pipe was exposed. In response to the question, "Then what happened to the pipe", he answered, "The fill pulled out and pulled the pipe with it."

[1] As we gather from the opening brief of the defendant he urges two grounds for reversal of the judgment. He first contends that the liability for the damage resulting from the washing out of the fill rests upon the Marin Municipal Water District, the owner and operator of the water main, and secondly, that the trial court erroneously applied the doctrine of absolute liability, or liability without fault, in deciding the case. The argument is also made that plaintiffs failed to plead that he owed any duty to them with respect to the security of their property from damage.

The fact that as the fill washed out it "pulled the pipe with it" coupled with the finding of the trial court that no part of the failure of the water pipe resulted from the negligence or wrongful misconduct of the Marin Municipal Water District dis-

poses of appellant's first contention. The situation presents a finding supported by substantial evidence. *Raggio v. Mallory*, 10 Cal.2d 723, 725, 76 P.2d 660.

[2,3] The doctrine of absolute liability or liability without fault is predicated upon the theory that the actor realizing the hazard of his undertaking nevertheless assumes the risk connected therewith and, notwithstanding he is free from all negligence or wrong and has used the utmost care, he nevertheless is liable for any invasion of the person or property rights of another. The rule is stated in *Luthringer v. Moore*, 31 Cal.2d 489, 498, 190 P.2d 1, 7, in this language: "One who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the *utmost care is exercised* to prevent the harm. \* \* \*" (Italics added.) The case before us was tried on the theory that the defendant, Paoli, did not use any care at all in the use of his property but intentionally, or at least with utter disregard, damaged the property of the Motzers. The complaint in effect so alleges, and the trial court on substantial evidence so found. Obviously the doctrine of absolute liability was not applied to the case at any stage of the proceedings.

[4] The case is governed by the rules set forth in *Razzano v. Kent*, 78 Cal.App. 2d 254, 177 P.2d 612 and *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50. In the *Razzano* case the court held it to be a trespass for an operator of an upper dredging operation to allow mud and silt to flow into the ditch and pond of a lower operator through the medium of surface rain water. In the *Perkins* case in the language of the court, 163 Cal. at page 786, 127 P. at page 52, "The allegations of the complaint taken together amount to this: That the defendants cut a canal through the natural bank of the Sacramento river. After cutting the canal [they] failed to take proper precautions to prevent the waters of the river from flooding plaintiff's land; that the waters of the



river did in fact flood plaintiff's land to his injury." The complaint was held to be a sufficient pleading of a trespass and to the objection that it was not pleaded that the cutting was done without plaintiff's consent, the court said: "But we are not advised of any rule of pleading which requires a declaration from plaintiff that an unlawful trespass was committed without his acquiescence. There is no presumption that a plaintiff consents to an unwarranted invasion of his personal rights or rights of property." And to the objection that negligence was not pleaded in terms, it said: "It is, of course, not necessary to aver in terms that an act was negligently done to state a cause of action in tort." (Citing *Cooley 2, Elements of Torts*, p. 19.)

As the foregoing authorities indicate, the law defines the rights and duties existing between parties where there is a trespass such as is alleged here, and such rights and duties need not be alleged.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



110 Cal.App.2d 237

**CARLSON et al. v. BRICKMAN.**  
Civ. 15022.

District Court of Appeal, First District,  
Division 1, California.

April 4, 1952.

Peter S. Carlson and Fredrika S. Carlson brought action against L. G. Brickman for rescission of an exchange by plaintiffs of an apartment building for a motel of defendant, on ground of alleged fraud and misrepresentation on part of defendant. The Superior Court of the State of California in and for the City and County of San Francisco, John B. Molinari, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that there were no

untrue representations by or on behalf of defendant.

Judgment affirmed.

### 1. Exchange of Property ⇨3(1)

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, provision in exchange agreement that it was understood that broker was released from all responsibility regarding valuations, and that the principals had investigated the properties and knew value thereof and conditions of the properties, would not relieve defendant from responsibility of any actual fraudulent misrepresentations, but could be considered on question whether plaintiffs were relying on alleged misrepresentations by defendant or on their own investigation.

### 2. Exchange of Property ⇨8(4)

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, evidence sustained finding that no untrue representations of fact were made by or on behalf of defendant.

### 3. Appeal and Error ⇨99I

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, question whether plaintiffs regarded statement that vacancy rate of motel was only one-third as an opinion or as a statement of fact was for trial court to determine.

### 4. Exchange of Property ⇨8(4)

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, evidence sustained finding that plaintiffs made an independent investigation of the motel and its probable income and relied on such investigation rather than on anything said by or on behalf of defendant.

**5. Exchange of Property** ⇨8(4)

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, evidence established that representations made by or on behalf of defendant as to income of motel were warranted by information of defendant or one who made representations on behalf of defendant.

**6. Exchange of Property** ⇨8(4)

In action for rescission of an exchange by plaintiffs of an apartment building for motel of defendant, on ground of alleged fraud and misrepresentation by defendant or on defendant's behalf as to income of motel, court had right to consider letters which had been written by one of the plaintiffs to defendant after the exchange, and which showed cordiality towards defendant, in determining whether plaintiffs had considered statement or estimates of income from motel as made by defendant or on defendant's behalf as representations of fact and had relied on it rather than on their own investigation.

**7. Appeal and Error** ⇨843(3), 1071(1)

If judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by the evidence, or are uncertain or otherwise defective.

---

Frederick W. Kant, Allan H. Fish, San Francisco, for appellants.

Raymond B. Haizlip, San Francisco, for respondent.

BRAY, Justice.

The sole question on this appeal by plaintiffs from a judgment in favor of defendant in an action for rescission on the ground of fraud and misrepresentation is the sufficiency of the evidence to support the findings and judgment.

Facts.

The action results from the exchange of an apartment building in San Francisco owned by plaintiffs for a motel at Pismo

Beach owned by defendant. In August of 1948 plaintiffs had listed their apartment house with real estate brokers Davis & Dunn for \$55,000. There was a \$23,000 loan against it. Plaintiffs had previous experience in owning and operating an apartment house in Oakland prior to owning and operating the San Francisco one, but had never owned or operated a motel. There is evidence, although denied by them, that plaintiffs were anxious to get rid of their property because of Negroes in the neighborhood; that plaintiff Fredrika "was afraid to open the door" because the apartment house "was completely surrounded by negroes." Plaintiff Peter was an experienced carpenter. Kane, a real estate broker, independent of Davis & Dunn, obtained from the latter the listing of plaintiffs' property. He called on plaintiff Fredrika, who advised him plaintiffs would be interested in a trade for out of town property and had been looking at a Fort Bragg motel. Kane said he knew of a motel at Pismo Beach and that he would get a statement concerning it. Later he showed her a statement which he received from Dunn. Plaintiffs knew nothing about Pismo Beach motels. Shortly thereafter Kane drove plaintiffs to Pismo where they looked at the motel and its grounds, went through every unit with the manager, saw the renovations, furnishings, etc. Plaintiff Fredrika testified that the manager stated that they had been three to four months in remodeling; that plaintiffs knew the motel had been under construction during the time defendant had owned it. She claimed, however, that at the time of their visit only one unit was uncompleted. The manager claimed he told plaintiffs that the motel had been under construction for the past year and he could not give figures on the income and expense of operating for that reason. On returning to San Francisco Kane suggested that plaintiffs consider an exchange. A few days later plaintiffs, on their own initiative, and alone, went down to see the motel again, arranging to meet there their 35 year old son who lived in Los Angeles. The three of them looked over the entire motel again and stayed there overnight. Mrs.

Rice, the wife of the manager, testified that she showed plaintiffs and the son the books and read aloud to them the daily totals for several days preceding. That night the motel was filled with guests. Plaintiffs discussed the prospective deal with the son. They asked the manager, Rice, what the motel's prospects were and he told them that a news item had appeared in a local paper to the effect that the government was considering the reactivation of Camp Roberts (which was nearby), and

if this was done, the motel business should boom. He read aloud to them the *daily totals* for several days preceding, but apparently did not let them inspect the books. Plaintiff Fredrika testified that he read *total figures for three months*. On returning to San Francisco plaintiffs called Kane and told him they were interested in making a trade, and asked him for a copy of the statement he had shown them. This he gave them. The statement was on Davis & Dunn's letterhead and read:

"Half Way Motel

|               |                                                                                                                                                                                  |                |             |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------|
| Location:     | On Hi-Way 101, Pismo Beach, California                                                                                                                                           |                |             |
| Lot:          | 2½ acres—Frontage 450 feet.                                                                                                                                                      |                |             |
| Improvements: | 30 Stucco Units; 23 singles, 7 doubles—20 with complete Bath and Kitchens; 2 with complete Bath. 6 with Basin & Toilet; 2 Single rooms. All are newly furnished and redecorated. |                |             |
| Income:       | 30 (at) \$4.00 ea.                                                                                                                                                               | \$3,600.00 Mo. |             |
|               | Less: ⅓ for vacancies                                                                                                                                                            | 1,200.00       |             |
|               |                                                                                                                                                                                  | <hr/>          |             |
|               |                                                                                                                                                                                  | 2,400.00       | x 12        |
|               | Gross Annual Income .....                                                                                                                                                        |                | \$28,800.00 |
| Expenses:     | Taxes (Annual)                                                                                                                                                                   | 178.00         |             |
|               | Ins. (\$60,000 (at) 90¢)                                                                                                                                                         | 180.00         |             |
|               | Mgr. Apt. (at) \$4.00                                                                                                                                                            | 1,440.00       |             |
|               | Laundry                                                                                                                                                                          | 2,700.00       |             |
|               | Water                                                                                                                                                                            | 200.00         |             |
|               | Gas & Electricity                                                                                                                                                                | 1,167.00       |             |
|               | Garbage                                                                                                                                                                          | 75.00          |             |
|               | Telephone                                                                                                                                                                        | 60.00          |             |
|               | Supplies                                                                                                                                                                         | 1,200.00       | 7,200.00    |
|               | <hr/>                                                                                                                                                                            | <hr/>          |             |
|               | Net Annual Income .....                                                                                                                                                          |                | \$21,600.00 |
| Encumbrance:  | \$59,500.00 payable \$595.00 month plus 6% interest"                                                                                                                             |                |             |

Plaintiff Fredrika testified that she relied solely on the representations in the above statement and had she known they were false she would not have bought the motel. About this time, Davis & Dunn ran ads in a San Francisco newspaper on three consecutive Sundays, advertising a motel on highway 101 at Pismo which was running full and would net annually \$20,000 (one said \$21,500). These ads corresponded substantially with the data in the statement. Both plaintiffs claim they saw these ads and related them to defend-

ant's motel. However, in her deposition plaintiff Fredrika testified she relied solely on the statement, explaining at the trial that she did not mention having seen the ads as she did not consider it important. While the statement gives 30 stucco units, 23 singles, 7 doubles, plaintiffs testified that there are only 18 singles and 7 doubles, a total of 25 units. The manager and his wife testified that there were 18 singles, 6 doubles, each double bearing two numbers. In their complaint plaintiffs charged this as a material misrepresentation. How-



ever, they abandoned it at the trial, possibly because having inspected the place on two occasions, staying overnight on one, they must have counted the units and could hardly claim now that they were deceived by the statement in this respect. In the first year after they acquired the property, their net income was either \$5,076.98, or, if certain additional deductions can be considered, \$4,272.81. The statement shows a vacancy rate estimated at one-third. Actually, defendant's books for the period he had the motel show a vacancy rate of 77 per cent. Defendant explained this by the reconstruction. Plaintiffs' experience in operation shows a vacancy rate much higher than one-third.

Defendant, during his ownership of the motel, had no active part in its operation. He saw its books at the office of his accountant and authorized the latter to turn the figures over to Dunn. He testified that there was no net income because it took all of 1948 up to the time plaintiffs purchased, to reconstruct. The cost of the reconstruction was \$22,000. Units that were not being worked on were occupied by workmen or used to store materials and equipment, preventing occupancy of seven or eight units at a time. In the month of March, due to the work going on, only two cottages were available for renting. Moreover, Kane told plaintiffs that the winter season was slack because travel was slow. That plaintiffs were exercising their own judgment is shown by the fact that plaintiffs told Kane on two different occasions that they thought the manager was withholding money from defendant, "was gyping him." Defendant had no contact with either Kane or plaintiffs. Dunn had no contact with plaintiffs. Dunn prepared a certain escrow statement and sent it to plaintiffs, claiming he did so because Kane had no typewriter. However, Dunn received a commission from defendant and Kane from plaintiffs. These commissions were joined and split equally between Dunn and Kane.

Defendant testified he did not know where Dunn got the information for the statement. Dunn testified that he got it from a prior owner, and the information

concerning taxes from defendant's accountant. Dunn arrived at the price for the motel because of estimates received from Raitt Realty Company which specializes in motels. He also spoke to certain brokers who had listings from the former owner. He said there was a custom in the real estate business to give in these statements a list of exact income and expense only where there is a prior history (here because of the reconstruction, there was none) so he used only round figures. Plaintiff Fredrika testified she thought that the figures in the statement may have referred to the year prior to 1948 (which was prior to defendant's ownership).

In the trade plaintiffs valued their apartment house at \$45,000. Defendant assumed the \$23,000 encumbrance against it and its contents. Apparently no specific value was placed on the motel. Plaintiffs assumed a purchase money encumbrance of \$56,000 on the real and personal property. Plaintiffs' witness Arsenio appraised the property in 1949 at \$21,200. Defendant's appraiser appraised it at between \$65,000 and \$75,000.

It is difficult to determine just what was the difference in value of the properties traded. One expert valued plaintiff's apartment house at the time of exchange as \$45,000. Dunn placed on it a value of from \$40,000 to \$45,000. Apparently plaintiffs valued it for trade purposes at \$45,000. Defendant took it subject to an indebtedness of approximately \$23,000. The witness Hulse valued the motel at from \$65,000 to \$75,000. In one ad the motel price was given as \$85,000 and in another, \$79,500. Kane said defendant was asking \$85,000. Kane asked plaintiffs to assume an encumbrance of \$57,700, but plaintiffs would and did assume only \$56,000. Dunn accepted the value of \$70,000-\$79,000 placed on the motel by the Raitt Realty Company. Apparently there was some puffing of the values on each side and the parties were primarily interested in the amount of the encumbrances. Assuming a value of \$45,000 on the apartment house and deducting the \$23,000 indebtedness left a \$22,000 equity. Apparently the equity in the motel was less than this, for as-

suming a valuation of \$75,000 which Raitt company said would be the top price in July, 1948, and deducting the \$56,000 encumbrance would leave an equity of \$19,000.

In the exchange agreement appear the following provisions: "And it is presumed and understood that the agent or broker acting under the terms of this agreement, is released from all responsibility regarding valuations of same, and that the principals have, each for himself, investigated the properties herein proposed and accepted for exchange and know the value thereof and conditions of said properties. \* \* \* No representations, guaranties or warranties of any kind or character have been made on behalf of either party which are not herein expressed."

[1] While this clause would not relieve defendant of the responsibility of any actual fraudulent misrepresentations, *Palladine v. Imperial Valley Farm Lands Ass'n*, 65 Cal.App. 727, 225 P. 291, it may be considered on the question of whether plaintiffs were relying on the statement or on their own investigation. Plaintiffs knew that no past vacancy rate could be determined because of reconstruction and that hence no future vacancy rate could be determined.

#### Sufficiency of the Evidence.

##### (a) No Untrue Representations.

[2] The court found that no untrue representations of fact were made. So far as the representations in the newspaper ads are concerned, the evidence supports the conclusion that plaintiffs did not see them, or if they did, in nowise relied on them. Their discussions with Kane, in which they professed complete ignorance of any Pismo hotels, plaintiff Fredrika's failure to mention them when in her deposition she was testifying as to what she relied on, and the contents of the ads themselves, would justify the conclusion that plaintiffs neither saw nor relied on them.

While the evidence would have supported a conclusion that the statements concerning income were representations of fact and not merely estimates or opinions, the evidence does not compel such conclusion.

It is obvious to plaintiffs that they could not be statements of the actual condition, and it was permissible for the trial court to infer that it was not a statement of a past condition, for the reason that they knew that during all the time defendant had the property it was in course of construction and a substantial number of the units unusable. They were given actual figures for several days past and total figures for the preceding three months. Moreover, the figures were in round numbers, thereby indicating that they were estimates. Plaintiffs also knew that the vacancy rate of one-third was completely off. Thus, the finding is correct as the figures given were not representations of fact but estimates and opinions.

[3] Plaintiff Fredrika was asked if she regarded the statement as "a sound opinion" to which she answered "yes." Whether this answer meant, particularly in view of the fact that she knew that defendant had no past experience on which to base a statement of fact, that she accepted the statement as an opinion, rather than a statement of fact, as contended by plaintiffs, was a matter for the trial court to determine. Again, on the question of reliance by plaintiffs on the statement, it might be pointed out that, in the listing of the apartment house rentals given Davis & Dunn by plaintiffs, figures were used based on O.P.A. rentals, but which were about \$1,000 higher than the actual income shown by the apartment house books. The trial court was entitled to take this attitude towards rental statements into consideration in determining how much reliance plaintiffs placed on the one given them. "What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case, and is a question for the trial court to determine." *French v. Freeman*, 191 Cal. 579, 585, 217 P. 515, 517. Cases like *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958, and *Crandall v. Parks*, 152 Cal. 772, 93 P. 1018, referring to dishonest opinions of value, given in such manner as to indicate them to be statements of fact, are not in point here, as the facts are different. The situation here

was one where, under all the circumstances the following quotation from *Herrill v. Rugg*, 114 Cal.App. 492, 300 P. 140, applies. They were representations "which from the very nature of things are not susceptible of personal knowledge, are uniformly held expressions of opinion and not actionable." 114 Cal.App. at page 494, 300 P. at page 140. The court so found.

(b) Independent Investigation.

[4] The court found that plaintiffs made an independent investigation and relied upon that rather than upon the statement. There is ample evidence to support this finding. Plaintiffs were experienced in the unit rental business. It is true that they had never operated a motel. But with their background it is unreasonable to assume that from their two visits to Pismo they could not and did not estimate for themselves what the rental units would bring. Cases like *French v. Freeman*, supra, 191 Cal. 579, 217 P. 515, and others cited by plaintiffs which hold that a visit by an unexperienced person to premises which he purchases does not preclude him from showing reliance on representations, do not apply as plaintiffs were experienced in a similar type of business to the one they were examining. While they contend that they did not consult with their son, it again is unreasonable to assume that they brought him from Los Angeles to Pismo, showed him the motel, inspected with him all the units, stayed there overnight, and then did not ask his advice. It must be pointed out, too, that they must have counted the units, and because of the discrepancy between the actual number and the number in the statement have concluded that the statement was not accurate. Moreover, it showed that the statement was based, at least as far as units were concerned, on an estimate. They knew, too, that defendant's experience with the place would not support a statement of income and rate of vacancy.

*Hefferan v. Freebairn*, 34 Cal.2d 715, 214 P.2d 386, cited by plaintiffs, is not in point. There the purchaser inspected the

seller's records and noticed that the profits did not appear as represented. Before buying, the purchaser sought an explanation. The seller and his accountant then gave an explanation which the trial court found to be untrue. The purchaser did not investigate the truth of this explanation. The trial court found that the purchaser believed and relied upon these representations and that he had no knowledge or experience concerning the business in question. In our case the trial court found to the contrary. Moreover, plaintiffs' experience in the unit rental business has heretofore been shown.

(c) Representations Not Warranted.

[5] The court found, in effect, that defendant and no one acting for him made any representations of fact concerning income in a manner not warranted by their information. Taken as estimates or opinions (as we have pointed out before the evidence justifies), the source of Dunn's information in making up the statement warrants the statements therein contained. Before making them, Dunn consulted the former owner of the motel, the former owner's broker, a realty company specializing in the buying and selling of motels. While Dunn might have consulted defendant's books, his failure to do so does not necessarily indicate that he was not justified in making the estimate he did, for the reason that because the motel had been running under the severe handicap of reconstruction, the figures would not have been of much value in determining the future income. Not only were many units unusable, but the fact that the place was torn up would undoubtedly cause tourists not to patronize it. "It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and, although false, does not amount to actional fraud. Ordinarily a person has no right to rely upon such statements, and, if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and un-



derstood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury." *Stockton v. Hind*, 51 Cal.App. 131, 136, 196 P. 122, 124.

On the first day of the second visit there were very few cabins rented. Plaintiffs and their son went out to dinner. On their return every cabin except the one held for them had been rented. The evidence indicates that this fact had considerable to do with the fact that the next day plaintiffs notified Kane they would like to make the trade.

[6] Plaintiff Frederika testified that after plaintiffs took possession of the motel defendant visited it several times, staying overnight. On none of these occasions did plaintiffs claim that the income had been misrepresented. On February 16, 1949, approximately six months after the trade, plaintiff Frederika wrote defendant a cordial letter enclosing a statement "for the past month" and stating, "its not so good looking on paper. \* \* \* The business has been terrible as you can see, hope it soon picks up as things are getting a bit thin." On April 19, sending him a statement for the past month, she said: "We sure thought it would be terrible this month but the week end of April 9th and thru that week brought things up a little. I am looking forward to your stopping in some time on your way south, we are anxious for you to see the improvements." May 17, enclosing a statement, she said, "I am in hopes next month will show us a better return, altho the old timers here tell me not to look to [sic] much until after the middle of June. \* \* \* Stop in some time when you pass, will be very happy to see you." On August 19 she said: "I sincerely hope the business keeps up next month so we can make another payment to advantage." While these letters are not conclusive of the subject, the trial court had the right to con-

sider them in determining whether plaintiffs, at least up to that time, had considered the statement as estimates or as representations of fact, and had relied on it rather than on their own investigation.

(d) Relationship of Kane and Dunn.

[7] The court found that Kane and Dunn were independent of each other and did not represent both parties. This finding is incorrect. While they were independent of one another in general business, the evidence shows that here they were acting together and for both parties, even though the parties themselves were not aware of the fact. The splitting of the total commissions received from the parties demonstrates that. However, the error in this finding does not change the other findings and the judgment in the case. "But if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by the evidence, or are uncertain or otherwise defective." 2 Cal.Jur. p. 1028.

(e) Confidence.

The court found that plaintiffs did not repose confidence or trust in Kane or Dunn. Plaintiffs had listed their property with Davis & Dunn. Kane indicated to plaintiffs that he came from that firm and, of course, the statement was on the letterhead of that firm. Plaintiffs considered them reliable, and undoubtedly had confidence in and believed them. However, plaintiffs did not rely on that trust and confidence to the exclusion of their own independent investigation. Nor were they misled by their statements. Again, any error in this finding does not change the ultimate result.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

110 Cal.App.2d 8

**In re PERL'S GUARDIANSHIP.****SILVERSTEIN v. DEPARTMENT OF  
MENTAL HYGIENE.**

No. 15077.

District Court of Appeal, First District,  
Division 1, California.

March 25, 1952.

The State Department of Mental Hygiene brought a proceeding for allowance of its claim against the estate of Herman Perl, an incompetent person, for charges for board, care, maintenance, and medical attention furnished him at the Napa State Hospital. From an order of the Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., directing Rose Perl Silverstein, guardian of the estate, to pay such charges at monthly rates fixed by the Director of the Department, she appealed. The District Court of Appeal, Fred B. Wood, J., held that the Director properly determined the rates on the basis of the per capita cost of care, support and maintenance of all inmates of the hospital, rather than the actual cost of care, support and maintenance furnished appellant's ward.

Order affirmed.

**1. Insane Persons ⇨52**

The State Mental Hygiene Department Director correctly determined monthly rate of charges against incompetent's estate for board, care, maintenance and medical attention furnished him at state hospital on basis of per capita cost of care, support and maintenance of all inmates of hospital, rather than actual cost of care, support and maintenance furnished such particular inmate. Welfare and Institutions Code, §§ 6650, 6651.

**2. States ⇨119**

The State Mental Hygiene Director's determination of monthly rate of charges against incompetent person's estate for board, care, maintenance and medical attention furnished him at state hospital on basis of per capita cost of care, support and maintenance of all inmates thereof, instead of actual cost of such incompetent's care, support and maintenance, was not unconstitutional as returning a profit to state on such patient as incompetent, who suffered from mental disease not amenable to cura-

tive treatment, and operating as gift to patients requiring more than average care. Welfare and Institutions Code, §§ 6650, 6651, 7009-7011.

**3. Insane Persons ⇨52**

The State Mental Hygiene Director's determination of monthly rate of charges against incompetent's estate for board, care, maintenance and medical attention furnished him at state hospital on basis of per capita cost of care, support and maintenance of all inmates of hospital, instead of actual cost of care, support and maintenance furnished such incompetent, was proper as against contentions that estate was liable for reasonable value of such care, support and maintenance and that per capita cost thereof to state did not necessarily represent such value. Welfare and Institutions Code, §§ 6650, 6651.

**4. Insane Persons ⇨52**

The State Mental Hygiene Director properly based his determination of monthly rate of charges against incompetent's estate for board, care, maintenance and medical attention furnished him at state hospital on costs incurred during fiscal year preceding period for which rate was fixed, rather than costs incurred during each month of such period. Welfare and Institutions Code, §§ 6650, 6651.

Hone & Lobree, Hubert D. Forsyth, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Palmer, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

This is a proceeding brought by the State Department of Mental Hygiene pursuant to the provisions of section 6655 of the Welfare and Institutions Code, for an order allowing the claim of the department against the estate of Herman Perl, an incompetent, for accrued and accruing charges for board, care, maintenance, and medical attention furnished to Herman Perl at Napa State Hospital.

After a hearing, the court ordered the guardian of the estate to pay those charges, at the rates fixed by the department, \$60 per

month from February 1, 1950, to December 31, 1950, and thereafter at \$90 per month or until changed by the department. The guardian has appealed from that order.

It appears that the guardian has since paid the department through April 30, 1951, at the rate of \$60 per month, without prejudice to the estate or to the department in a final determination by this appeal or other proceedings of what is the proper and legal charge for the period January 1, 1951, to April 30, 1951, and thereafter.

The sole question is whether or not the Director of Mental Hygiene properly and legally determined and fixed the rate of \$90 per month in the exercise of the authority conferred upon him by section 6651 of the Welfare and Institutions Code.

Appellant claims that this statute requires the director to fix the rate at the actual cost of the care, support, and maintenance furnished to the particular inmate, in this case Herman Perl. That was not done. The rate was based upon the per capita cost of all inmates, many of whom required a great deal more care, including medical attention, than did Herman Perl. The significant findings of the court, as summarized by the appellant, were as follows: (1) Herman Perl is chronically insane and suffers from a sort of mental disease not amenable to curative treatment. (2) As a patient at the Napa State Hospital during the period January 1, 1951, to April 30, 1951, Herman Perl received board, lodging and custodial supervision; during said period Herman Perl received no medical care, treatment or attention as a patient in said hospital other than being kept busy in an effort to prevent further mental deterioration. (3) The rate of charge of \$90 per month to the estate of Herman Perl was based by the Director of the Department of Mental Hygiene upon the per capita cost of care, support and maintenance of patients at the Napa Hospital, which per capita cost was made up of costs of support of the Napa Hospital, a pro rata portion of the administrative costs of the Department of Mental Hygiene, depreciation of improvements and equipment of said hospital, interest on capital investment in said hospital and a pro rata

cost of certain State service agencies, and of employees' retirement costs. (4) Said rate of charge of \$90 per month was not based by the Director upon the cost of actual care, support and maintenance furnished to said Herman Perl nor upon the reasonable value thereof.

[1] That method of determining the rate was correct. Upon the per capita basis, if all inmates paid in full, the state would be paid the actual cost to it for the care, support, and maintenance of all inmates at the hospital.

The policy of requiring patients "whose friends or whose property can pay their expenses" to "pay according to the terms directed by the Trustees" of the institution, was declared in the Act of May 17, 1853, establishing the Stockton State Hospital. Stats.1853, chap. 203, sec. 17, p. 925. The special statutes creating other state hospitals contained similar provisions. (For example, "actual charges and expenses," Napa State Hospital, Stats.1871-72, p. 673, sec. 18, p. 678; Mendocino State Hospital, Stats.1889, p. 25, sec. 15, p. 30.) The provisions of the earlier statutes were consolidated in the Act of March 31, 1897, which imposed "Liability for the care, support, and treatment of the insane" upon the guardian of the estate, if sufficient for the purpose, and upon certain relatives, if of sufficient ability. Stats.1897, p. 311, art. 3, sec. 6, p. 328. In 1903, this Act was revised and placed in the Political Code, as sections 2136-2199. Stats.1903, p. 485. Sections 2176 and 2180 are of significance in the present inquiry.

Sections 2176 declared the relatives, if of sufficient ability, and the estate of the patient, to the extent it is sufficient for the purpose, "liable for the care, support and maintenance" of the patient, provisions which in 1937 were carried into and are now expressed in section 6650 of the Welfare and Institutions Code.

Section 2180 fixed the rate to be charged, fifteen dollars per month "for the care, support, maintenance and clothing of all insane patients at state hospitals for the insane, where there is liability to pay for such care, support, maintenance and clothing \* \* \*." It authorized the



medical superintendent of any state hospital to "reduce or remit the amount to be paid by the estate or the relatives \* \* \* on satisfactory proof that said estate or said relatives \* \* \* are unable to pay the said sum of fifteen dollars per month." In 1919, section 2180 was amended to fix the rate at twenty dollars per month Stats.1919, p. 272. In 1929, the formula was changed, the rate to be fixed by the director of institutions within a statutory limit of forty dollars, expressed in these terms: "The monthly rate for the care, support, and maintenance of all insane persons at the hospitals for the insane and where there is liability to pay for such care, support and maintenance, shall be the actual cost thereof as may be determined by the director of institutions, with the approval of the department of finance, but not to exceed forty dollars per month payable in advance \* \* \*." Stats.1929, p. 1467. The provision for reduction or remission upon proof of inability to pay was retained. In 1933 section 2180 was amended by deleting from the formula just quoted the words "the actual cost thereof as may" Stats.1933, p. 2305. In this form, without material change, the text of section 2180 became section 6651 of the Welfare and Institutions Code in 1937. It was amended in 1943 to omit the statutory limit of forty dollars a month. The significant portion now reads: "The monthly rate for the care, support, and maintenance of all insane persons and inebriates at the hospitals for the insane and inebriates where there is liability to pay for such care, support, and maintenance, shall be determined by the Director of Institutions, and shall be payable in advance." Stats.1943, p. 2991. The power to reduce or remit for inability to pay has been retained. The obligation, of course, is not enforceable when there is likelihood of the patient's recovery or release and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital. Sec. 6655, Welf. & Inst.Code; based upon former sec. 2181, Pol.Code.

until 1919; thereafter, \$20) there could have been no contention that a particular patient could be charged less if he required only custodial care and such care cost the state less than the statutory rate. The statute permitted him to be charged less only if his estate and the responsible relatives were financially unable to pay the \$15 or the \$20 in full.

The 1929 amendment, giving the director the duty of fixing the rate from time to time, not to exceed \$40, did not necessarily change the concept of a uniform rate for all patients able to pay, even though it told the director to fix it at "the actual cost". The state desired to make no profit from the care of its patients if all paid the rate so fixed. In the prudent management of its affairs, it did desire to recoup the cost, up to the \$40 limit, if all were able to pay. The major feature of the 1929 amendment was the transfer of the rate-fixing function to the director. He could act promptly, as prices changed and costs fluctuated; the Legislature could not. Illustrative of such changes is the rise in the per capita cost at Napa State Hospital during recent years: in 1945-46, the per capita cost was \$43.32 per month; in 1946-47, \$52.95; 1947-48, \$68.91; 1948-49, \$80.81; 1949-50, \$94.75. Whatever inference might have been drawn from the interpolation of the words "actual cost" in the 1929 amendment vanished utterly upon the deletion of those words in 1933. Their deletion did not leave the director without a standard to guide him in fixing the rate. The very obligation of the patient's estate, expressed in terms of liability "for his care, support, and maintenance," sec. 6650, for which the "monthly rate" is the monetary equivalent, sec. 6651, denotes cost to the state.

The basing of a rate upon per capita costs is more practical and much less expensive than to keep books on each patient as appellant seeks to require. Few are able to pay in full. Less than half are able to pay in part. According to one witness, "\* \* \* you would have to hire a whole battery of cost accountants and clerks" to do as appellant would require. It would be a strange doctrine that would require the state to keep books upon each of the

During the period (1903 to 1929) when the monthly rate was fixed by statute (\$15

patients in the several state hospitals (32,100 in March of 1951) in order to ascertain the precise and varying individual costs for the mere 3.7 per cent (1204 in March of 1951) who pay in full or for the additional 42.6 per cent (13,686 in March of 1951) who pay something toward the cost of their keep.

[2] But, says appellant, the Constitution requires the keeping of books on each and every patient because the per capita method of computing costs returns the state a profit on such patients as Herman Perl and operates as a gift to those who require more than average care. That argument would apply with equal force to a statutory rate of charge, but we have not found a record of any such challenge of the statutory rate which obtained during the period of 1903 to 1929. The decision in *Jensen v. McCullough*, 1928, 94 Cal.App. 382, 271 P. 568, is persuasive of the view that such a challenge would not have been sustained. The court in that case held constitutional the provisions of sections 2192 and 2193 of the Political Code which imposed upon the parent or guardian of a feeble minded person, having the ability to pay, the duty of paying twenty dollars a month for the support of that person at the home for the feeble minded and required the county of residence to pay that sum to the state in the first instance. Some of those provisions now appear in sections 7009-7011 of the Welf. & Inst. Code. A statutory rate of twenty dollars a month was sustained in *State v. Grassman*, 1937, 157 Or. 696, 74 P.2d 60, 114 A.L.R. 978. We think the constitutional principles invoked by appellant herein are inapplicable. The purpose of the statute is to facilitate the prudent, efficient, and economical conduct of the business of the state; not to make a profit on Herman Perl, nor to give something of value to some other patient.

In selecting the per capita method (whether the rate be fixed by statute or by the director) the Legislature doubtless took into consideration the greatly increased cost of collection appellant's method would entail,—cost of collection it would be, not any element of service or care,—which, if allocated and apportioned among the 3.7

per cent who pay in full, or to them and the 42.6 per cent who pay in part, might cause them to pay more than they would pay upon a per capita cost basis. It would be equitable (under appellant's theory, mandatory) to recoup from the paying patients the entire expense of the additional cost accounting and bookkeeping involved.

There is thus presented a situation quite similar to that which furnishes the basis for statutory allowances (by the day, week, month, or year) and fixed mileage rates, in lieu of actual expenses, by way of reimbursement of public officers for costs incurred by them in the performance of official duties. See *Ware v. City of Battle Creek*, 201 Mich. 468, 167 N.W. 891, L.R.A.1918E, 673, \$40 per month; *State ex rel. McMaster v. Reeves*, 44 S.D. 568, 184 N.W. 993, \$150 per month; *Milwaukee County v. Halsey*, 149 Wis. 82, 136 N.W. 139, \$4,000 a year; *Macon County v. Williams*, 284 Mo. 447, 224 S.W. 835, \$1,200 a year; *Scharrenbroich v. Lewis and Clarke County*, 33 Mont. 250, 83 P. 482, 10 cents per mile; *Clark v. Board of County Com'rs of Clark County*, 64 S.D. 417, 267 N.W. 138, a fixed rate per mile for the use of the officer's own car; *Taxpayers' League of Carbon County, Wyo. v. McPherson*, 49 Wyo. 251, 54 P.2d 897, 106 A.L.R. 767, 15 cents per mile for the use of his car. In the *Scharrenbroich* case, the court observed that while on some trips an officer would make money, on others he would lose; and assumed that the Legislature understood that official expense would average the statutory rate. In the *Clark* case, the court said the Legislature adopted the fixed rate per mile as a method of computing the amount to be paid instead of requiring the keeping of a precise record of all items of expenditure in detail.

Appellant claims *In re Estate of Stobie*, 30 Cal.App.2d 525, 86 P.2d 883, 884, supports his theory. We do not so read that decision. The main point under discussion was the appellant's contention that the deletion from section 2180 of the Political Code in 1933 of the words "the actual cost thereof as may be" rendered the statute unconstitutional as an unwarranted delegation of legislative power. The court overruled

that contention upon the ground that the very terms of the liability of the estate ("care, support, and maintenance") prescribed the cost thereof as the basis for the monthly rate, hence prescribed a standard to guide the director in fixing the rate. By that holding the court did not expressly or by necessary implication determine that a particular method (the method used by the director in the present case or the method which appellant would have him use) is the only proper method for the fixing of the monthly rate. Indeed, there is some indication that the director in that case used the per capita method. It was stipulated that "the average per capita operating cost of the Stockton hospital for the fiscal year ending June 30, 1935, was \$213.78 and that the state's capital investment in that institution was \$3,288,478.15," 30 Cal.App.2d at page 530, 86 P.2d at page 886, and the court made the following significant comment: "In the instant case there is no evidence upon which to base the conclusion that the director of institutions acted arbitrarily or discriminatorily in fixing the cost to the state of the care, support and maintenance of the incompetent. The stipulated average per capita cost of the hospital only represented the average cash expense to the state of maintaining each patient during the fiscal year ending June 30, 1935. The state has a large capital investment in the Stockton hospital. The actual cost to the state of maintaining each patient in that hospital should include consideration of this investment. Therefore, as appellant had failed in any satisfactory manner to attack the action of the director of institutions in fixing the cost of the care, support and maintenance of the incompetent at forty dollars per month 'there is no basis for the intervention of this court'. [Citation.]" 30 Cal.App.2d at page 531, 86 P.2d at page 886. It further appears that the appellant therein had stipulated that the director fixed the rate "after an investigation of his [the patient's] requirements in the state hospital." 30 Cal.App.2d at page 530, 86 P.2d at page 886. It does not appear that an issue was drawn, for decision by the reviewing court, as between the per capita cost and the so-called actual cost

methods of computing the monthly rate. Indeed, appellant, in his opening brief therein, said that an examination of the evidence revealed that the "only reference to the cost of care, support and maintenance of inmates \* \* \* reads as follows: 'annual per capita operating cost, \$213.78.' \* \* \* Such annual sum amounts to the sum of \$17.815 per month and not Forty Dollars per month as found 'fair and reasonable' by the conclusions of law \* \* \*. No testimony was offered nor stipulation requested to the effect that any condition existed nor service nor materials furnished which would require any sum in excess of the 'annual per capita operating cost,' to maintain the ward in this case at such institution." Page 5. "The fact appears in evidence without conflict, that the annual per capita operating cost to the institution in question, amounts to only \$213.78. Such sum must necessarily include every cost of every kind to such institution for the care, support and maintenance of its inmates." Page 6. The monthly rate fixed (\$40) "is more than double the actual annual per capita cost. \* \* \* That portion of such amount [\$480] \* \* \* which is in excess of the actual cost thereof [\$213.78] is a special assessment or collection of tax \* \* \*." Pages 7, 8. He was willing to pay \$20 a month, and offered to pay at that rate. It is apparent that he accepted the per capita operating cost method of computation as proper, but objected to paying a share (pro rata or otherwise) of the depreciation of the state's three million dollar investment in buildings and equipment, the hospital's fair share of departmental administrative costs, and other similar expenses.

[3] Appellant further contends that the estate is liable for the "reasonable value" of the care, support and maintenance furnished the patient and that the per capita cost thereof to the state does not necessarily represent such reasonable value. In support thereof, he cites *In re Estate of Yturburru*, 134 Cal. 567, 66 P. 729. It is true that in that case the court did speak of reasonable value, but the "only point urged by the guardian for a reversal of the



order" there involved was to the effect that the law making the guardian responsible for maintenance of his ward was unconstitutional. 134 Cal. at page 568, 66 P. at page 729. In overruling that contention, the court observed that an insane person is liable for the reasonable value of things furnished to him, necessary for his support, citing section 38 of the Civil Code, and concluded that there was nothing in the Constitution to prevent the Legislature from "requiring that patients at the hospitals for the insane shall be there supported out of their own estates". 134 Cal. at page 569, 66 P. at page 729. We do not infer from that holding that the court intended to prescribe a particular method for the computation of a monthly rate of charge. Moreover, that decision was rendered prior to the time when the Legislature by statute prescribed a fixed sum as the monthly rate for all patients able to pay. It is not a decision upon the point in issue upon the appeal now before us.

[4] Appellant further criticizes the computation made because, for the period beginning January 1, 1951, the director fixed a monthly rate based upon costs incurred during the fiscal year 1949-50. She does not indicate why she believes the use of those costs was improper. The use of the records for the preceding fiscal year would seem quite appropriate. Upon the closing of the books for a fiscal year, the various elements of cost become known, definite and certain. In contrast, if the director were to compute the monthly rate each month based upon costs during that month, he would have to estimate the probable costs for the remainder of the month, and the added expense of doing so would increase the rate. Also, though costs may fluctuate from year to year, the amount the patient pays will average out over a period of time. Appellant has failed to show why the use of the cost data for the preceding fiscal year is not proper in fixing the monthly rate. The order should be affirmed.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

109 Cal.App.2d 890

**PEOPLE v. HURST.**

**Cr. 2785.**

District Court of Appeal, First District,  
Division 2, California.

March 24, 1952.

Defendant was convicted in Superior Court in and for the County of Contra Costa, Harold Jacoby, J., of a violation of § 288 of the Penal Code, and he appealed from judgment of conviction and order denying new trial motion. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to support the verdict.

Judgment and order affirmed.

**Infants ⇐20**

Evidence sustained conviction of defendant on charge of a violation of section 288 of the Penal Code. Pen.Code, § 288.

Morris Hurst, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondents,

NOURSE, Presiding Justice.

The defendant appeals from a judgment of conviction of a violation of section 288 of the Penal Code and also from an order denying his motion for a new trial. He presents his appeal in propria persona and as is frequently the case when this is done the briefs carry all the testimony most favorable to the appellant. The only question raised on the appeal is whether the evidence supports the verdict.

The defendant was charged with a violation of section 288 in the precise terms of the section. The evidence of the complaining witness (a step-daughter of defendant of the age of thirteen) was that, between twelve and one midnight, defendant forced her to get out of bed, to accompany him to the living room where he forced her to lie on the floor after he had removed her clothing. The act was then committed to the satisfaction of defendant. He then directed the girl to go to the bathroom and take care of herself. All this evidence was denied by the defendant who attempted to show that

the prosecution was instigated by a sixteen year old sister of the complainant because both sisters wished to get away from the defendant and place themselves under the control of the juvenile court.

No claim is made that improper evidence was received or rejected. The sole question is whether the jury was justified in believing the testimony of the young girl or whether it should have accepted the denials of the defendant.

It is manifest that the verdict of the jury should not be disturbed.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.



110 Cal.App.2d 98

In re JENKINS' ESTATE.

JENKINS v. OVERHOLT.

Civ. 18652.

District Court of Appeal, Second District,  
Division 1, California.

March 27, 1952.

Proceeding in the matter of the estate of Andrew T. Jenkins, deceased, wherein Minnie B. Jenkins, widow, filed petition for order setting aside parcel of alleged community property as homestead for her use, and was opposed by E. Llewellyn Overholt, executor of decedent's will. The Superior Court of Los Angeles County, J. F. Moroney, J., entered an order setting aside realty for use of widow for a limited period, and the widow appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding that realty was separate property of decedent.

Order affirmed.

#### 1. Appeal and Error ⇨1001(1), 1010(1)

##### Trial ⇨139(1)

Sufficiency of evidence is generally matter for trial court or jury, and findings or verdict will not be lightly set aside.

#### 2. Appeal and Error ⇨996, 1010(1), 1011(1)

Finding of trial court that property is either separate or community in character is binding and conclusive upon appellate court, if supported by sufficient evidence or if based on conflicting evidence or upon evidence that is subject to different inferences.

#### 3. Appeal and Error ⇨1010(1)

Finding against a presumption is binding upon appellate court unless evidence to rebut it is so weak and improbable that finding is without substantial support.

#### 4. Husband and Wife ⇨273(12)

It is question of fact for jury or court to determine whether evidence is sufficient to overcome presumption that property acquired during marriage is community property. Civ.Code, § 164.

#### 5. Husband and Wife ⇨264

Presumption that property acquired during marriage is community property is disputable and may be controverted by evidence, even by an inference tending to prove contrary contention. Civ.Code, § 164.

#### 6. Husband and Wife ⇨262(1)

It is presumed that a husband's earnings are used for family expenses.

#### 7. Husband and Wife ⇨264

In proceeding by widow to set aside parcel of alleged community property as homestead for her use, wherein decedent's executor filed objections alleging that realty was separate property of decedent, evidence was sufficient to overcome presumption that property acquired during marriage is community property, and to sustain finding that realty was separate property of decedent husband. Civ.Code, § 164.

Edward S. Cooper, Los Angeles, for appellant.

H. Melvin Swift, Jr., Los Angeles, for respondent.

DRAPEAU, Justice.

By petition the surviving widow of Andrew T. Jenkins, deceased, sought an order setting apart a parcel of alleged com-

munity property as a homestead for her use. The executor of decedent's last will filed objections on the ground that said parcel of real estate was the separate property of decedent and not community property, as alleged.

The court found that the realty was the separate property of decedent and that no homestead was selected during his lifetime. And ordered that said parcel be set aside for the use of the widow for a limited period, to-wit: for the remainder of her life subject to the terms of the will and the widow's election to take her community interest in the estate against the terms of the will. The widow appeals.

It is here urged that the evidence is insufficient to support the order. This is for the reason that property acquired during marriage is presumed to be community property, Civ.Code, sec. 164, and that respondent objector did not sustain the burden of proof necessary to rebut that presumption.

[1-5] The law with respect to this problem was pointed out by this court in *Estate of Trelut*, 26 Cal.App.2d 717, 723, 80 P.2d 147, 150, as follows: "The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not be lightly set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. 3 Cal.Jur.Supp. 573. Further, a finding against a presumption is binding upon the appellate court (*Estate of Cronvall*, 220 Cal. 503, 31 P.2d 372), unless the evidence to rebut it is so weak and improbable that the finding is without substantial support. *Olson v. Cornwell*, 134 Cal.App. 419, 25 P.2d 879. It is finally in each case a question of fact for the court or jury to determine whether the evidence is sufficient to overcome the presumption. The rule has been expressed as follows: 'If, upon an analysis of evidence of substantial character, in the light of established rules, the mind of the trial judge,

exercising reasonable discrimination, is satisfied that the naked presumption in favor of community property has been outweighed, then the findings of the trial court must prevail.' 3 Cal.Jur.Supp. 575, citing *Estate of Tompkins*, 123 Cal.App. 670, 11 P.2d 886. The presumption in favor of community property is disputable and may be controverted by evidence 'even by an inference tending to prove the contrary contention'. *Estate of Bryant*, 3 Cal. 2d 58, 68, 43 P.2d 529."

In support of the community character of the realty here in controversy it was established that decedent and appellant had been married for over sixty years and that such realty was acquired during the marriage relation.

On the other hand there was testimony to the effect that at the time the parties were married in Pennsylvania, decedent owned a house. Later he inherited \$10,000 from his father. This inheritance was kept in bonds. Decedent practised law in Philadelphia, and in 1921, when he was around sixty years of age, he brought his family to Los Angeles. He rented desk space in respondent's law office for about twenty years, but was inactive in the practice of law. At first the family lived in a house on Trinity Street. This stood of record in decedent's name alone. Later they lived in a rented house on Cambridge. They were being evicted from this place and bought the house here in controversy. The purchase price was \$12,000 cash. This money was derived from the sale of bonds. Two of these were dated in 1897 and 1902, respectively; others were United States Treasury bonds of 1941, 1943 and 1944. All of them stood in decedent's name alone, as did the safe deposit box where they were kept. This box also contained securities standing in the name of appellant, but none standing in the names of both.

The deed to the house ran to decedent as his sole and separate property. By his will of 1946, decedent declared that the property disposed of thereby was his sole and separate property and was derived from property acquired either before his marriage or before he came to California.



[6] There is no evidence of the extent of decedent's earnings after he came to California. However, the presumption is that any such earnings were used for family expenses. Estate of Ades, 81 Cal. App.2d 334, 338, 184 P.2d 1.

[7] Clearly the evidence is sufficient to overcome the presumption in favor of community property and to sustain the trial court's finding that the realty here in question was the separate property of decedent husband.

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



110 Cal.App.2d 45

CALAME v. STEVENS et al.

Civ. 14885.

District Court of Appeal, First District,  
Division 2, California.

March 26, 1952.

Hearing Denied May 22, 1952.

Action by Harvey Calame against H. L. Stevens, and others, for injuries sustained by plaintiff customer from fall resulting when part of structure intended to hold sign on defendant used car dealer's lot broke while customer was working thereon at dealer's request. The Superior Court of State of California, in and for County of Santa Clara, Leonard R. Avilla, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Jones, J., pro tem., held that doctrine of res ipsa loquitur applied, and that evidence sustained findings that customer did not assume risk of injury.

Judgment affirmed.

#### 1. Negligence ⇨136(2)

Question whether person assumes risk of injury in any particular case is question of fact for court or jury to determine.

#### 2. Negligence ⇨134(5), 135(1)

In action by customer for injuries suffered in fall when part of structure over

entrance to defendant used car dealer's lot broke while customer was, at dealer's request, helping to construct superstructure for display sign, evidence sustained findings that customer did not assume risk of injury and that defendant was negligent.

#### 3. Negligence ⇨121(2)

Doctrine of res ipsa loquitur applies where thing is shown to be under exclusive management or control of defendant, or his servants, and accident is such as in ordinary course of things will not happen if those who have management use proper care.

#### 4. Negligence ⇨121(2)

It is incumbent upon defendant in res ipsa loquitur case to bring forth evidence to rebut inference of negligence.

#### 5. Negligence ⇨50

Where used care dealer invited customer to work upon structure which was to hold display sign on lot, dealer had obligation to exercise reasonable care to make framework safe for operation which customer undertook and should have tested structure before making invitation to customer.

#### 6. Negligence ⇨32(2.3), 50

Not only has owner duty to furnish safe place for invitee to work, but this duty requires owner to make reasonably careful inspection at reasonable intervals to learn of dangers not apparent to eye.

#### 7. Negligence ⇨130(1)

In action by customer for injuries suffered in fall when pipe on structure over entrance to defendant used car dealer's lot broke while customer, at dealer's request, was helping to construct superstructure for display sign, fact that dealer did not attempt to find pipe which broke or to determine cause of break was to be considered in determining whether inference of negligence of dealer was refuted.

#### 8. Negligence ⇨121(3)

Where customer sustained injuries in fall when part of structure over entrance to used car dealer's lot broke while customer was working thereon at dealer's request, doctrine of res ipsa loquitur applied.

Campbell, Hayes, & Custer and Austen D. Warburton, all of San Jose, for appellants.

Smith, Wool & Perren and Vernon E. Perren all of San Jose (Robert L. Crane, Burlingame, of counsel), for respondent.

JONES, Justice pro tem.

This appeal is from a judgment in favor of plaintiff on account of personal injuries suffered when he fell from a metal framework over the entrance to defendant's used car lot in San Jose. The case was tried by the court sitting without a jury.

The framework from which plaintiff fell was made of iron pipes two or two and one-half inches in diameter. An upright pipe stood on each side of the entrance to the lot extending upward ten to twelve feet. These uprights were connected at the top by a horizontal pipe of the same size. The two gates of the entrance hinged on the uprights, and a wire fence extended from each upright in either direction.

The defendant undertook to extend this framework upward by constructing a superstructure for hanging a display sign. Pieces of pipe of the same diameter, about two and one-half feet long, were coupled onto the existing uprights. This work was done by two of the defendant's employees. These men were busy trying to fasten the horizontal pipe of the superstructure to the two vertical extensions when the plaintiff arrived at the car lot. Plaintiff was also in the used car business in the same city. The defendant had telephoned him earlier about some used cars that he had for sale and had asked him to come over and look at them. When plaintiff arrived the two employees of defendant were having difficulty in coupling the horizontal pipe to the south upright extension. After some casual conversation the defendant said in a jocular manner to plaintiff, "Well, if I was as tall as you are, I'd just reach up there and screw it in for the boys." To which plaintiff replied, "Yes. All right. I will." He then climbed up and straddled the lower horizontal pipe, and wrapped his legs about the upright securing himself. Next he guided the top pipe into the coupling in the extension of

the south upright and gave it a turn or two with his hands. The defendant then asked him to tighten the pipe with a wrench, and handed up to him a two foot pipe wrench. Plaintiff leaned over to take the wrench from the defendant and in doing so grasped the south upright extension for support. Just as he was about to take the wrench from the hands of the defendant the extension gave way and he fell to the sidewalk sustaining three fractured vertebrae and other injuries. The trial court awarded him damages and it is from this judgment that the defendant has appealed.

Appellant urges as grounds for reversal that the evidence is insufficient to sustain the finding of the trial court that the injury resulted from his negligence, and secondly, that the plaintiff assumed the risk of injury when he climbed onto the framework.

The defendant rested at the close of the plaintiff's case and offered no proof in defense.

Appellant pleaded in his answer and makes the argument here in support of his second ground for reversal of the judgment that the plaintiff acted with full knowledge of all the facts and circumstances surrounding his injury and assumed the risk of the matters which brought it about. This issue was resolved against appellant by an appropriate finding and this court is only concerned as to whether the finding is supported by substantial evidence. In *DeGraf v. Anglo California Nat. Bank*, 14 Cal.2d 87, 100, 92 P.2d 899, 905, it is said that, "\* \* \* before it can be said that one has 'assumed the risk' of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard. One does not assume the risks of danger which he has no reason to anticipate." The main structure over the entrance appeared to be perfectly safe, and so it proved to be upon plaintiff climbing onto it. The danger lay in the extension which broke when plaintiff grasped it for lateral support. Taking hold of it for support is nothing more than any reasonable person would have done under the same circumstances. It was perfectly natural and reasonable to grasp the extension in leaning over to reach the pipe

wrench. The extension was of the same size and kind of material as the pipe on which he was sitting, and he had no reason to anticipate that it would not afford the same degree of support. There was nothing in its appearance to indicate any inherent weakness.

The witness Slaughter in describing the pipe as he saw it on the ground after the accident testified: "I couldn't tell you whether it was an old break or a new one, but had broken off from the bottom where it had been screwed in, and not all the way around, about half way \* \* \* It looked like it come loose. It looked like the thread could be cut too deep."

[1,2] It is the established rule that whether a person had assumed the risk of injury in any particular case is a question of fact for the court or jury to determine. As is said in *DeGraf v. Anglo California Nat. Bank*, supra, "The question of knowledge and appreciation of a danger or the lack thereof in an action of this nature is ordinarily one to be determined by the jury from the facts of the case." And in *Wilmot v. Golden Gate Investment Co.*, 41 Cal.App.2d 664, 668, 107 P.2d 263, it is held that before an appellate court may say that a party has assumed the risk from which the injury occurred the evidence must show without substantial conflict that he had knowledge or means of knowledge of the existing danger, or that the danger was obvious. All of the evidence in this case is to the effect that the plaintiff had no knowledge or means of knowledge of the existing danger and under such a state of facts this court may not set aside the finding of the trial court on the assumption of risk.

[3-7] Plaintiff relies upon the doctrine of *res ipsa loquitur* to establish the negligence of the defendant and contends that the facts of this case give rise to the inference of negligence which the doctrine affords. As is said in *Hinds v. Wheadon*, 19 Cal.2d 458, 461, 121 P.2d 724, 726, "This doctrine is applicable where a thing is shown to be under the exclusive management or control of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use

proper care. In such cases an inference arises that the accident resulted from a want of proper care on the part of the defendants. (Citing authorities.) It is incumbent upon the defendant in such a case to bring forth evidence to rebut the inference of negligence \* \* \*." The defendant was obliged to exercise reasonable care to make the framework safe for the operation which plaintiff undertook for the reason that he invited him to work upon the structure. It is so held in *Shanley v. American Olive Co.*, 185 Cal. 552, 555, 197 P. 793, 794, where it is said that the invitor is "required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger." Not only is it the duty of the owner to furnish a safe place for such an invitee to work, but this duty requires him "to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye." *Devens v. Goldberg*, 33 Cal.2d 173, 178, 199 P.2d 943, 947. It cannot be said that the requirements of this rule were met by the defendant here. He should have tested the framework before he made his invitation to the plaintiff to use it as a staging. Nor can the defendant claim the benefit of lack of knowledge of the dangerous condition. It is said in *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 806, 117 P.2d 841, 845, that: "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition \* \* \*." The claim of lack of knowledge where the extension was set by the employees of the defendant does not tend to refute the inference of his negligence. In *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94, a plank on a scaffold broke injuring a workman. The court there said, 81 Cal.App.2d



at page 766, 185 P.2d at page 103: "The plank was obviously defective because it broke in half with the weight of one man. It is quite significant, and the jury would be entitled to consider this fact on this issue, that the broken plank was not produced, and Carlson made no attempt to find it or to examine it to find out what caused it to break." Neither did the defendant in this case make any attempt to find the broken pipe or to determine what caused it to break. The trial court was free to consider this fact in determining whether the inference of negligence had been refuted.

[8] The use which plaintiff was making of the framework is analogous to that made by workmen using a scaffold. In *Nolen v. F. O. Engstrum Co.*, 175 Cal. 464, 466, 166 P. 346, 347, the court said: "The fact that while the plaintiff was at work upon the scaffold it fell and precipitated him to the ground was of itself sufficient evidence that the scaffold was defectively constructed." In that case it was held that the doctrine of *res ipsa loquitur* did apply.

We conclude that it applies in this case, and that the inference of the negligence of the defendant which it affords has not been refuted or overcome by other evidence. The inference is sufficient to sustain the finding of defendant's negligence.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.



110 Cal.App.2d 159

**JOUGHIN et al. v. WEST et al.**

Civ. 4317.

District Court of Appeal, Fourth District,  
California.

March 28, 1952.

Rehearing Denied April 24, 1952.

Action by W. D. Joughin, and others, against Harry D. West, and another, to determine rights in pipe line diverting water from creek for purpose of watering stock. The

Superior Court of Kern County, W. L. Bradshaw, J., entered judgment for plaintiffs and restrained defendants from diverting water through pipe for use in trough on section 6 or for use anywhere else except on sections 2 and 11, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained findings of trial court on which judgment was based, except that plaintiffs were entitled to use of only two troughs on section 1, and that judgment did not foreclose defendants' riparian right to divert excess water of creek where diversion would be contractual and not appropriative.

Judgment affirmed.

#### 1. Waters and Water Courses ⇨158(1)

Where pipe line was constructed pursuant to oral agreement to divert water from creek for use in watering stock outside watershed, terms of the agreement were controlling as to use of pipe line.

#### 2. Waters and Water Courses ⇨158½(1)

In action to determine rights in pipe line diverting water from creek for purpose of watering stock, evidence sustained findings that, under oral agreement between parties concerning diversion, defendants could use diverted water to supply troughs on section 2 and on section 11 so long as they were tenants thereof, but not on section 6, on which defendants had installed trough without plaintiffs' permission and adverse to their riparian rights, that defendants owned pipe lines with easement over plaintiffs' lands, and that diversion was not to interfere with riparian rights of parties.

#### 3. Waters and Water Courses ⇨158½(1)

In action to determine rights in pipe line diverting water from creek for purpose of watering stock, where complaint alleged that trough was installed on section 6, and one finding stated that certain installations were made in reliance upon agreement between parties but did not mention any such trough, and another finding stated that defendant had installed trough on section 6 without plaintiffs' permission and adverse to plaintiffs' riparian rights, there was no variance between complaint and findings.

#### 4. Waters and Water Courses ⇨157

Where defendant obtained permission from plaintiff to divert water from stream by installing pipe line to take water to cer-

tain place, permission granted was limited to that purpose.

**5. Waters and Water Courses** ⇨158½(1)

In action to determine rights in pipe line diverting water from creek for purpose of watering stock, evidence showed that under oral agreement plaintiffs were entitled to use of only two troughs on section 1.

**6. Waters and Water Courses** ⇨158(2)

Where adjoining landowners agreed that one of them was entitled to take water from pipe diverting water from stream for purposes for which his premises were then being used, and he was leasing land in connection with the premises, right to take water for use on leased premises existed only so long as did the tenancy.

**7. Judgment** ⇨744

Where diversion of water by pipe line from creek for purpose of watering stock was contractual and not appropriative, rights not resting on that agreement, such as riparian rights of one party to contract to appropriate excess water of creek in manner not interfering with other party's riparian rights, were not foreclosed by judgment in action determining rights in pipe line.

Calvin H. Conron, Jr., Bakersfield, for appellants.

Deadrich, Gill & Bates and W. E. James, all of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This action involves the rights of the parties with respect to the use of a small pipe line. The Joughins and the Wests are adjoining landowners, each owning several sections of grazing land, a part of the land of each being riparian to a small creek. Under some oral agreement the defendants, in 1941, constructed diversion works and installed the pipe line for the purpose of taking water from this creek to be used in watering stock on certain lands outside of that watershed. This pipe line started on section 4, and went across section 5 belonging to the plaintiffs, across section 6 in which both parties had land, across section 1 owned by the plaintiffs, to

section 2 owned by the defendants, and thence to section 11 which was leased by the defendants and used in connection with section 2 which had long been known as the "Brown Place." The defendants installed a trough on their land in section 6, some troughs on sections 1 and 2 and a trough on section 11. Water in the various troughs was controlled by float valves, the flow being governed by the number of cattle watered and not by the size of the pipe line.

A dispute over the rights of the parties in the use of this pipe line resulted in this action. So far as material here, the complaint described the course and flow of the stream and the construction of the pipe line with the location of the troughs, and alleged an oral agreement that the defendants might divert surplus water from the creek; that the water diverted should be shared equally with the plaintiffs; that water should be supplied to two troughs on section 1 at all times when water was flowing in the pipe line; and that the defendants would enter into a written agreement setting forth the oral understanding. It was then alleged that the defendants were increasing their use of the water and refused to restrict such use to that prevailing at the time of the agreement; that they refused to execute a written agreement; and that the plaintiffs had elected to cancel and terminate the oral permission to take water through the pipe line. The prayer was that plaintiffs' rights to the flow of the stream be quieted; that the defendants be restrained from diverting the flow of the stream by means of the pipe line or otherwise; that they be required to remove the pipe line from plaintiffs' lands; and for other and further equitable relief. The answer, among other things, alleged that the pipe line had been built in reliance upon a promise that it might be used to supply water to the troughs mentioned in the complaint, and that the plaintiffs are estopped to deny such use. The defendants also filed a cross-complaint claiming an easement across plaintiffs' lands in sections 4, 5, 6 and 1, with the right to use water to supply troughs "along said pipe line," subject to plaintiffs' right to water for two troughs on

their land when water is flowing through said line.

Mr. Joughin died before the trial of the action. Among other things, the court found that in 1941, the parties had orally agreed as follows: 1. That the Wests could construct a pipe line and divert water from this creek to their land in section 2, and to section 11, so long as the Wests continued as tenants of said section 11. 2. That the plaintiffs would have a prior right to such diverted water for use at a location on the south half of section 1 and at another location on the north half of section 1. 3. That the Wests would be entitled to reasonably use the diverted water on their Brown Place, based on the purposes to which the premises were then devoted. 4. That the Wests assumed no obligation to maintain or service the pipe line. 5. That the diversion of water through such pipe line would be subject to the riparian uses of both parties, only surplus water to be diverted. It was further found that sections 2 and 11 were not in the watershed of this creek, and that water therefrom had not been previously used on those sections; that in 1941, the defendants installed this pipe line across sections 5 and 6, and running to a trough on the south half of section 1 and two troughs on the north side of section 1, thence to three troughs on section 2, and thence to a trough on section 11; that since 1941, water from this pipe line has been used in three troughs belonging to the plaintiffs in section 1, and four troughs on defendants' lands in sections 2 and 11; that this use was permissive and pursuant to the agreement; that in addition to such permissive use the defendants also installed and used a trough on section 6 which was not permissive and was adverse to plaintiffs' riparian rights; and that the defendants have no right to use such water on section 6 or at any place except on sections 2 and 11, subject to their continued tenancy of section 11. It was further found that the defendants owned this pipe line with an easement over plaintiffs' lands in sections 5, 6 and 1, with a right to take and use water thus diverted to supply four troughs on sections 2 and 11, subject to the conditions prevailing when the system was installed;

that the defendants' right to take such water to section 11 shall continue only so long as they remain tenants thereof; that the plaintiffs are entitled to water for one trough on the south side of section 1 and to two troughs on the north part of section 1, prior to any other use of the pipe line; and that any diversion and use through the pipe line is not to interfere with the riparian rights of the parties. A judgment was entered to the same effect, awarding these rights to the respective parties and restraining the defendants from diverting water through this pipe line for use in the trough on section 6, or for any other use except on sections 2 and 11, as provided for in the findings.

The defendants have appealed from the judgment, contending that there is a variance between the findings and the pleadings, that there are findings on issues not raised by the pleadings, and that some of the findings are not supported by the evidence. It is argued that the entire system was installed in reliance upon the oral agreement, that no objection was made for more than two years, and that the evidence fails to show that the appellants ever extended their use of the pipe line. It is urged that the judgment is erroneous (1) in restraining the appellants from using this water on section 6, or anywhere except on sections 2 and 11; (2) in awarding the respondent three troughs on section 1 instead of two; and (3) in confining appellants' use of water on section 11 to the period of their tenancy of that land.

[1,2] This pipe line was constructed pursuant to an oral agreement, and the terms of that agreement are controlling as to its use. With respect to the making of this agreement, the respondent testified that Mr. West told them that he wanted to lay the pipe line from the springs down to the Brown Place (Section 2), and if they would allow it he would go 50-50 on the water and give them water for "our lower field" (Section 1); that he said he "wanted the water just to be used on the Brown place" and wanted to start work the next morning; and that he said he would sign an agreement to this effect whenever they desired. Mr. West testified that at this conversation



"I asked Mr. Joughin if I could run a line down the roadway, down to my lower place and I told him in consideration of running the line down there I would give him one trough of water on the north side of the road in the lower pasture. That was the proposition"; that Mr. Joughin said this would be all right; and that he put in a trough for him. While the evidence is meager it supports the court's finding as to the terms of the agreement, with one exception hereafter noted.

The appellants contend that no issue was raised as to whether their use of a trough on section 6 was adverse rather than permissive; that there is a variance between the complaint and the findings in that the complaint alleged that a trough was installed on section 6, and it was found in Finding IX that this trough was installed in reliance upon the agreement, while Finding X finds that the agreement did not permit a trough on section 6; and that the evidence does not support the finding that the appellants have no right to the use of a trough on section 6.

[3,4] While the complaint alleged that a trough was installed on section 6, and Finding IX finds that certain installations were made in reliance upon the agreement, that finding does not mention any trough on section 6. No variance appears in this respect. The pleadings raised an issue as to the terms of the agreement, and the controlling question is as to whether the evidence supports Finding X. There is no evidence that anything was said by either party relating to the use of a trough on section 6, and the existence of a right thereto depends upon the terms of the agreement. Mr. West testified that he asked for permission to install the pipe line for the purpose of taking water down to his lower place, which would be section 2 (and possibly section 11). The respondent testified to the same effect, and that Mr. West stated that he wanted the water for use only on the "Brown Place". The appellant sought and obtained permission to divert this water for a particular purpose and, in the absence of any further agreement, the permission granted was limited to that purpose. The cross-complaint also presented an issue

as to appellants' right to use troughs anywhere along the pipe line, and the evidence supports the findings with respect to such a right.

[5] Error is next assigned in that the court awarded the respondent the use of three troughs on section 1 instead of two. One paragraph of the complaint alleged that the oral agreement provided for two troughs for plaintiffs' use on section 1, but did not specify their location. In another paragraph it alleged that water was taken through this pipe line to two troughs for the plaintiffs' use on the north half of section 1, and also that "by virtue of an agreement with the plaintiff Ethel Joughin" the defendants maintained another trough on plaintiffs' land in the south half of section 1. The court found that the agreement provided that the Wests would supply water to the plaintiffs at a location on the south half of section 1 and at another location on the north half of section 1, and also found that pursuant to the original agreement diverted water had been supplied to and used by the plaintiffs in three troughs on section 1.

A witness for the respondent testified that there were two troughs on the north half of section 1. Mr. West testified that since the installation of the pipe line water has been continuously furnished and used in the Joughin "troughs". The only evidence of a trough on the south half of section 1 is that of Mr. West, who testified that he had a trough there and was using a part of the south half of section 1 under an agreement with the Joughins for the exchange of the use of certain properties. This is confirmed by the allegations of the complaint that the plaintiffs were to have two troughs on section 1, that water was furnished to them for two troughs on the north half of section 1, and that a trough was maintained by the defendants on the south half of section 1 by virtue of some agreement. Apparently, this was a separate and distinct agreement and the rights of the parties with respect to the trough on the south half of section 1 would be governed thereby. While the evidence justifies the inference that the original agreement called for two troughs for the plaintiffs' use on the north half of section 1 there is no

evidence that it called for another trough for their use on the south half of section 1, or that they were entitled to three troughs on section 1. Those portions of the findings are without evidentiary support, and the judgment should be modified accordingly.

[6] It is next contended that no issue was raised in the pleadings with respect to limiting, to the duration of their tenancy, the appellants' use of this water on section 11. An issue was raised as to the terms and extent of the oral agreement. As the court found, the agreement was that the Wests should be entitled to take this water for use on the "Brown Place" for the purposes for which those premises were then used. The Wests were then leasing land in section 11, which they were then using in connection with the old "Brown Place" which they owned. Mr. West testified that the agreement was that he could take the water "down to my lower place." The court apparently viewed the agreement as inferentially including section 11 as a part of the "Brown Place" so long as the existing tenancy condition existed. This portion of the findings and judgment is more favorable to the appellants than otherwise, and no reversible error appears in this connection.

[7] It is further contended that the appellants have a right to appropriate any excess waters of this creek which does not interfere with the respondent's riparian rights, and that the judgment improperly forecloses them from exercising such a right in the future. The only thing involved in this action was the diversion of water through this pipe line. Any such diversion was contractual and not appropriative, and no rights not resting on that agreement were foreclosed by the judgment.

It is unnecessary to consider the other points raised. Objections were promptly made, this action was timely brought, and the appellants acquired no rights by estoppel or adverse use.

Paragraph 1c of the judgment is modified by striking therefrom the words "in one trough south of the County Road and", so that said paragraph shall then read: "That the Plaintiff and Cross-Defendant is enti-

tled to use a reasonable amount of water for stock watering purposes in two troughs north of the County Road on their said Section 1, Township 27 South, Range 29 East, M. D. B. & M., at or near the location of the troughs now on said land, as a priority to any other use through said pipeline." As so modified, the judgment is affirmed, each party to pay his own costs.

GRIFFIN and MUSSELL, JJ., concur.



110 Cal.App.2d 17

PEOPLE v. GOLDBERG.

Cr. 2744.

District Court of Appeal, First District,  
Division 1, California.

March 25, 1952.

Rehearing Denied April 9, 1952.

Hearing Denied April 24, 1952.

The defendant was convicted in the Superior Court of the State of California in and for the City and County of San Francisco, Milton D. Sapiro, J., of committing lewd and lascivious acts on a female child, and he appealed from purported judgment of conviction and from order denying motion for new trial. The District Court of Appeal, Peters, P. J., held that defendant's cross-examination of prosecuting witness was improperly restricted, but that the restriction was not reversible error.

Appeal from purported judgment dismissed, and order affirmed.

#### 1. Criminal Law ⚡865(2)

Within reasonable limits, trial judge is entitled to order jury back for further deliberations in a criminal prosecution, as long as judge believes that there is reasonable possibility that jury will reach a verdict.

#### 2. Criminal Law ⚡865(2)

The trial judge can not order jury back for further deliberations in a criminal prosecution, under circumstances that amount to coercion.

**3. Criminal Law** ⇨865(2)

Where case was given jury at 11:17 a. m., and at 4:55 p. m., jury returned into court room, and foreman stated that jury was unable to reach an agreement on either of the two charges, direction of trial judge that jury return and deliberate a little more and see if there was any possibility of agreement did not amount to coercion.

**4. Criminal Law** ⇨1166½(8)

Denial of challenge of juror for cause by defendant was not reversible error, where there was no showing that defendant exhausted his peremptory challenges.

**5. Criminal Law** ⇨1115(2)

Where defendant did not produce record of challenged voir dire examination and did not file in the trial court a request for an additional record requesting transcript of proceedings on voir dire, and defendant made no application to District Court of Appeal for augmentation of record, District Court of Appeal could not consider contention of defendant that challenge of juror for cause was improperly denied. Rules on Appeal, rules 12(a), 33(b) (3).

**6. Criminal Law** ⇨1171(2)

In prosecution for committing lewd and lascivious acts on female children, statement of prosecuting attorney that he intended to prove that while children were romping and playing in house of defendant it was then that the degenerate tendencies and characteristics of defendant came out was not prejudicial error, where jury was properly instructed to disregard statement and to decide case solely on the evidence, and verdict of jury exonerated defendant of the charge against one of the children and recommended leniency as to charge against the other child. Pen.Code, § 288.

**7. Criminal Law** ⇨703

In prosecution for committing lewd and lascivious acts on female children, statements by prosecuting attorney in opening statement that the charge against defendant was that he lasciviously touched the body and private parts of one of the prosecuting witnesses, who was a little girl of the age of eleven years, and that prosecuting attorney intended to prove that defend-

ant lewdly and lasciviously placed his hands on her private parts, were proper. Pen.Code, § 288.

**8. Criminal Law** ⇨723(2)

In prosecution for committing lewd and lascivious acts on female children, statement of prosecuting attorney in closing argument that he felt very deeply about such type of case because he was the father of two children and that there is nothing so innocent as an innocent little girl and nothing so low in the mind of the prosecuting attorney as a man who would sink to contaminate them, was not improper. Pen. Code, § 288.

**9. Criminal Law** ⇨742(1)

In prosecution for committing lewd and lascivious acts on female children, any inconsistencies between testimony given by prosecuting witness at the trial and testimony given by her at prior trial and on preliminary examination was for jury to decide. Pen.Code, § 288.

**10. Criminal Law** ⇨338(1)

In prosecution for committing lewd and lascivious acts on female children, the sustaining of objection to question asked by defendant of prosecuting witness if her mother had ever told her that she had had similar experience, was not error, in absence of explanation by defendant of relevancy of answer to such question. Pen. Code, § 288.

**11. Criminal Law** ⇨1186(4)**Witnesses** ⇨387

In prosecution for committing lewd and lascivious acts on female children, defendant should have been permitted in cross-examination of prosecuting witness to show that she had testified at present trial to a statement by defendant that she had not mentioned on prior trial, but improper exclusion of such testimony was not prejudicial error, where added words were merely cumulative of words testified to on both trials. Pen.Code, § 288; Const. art. 6, § 4½.

**12. Witnesses** ⇨266

Cross-examination by defendant of a prosecuting witness is not a matter of privilege but a right.



**13: Witnesses**  268(1)

The right of defendant to cross-examine witnesses for the prosecution, particularly in sex cases, is of fundamental importance and should not be unduly curtailed.

Paul Friedman, Clarence Desky, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Dep. Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] Fred Goldberg was charged with two violations of section 288 of the Penal Code<sup>1</sup>, it being alleged that on August 9, 1950, he committed lewd and lascivious acts on Agnes, age eight, and on Patricia, age eleven. On the first trial the jury disagreed. On the second trial, the instant one, the jury returned a verdict of not guilty on the count relating to Agnes, but guilty on the count relating to Patricia, with a recommendation of leniency. Defendant was granted probation for five years on condition he be confined in the county jail for four months. He appeals from the order denying his motion for a new trial, and also purports to appeal from the judgment of conviction. Inasmuch as no judgment of conviction has been entered, the appeal therefrom must be dismissed.

The appellant teaches art in two junior high schools and in an art school. At the time of trial, he had been married to his present wife for thirteen and one-half years, had lived in San Francisco about three years, and in his then location about six months. The Goldbergs have a daughter, Marian, then age eight. Marian has two playmates, Agnes, also called "Bonnie," then eight years of age, and Patricia, then eleven and one-half years of age. The three children all live in the same neighborhood.

The evidence in support of the count relating to Agnes is slight, hazy and uncon-

vincing. Inasmuch as the jury acquitted appellant of this charge, it is not necessary to refer to the evidence thereon.

Patricia's testimony was reasonably clear and coherent. She identified the defendant, and remembered the date the incidents occurred, namely, August 9, 1950. She testified that the three children had been playing at her home that morning; that about 12 o'clock they all went over to the Goldberg house; that appellant was there; that she remained there until sometime between 1:30 and 2 p. m.; that she was then dressed in pedal pushers with panties underneath; that during this period appellant twice, once while they were on a sofa and once while they were on a piano bench, put his hands underneath her clothes and onto her private parts. These two incidents occurred while the other two children were in and out of the living room-studio, a double room with an open door between, where the acts are alleged to have occurred. She also testified that while the other two girls were out of the room, and after the two acts above-described had occurred, appellant tried to kiss her and asked her to kiss him; that when she objected he said "Sh"; that appellant then told her not to tell anyone what had happened. She stated that, prior to August 9th, although she had been a frequent visitor at the appellant's house, appellant had never before committed such acts.

On cross-examination Patricia testified that one of the acts occurred when the three girls and appellant were seated on a piano bench playing the piano, with Patricia seated on the bench between appellant's legs, and with the other girls one on each side. A piano bench of dark wood was introduced by appellant, he and his wife testifying that this was the only piano bench they ever owned, and the one in the house on August 9th. Patricia testified that it was not the bench then in the house. This was consistent with her testimony on the prior trial when she testified that the bench she remembered was of light wood, and larger

1. That section provides: "Any person who shall wilfully and lewdly commit any lewd or lascivious act \* \* \* upon or with the body, or any part or member thereof, of a child under the age of four-

teen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony \* \* \*."

than the one introduced by appellant. One of the attorneys for appellant, and a doctor, both family friends, testified that they had been in the Goldberg house many times before and after August 9th and had never seen any light-colored piano bench, but had seen the one introduced into evidence. The bench produced in court was too small to permit four persons to sit on it at one time. The piano was admittedly cream-colored.

Appellant denied committing any of the charged acts. His story is that on the morning of August 9th he taught school from 9 a. m. to 12 o'clock; that his wife worked; that their child, Marian, was left with a Mrs. Oppenheimer, who lived some distance from appellant's home; that he went from the art school to Mrs. Oppenheimer's, where he picked up Marian sometime after 12:30; and that he then took Marian home where he arrived at 1 or 1:05 p. m. Mrs. Goldberg also testified that Marian was at Mrs. Oppenheimer's that morning. Thus, appellant's story directly contradicts that of Patricia who had testified that Marian was playing with her and Agnes that morning, and that the three children went to the Goldberg home at about noon, and found Goldberg was then there. It should be mentioned that no school records were produced to corroborate appellant's story as to the hours he taught that day, nor were Mrs. Oppenheimer or Marian called as witnesses to corroborate appellant.

Appellant next testified that when he arrived near his home Patricia and Agnes were playing in the street; that they waved and called to Marian, and asked if they could come in and play with her; that they all went into the house and he prepared lunch; that he and Marian ate, and then the three girls went into Marian's room to play; that he washed the dishes, did some other household chores, and then went into the studio-living room to paint; that the room has a large bay window facing the street; that after painting for a short time he started to play the piano; that the three girls then came into the room, clustered around the piano and started to play on it; that he suggested that Patricia be allowed to play alone; that he and Patricia were

seated on the piano stool when his daughter, Marian, started to tickle him and the other girls did likewise; that he tickled them back on their arms and sides, and they all had a little tussle. They all were laughing and having a good time. He was positive that at no time was he alone in the room with Patricia, denied that he and any of the children were at any time that day on the sofa, denied trying to kiss the prosecutrix, and denied committing the charged acts.

Goldberg and Patricia agree that sometime between 1:30 and 2 p. m. Patricia observed her father arriving home, and that Patricia then left the Goldberg house. Appellant testified that when Patricia left she was smiling and happy, and there is no evidence to the contrary.

The mother of Patricia testified that her daughter came home about 1:30 p. m. and immediately told her of the events in question; that her husband was then home and Patricia then told the story to her father; that they talked it over and Patricia started to cry; that they then had lunch and then Patricia and her father took a nap; that that night, after dinner, they decided to and did call the police; that Patricia told her story to the police. A police officer testified that this call came in about 7:30 p. m; that he and another officer went out to talk to Patricia and her family; that after hearing the story they arrested appellant; and that the next day the other officer called on Agnes and secured the information that forms that count of that charge.

The evidence is uncontradicted that Agnes and Patricia before August 9th had been frequent visitors at the appellant's home, and that since that date they continue to play with Marian, but do not now visit her home.

Appellant makes a series of contentions. In his opening brief he does not cite one case in support of these contentions. He has not filed a reply brief, but in a letter to this court after argument cites one authority. He does not directly attack the sufficiency of the evidence. It must be conceded that this is a close case on the evidence. This is indicated by the fact that one jury

disagreed, and that the present jury recommended leniency.

In these sex cases, because of the nature of the charged acts, it is seldom that direct corroborating evidence can be produced by either side, and the case must usually rise or fall on the credibility of the prosecuting witness and of the accused. That is peculiarly a jury question. If Patricia's story is true, appellant is guilty of the offense charged and should be punished. If appellant's story is true, he is innocent. The jury saw these two witnesses. It was properly instructed that such charges are difficult to disprove, and that the testimony of young girls who testify to such acts should be examined with care. In spite of these admonitions, it has found that Patricia told the truth and that appellant did not. This finding is binding on an appellate court. The evidence is sufficient to sustain the conviction.

Appellant charges that the jury was coerced into bringing in a guilty verdict. The record shows that the case was given the jury at 11:17 a. m. At 4:55 p. m. it returned to the courtroom and the following occurred:

"The Court: Who is the foreman? I understand you have not reached an agreement. The Foreman: We are unable to reach an agreement on either of the two charges.

"The Court: Without indicating which way you stand, could you give me the division by number only? The Foreman: Yes, 8 to 4 on one—4 to 8 on the other. I take that back. On the second, with Agnes—

"The Court: Well, I don't want to know which way. The Foreman: On the second one it was 10-2 for and on the other was 8-4 against. A Juror: No, 11-1.

"The Court: Well, I think maybe you ought to go back and deliberate a little more. I am not interested in how you stand, and I don't want to know how you stand insofar as which way is 'for.' I just want to know the division as to numbers. I understand that in one case it is 11-1, and in another case it is 10-2, is that correct? The Foreman: Yes.

"The Court: Well, I think maybe you ought to go back and deliberate a little more and see if there is any possibility of agreement. The Foreman: May I speak, your Honor? Frankly, I don't think there is any possibility at all of reaching an agreement, your Honor. I am perfectly willing—I think we are all willing to go back, but—

"The Court: Well, let's try it for a short time longer and see."

The jury went back to deliberate at 4:59 p. m. and at 5:57 p. m. returned with the guilty verdict.

[1-3] The appellant argues that when the jury was ordered to continue its deliberations it was hungry and tired, that the court did not indicate whether food and lodging would be provided, and that the jury must have agreed on a verdict simply to get home. This is sheer speculation, unsupported by the record. Within reasonable limits, the trial judge is entitled to order the jury back for further deliberations as long as he believes there is a reasonable possibility of reaching a verdict. He cannot, of course, do so under circumstances that amount to coercion. The proper line between coercion and proper action of the trial judge was recently discussed, and the relevant cases cited, in *People v. Lammers*, 108 Cal.App.2d 279, 238 P.2d 667. (See, also, cases collected 8 Cal.Jur. p. 394, § 423; 4 Cal.Jur. (10 Yr.Supp.) p. 838, § 423.) There was no coercion here. The point is without merit.

[4] Appellant next complains that a challenge for cause of one juror was improperly denied. The point is without merit for at least two reasons. In the first place, appellant has not shown that he exhausted his peremptory challenges. This is a condition precedent in such cases. The rule, supported by ample authority, is stated as follows in 8 Cal.Jur. p. 609, § 595: "The erroneous disallowance of a challenge for cause is harmless if it does not appear that an objectionable juror was forced upon the defendant. If the defendant had not exhausted his peremptory challenges he cannot complain of the error, for, if he afterwards peremptorily challenged the objec-



tionable juror, he is not prejudiced; and if he did not do so, he cannot complain of an error the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it when he had the means and opportunity to do so."

[5] In the second place, the appellant has not produced the record of the challenged *voir dire* examination. Appellant did file in the lower court a request for an additional record, in which, among other things, he requested the transcription of proceedings on *voir dire*. In this respect he failed to comply with the requirements of Rule 33(b) (3) of the Rules on Appeal. That rule provides that when other than a normal record is required (and *voir dire* examination is not part of a normal record), the appellant shall file "with his notice of appeal an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it. \* \* \*" Appellant's request was filed eight days after his notice of appeal, and contains no reference to any point upon which he intended to rely insofar as *voir dire* examination is concerned. Although more than a year has elapsed since the order of the trial court was made omitting the *voir dire* examination, appellant has made no application to this court under Rule 12(a) for augmentation of the record, in this respect, and this in spite of the fact that respondent's brief calling specific attention to the lack of a record on this point has been on file since November 8, 1951. Under such circumstances, since the appellant did not take steps to produce a proper record on this point, the appellate court cannot and should not consider the contention. *People v. Hall*, 220 Cal. 166, 30 P.2d 23, 996.

[6] Appellant next contends that the prosecuting attorney was guilty of prejudicial misconduct, both in his opening and closing statements. In the opening statement the prosecuting attorney stated that

he intended to prove that while the children were romping and playing in the house "it was then that the degenerate tendencies and characteristics of the defendant came out." Counsel objected, and the trial judge directed the prosecuting attorney to "Confine yourself to the facts." No request to strike the remark or to admonish the jury was made. While the remark is argumentative and probably should not have been included in an opening statement,<sup>2</sup> it could not have been prejudicial. The jury was properly instructed to disregard the statements of counsel and to decide the case solely upon the evidence. The verdict of the jury exonerating appellant of the charge against Agnes, and recommending leniency on the charge against Patricia, is almost a demonstration that, if the remark was error, it did not result in prejudice. Moreover, the trial judge denied a motion for a new trial. Under such circumstances, no prejudicial error was here involved.

[7] Appellant also objects to the statement made by the prosecuting attorney in his opening statement that one of the charges was that appellant on August 9, 1950, "lasciviously touched the body and private parts of Patricia \* \* \*, a little girl of the age of 11 years" and again stated that he intended to prove that appellant "lewdly and lasciviously placed his hands" on Patricia's private parts. These were not misquotations of the charge contained in the information. The information contains substantially the language quoted, and also contains some much stronger language not used by the prosecuting attorney in his opening statement. Moreover, the language is a fair summary of the language used in section 288 of the Penal Code. The statements were proper as statements of fact of what the prosecution intended to prove.

[8] Objection is also made to a statement appearing in the prosecuting attorney's closing argument that he felt very deeply about this type of case because he was the father of two children and that

2. But see, *People v. Brown*, 22 Cal.2d 752, at page 755, 141 P.2d 1, at page 2, where, in a murder case in which rape may have been involved, it was held not improper

"and certainly not prejudicial" for the district attorney to refer, in his opening statement, to a "sex motive."

"there is nothing so innocent as an innocent little girl, and nothing so low in my mind as the man who would sink to contaminate them." Not only was no objection made to this remark, or request made to admonish the jury<sup>3</sup>, but there would not appear to be anything inherently or legally wrong with it.

[9] The next objection seems to be that in some respects Patricia's testimony given on the present trial is inconsistent with her testimony given on the prior trial and on the preliminary examination. Not only are those prior records not before us, but if there were any inconsistencies, that was for the jury to decide. *People v. O'Moore*, 83 Cal.App.2d 586, 189 P.2d 554.

[10] Appellant also contends that he was unduly prevented from inquiring into possible motives of Patricia. He refers to a question directed to Patricia asking her if her mother had ever told her that she had had a similar experience. An objection was sustained, and appellant's counsel made no attempt to pursue the subject. Whatever purpose counsel may have had in asking the question, such purpose was not disclosed to the court. Without some explanation of its relevancy, the question was objectionable.

Appellant also complains that he was unduly restricted in his cross-examination of Patricia in that he was prevented from showing that her present testimony was inconsistent with her testimony on the prior trial. In this connection appellant refers to the fact that on the present trial Patricia testified that when she objected to being kissed, appellant said "Sh," and then said "not to tell anybody." Permission was granted to appellant on the oral argument to augment that record to show Patricia's testimony on the prior trial. The appellant has since supplied us with page 24 of the transcript of the prior trial. From the excerpt it appears that Patricia then testified that after appellant had said "Kiss

me,' over and over again," she said "No" and he said "Sh," and "Be quiet." She did not then testify that he told her not to say anything about what had happened.

At the present trial appellant's counsel, after Patricia had repeated her testimony about what appellant had said to her, tried to read page 24 of the prior trial record to the witness for purposes of impeachment. The prosecuting attorney stated "I haven't any particular objection to your reading it. I don't think it serves any particular purpose. There is no contradiction." After some discussion, the court stated "I don't see any basis" and finally refused the requested permission. Counsel for appellant then stated: "\* \* \* I offer to insert in the record the statements of the previous transcript, page 24, lines 16 to 18, as contradictory of what the girl has just said." The testimony referred to is to the effect that when Patricia saw her father's car out of the window she went home, and that appellant did not then say anything to her.

[11-13] The specific proffered testimony on page 24, lines 16 to 18, was not contradictory to her present testimony. Her testimony on the present trial that appellant told her not to tell anybody obviously related to an event before she saw her father's car out of the window. Nevertheless, we think that the proffered testimony should have been admitted. Although the counsel for appellant called direct attention to testimony on the prior trial that was not impeaching nor contradictory to that given on the present trial, it should have been apparent that what he was trying to show was that Patricia had testified on the present trial to a statement by appellant that she had not mentioned on the prior trial. That was a proper subject of cross-examination. Cross-examination is not a matter of privilege, but of right. *People v. Hume*, 56 Cal.App.2d 262, 132 P.2d 52; *People v. Flores*, 15 Cal.App.2d 385, 59 P.2d 517; *People v. Ferdinand*, 194 Cal. 555, 229 P. 341. The right, particularly in sex

3. This alone would warrant an appellate court in refusing to consider the point—*People v. Albright*, 87 Cal.App.2d 222,

196 P.2d 800; *People v. Brancato*, 83 Cal.App.2d 734, 189 P.2d 504.

cases, is of fundamental importance and should not be unduly curtailed. *People v. Baldwin*, 117 Cal. 244, 49 P. 186. But the improper exclusion of this testimony could not have been prejudicial. The added words were merely cumulative of the words testified to on both trials. Under Article VI, section 4½ of the Constitution, such an error does not require a reversal.

The other contentions made are so obvi-

ously without merit that they do not require discussion.

The appeal from the judgment is dismissed; the order denying the motion for a new trial is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.





38 Cal.2d 707

**ANDERSON et al. v. STANSBURY et al.****L. A. 21607.**

Supreme Court of California, in Bank.

April 2, 1952.

Suit for accounting, for declaration of trust, and for declaratory relief. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered a judgment of nonsuit, and plaintiffs appealed. The Supreme Court, Spence, J., held that evidence was insufficient to show that there was any fraud or misrepresentation which induced plaintiffs to disclaim their interest in oil and gas prospecting permit.

Judgment affirmed.

Prior opinion, 233 P.2d 62.

**1. Mines and Minerals ⇨6**

In action by former owners of interest in oil and gas prospecting permit, who had signed two disclaimers of interest in permit, for accounting, and for declaration of trust on ground that they had been fraudulently induced to sign disclaimers, and for declaratory relief, evidence was insufficient to disclose any fraud or misrepresentation.

**2. Frauds, Statute of ⇨73, 158(2)**

Recovery on alleged oral agreement between plaintiffs who had signed a disclaimer of any interest in oil and gas prospecting permit, and one of the defendants that if plaintiffs would execute a second disclaimer, plaintiffs would have an interest in the permit, was barred by statute of frauds, and any evidence relating to alleged oral agreement was properly excluded, in action for accounting, declaration of trust, and for declaratory relief. Civ.Code, § 1624, subd. 4; Code Civ.Proc. § 1973, subd. 4.

**3. Frauds, Statute of ⇨106(2)**

Where plaintiffs signed disclaimer of any interest in oil and gas prospecting permit, and thereafter plaintiffs and one of the defendants entered into alleged oral agreement that if plaintiffs would execute a second disclaimer, they would have an interest in the permit, and plaintiffs executed second disclaimer, letter written by defendant, who entered into alleged oral contract with plaintiffs, suggesting that

plaintiffs not return letter which he had previously sent to them because it stated that plaintiffs had no further legal or equitable interest in the oil and gas lease and that under the proposed arrangement that would not be strictly true, was not a sufficient memorandum to satisfy statute of frauds with respect to alleged oral agreement. Civ.Code, § 1624, subd. 4.

**4. Frauds, Statute of ⇨129(1)**

Before a party is estopped to assert statute of frauds due to part performance by the other, it must appear that sufficient change of position occurred so that application of statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. Civ.Code, § 1624, subd. 4.

**5. Frauds, Statute of ⇨129(6)**

Where only change of position made by plaintiffs when they signed second disclaimer of interest in oil and gas prospecting permit pursuant to alleged oral agreement with one of the defendants that if they signed the disclaimer they would have an interest in the permit, was the return of an \$800 check which had been sent to plaintiffs for signing the disclaimer and execution and delivery of the disclaimer and assignment, there was not such part performance by plaintiffs as to take the alleged oral agreement out of the statute of frauds. Civ.Code, § 1624, subd. 4.

**6. Trusts ⇨89(1), 110**

In action by former owners of interest in oil and gas prospecting permit, who had signed two disclaimers of interest in permit, for accounting, and for declaration of trust on ground that they had been fraudulently induced to sign disclaimers, and for declaratory relief, evidence was insufficient to establish any fraud, undue influence, or unjust enrichment which would support assertion of a constructive trust or resulting trust. Civ.Code, §§ 2223, 2224.

**7. Declaratory Judgment ⇨361**

Where plaintiffs filed an action for accounting, for declaration of trust, and for declaratory relief, and plaintiffs introduced no evidence which would entitle them to accounting or declaration of trust, trial

court erred in entering nonsuit rather than a declaratory judgment.

#### **B. Appeal and Error** ⇨1170(12)

Where plaintiffs filed an action for accounting, for declaration of trust, and for declaratory relief, and plaintiffs introduced no evidence which would entitle them to accounting or declaration of trust, error of trial court in entering nonsuit rather than a declaratory judgment, was not prejudicial error when any declaration of the rights of the parties would necessarily have been unfavorable to plaintiffs in conformity with disposition of counts dealing with accounting and declaration of trust. Const. art. 6, § 4½.

---

**A. J. O'Connor**, Los Angeles, for appellants.

**Dunlap, Holmes, Ross & Woodson**, Robert H. Dunlap, Kenneth A. Millard, all of Pasadena, **O'Melveny & Myers** and **William W. Clary**, all of Los Angeles, for respondents.

**SPENCE**, Justice.

Plaintiffs appeal from a judgment of nonsuit in an action for declaratory relief, an accounting, and a declaration of trust with regard to certain oil rights.

Plaintiffs argue that a nonsuit was improperly granted because there is evidence in the case which, when considered in its most favorable aspect, would sustain their case. In re Estate of Arnold, 16 Cal.2d 573, 576-577, 107 P.2d 25; Easton v. Ash, 18 Cal.2d 530, 538, 116 P.2d 433. However, a review of the record indicates that their claim is without merit as a judgment in their favor could not be sustained.

On March 16, 1921, the Department of the Interior of the federal government issued to Henning E. Olund an oil and gas prospecting permit covering certain land in Kern County. 30 U.S.C.A. § 181 et seq. In 1922 defendants Olund, Benjamin M. Stansbury and Silas Gillan entered into an agreement with Alexander Anderson and his wife, whereby the Andersons were to advance up to \$10,000 for the development of the property in return for a one-fourth

interest in the permit. The three others were to hold the remaining interests one-fourth each, and Olund continued as record owner with the government. In 1923 the permit was assigned to General Petroleum Corporation. At the same time an operating agreement was executed between the permittees and the oil company, whereby the oil company (1) assumed the permittees' obligations to develop the property and (2) agreed to the consideration of \$320,000 bonus and \$2,905.19 for improvements on the land, with the permittees to receive, according to their respective interests, \$162,905.19 in cash, \$160,000 from the oil produced, and in addition certain overriding royalties. On January 10, 1924, the government issued a twenty-year lease to General Petroleum.

Following execution of the operating agreement, General Petroleum took possession of the property and drilled four wells thereon. The wells did not produce oil in sufficient paying quantities to make the lease profitable. Thereafter no more wells were drilled and pumping operations were confined to only two wells. This was the prevailing situation as the time approached for renewal of the lease—January 10, 1944. A few months prior to the expiration date, General Petroleum advised the permittees that it was not interested in continuing the lease and would make a re-assignment on condition that it be paid for its pumping equipment on the property. The lease carried a preferential right of renewal for successive ten-year periods.

Meanwhile the original Anderson permittees had died and their interest had passed to their children, plaintiffs herein. On January 3, 1944, General Petroleum assigned the old lease to Olund. For several months thereafter defendant Stansbury in California carried on extensive correspondence with plaintiffs, living in Minnesota, advising them of these circumstances; that it was necessary for the permittees to furnish money for purchase of General Petroleum's pumping equipment and for the cost of procuring a surety bond required for renewal of the lease; and that they also must find a new operator to take over the lease and continue with development of



the property. Neither Olund nor Gillan was willing to contribute to these expenses. Despite Stansbury's repeated urging of plaintiffs to "join in" the deal which he considered an "excellent investment," plaintiffs, in April, 1944, replied to Stansbury that "after carefully appraising the total situation" and upon "an impersonal analysis of these properties as investments," they did not wish to "continue holding these interests."

Stansbury then arranged for defendant Hugh Gordan to take over plaintiffs' interest. In April, 1946, Stansbury wrote to plaintiffs, expressing his regret that they had elected not to "join in the renewal application" and requesting their execution of a disclaimer required by the government "for the purpose of clearing the record in connection with \* \* \* application for issuance of renewal lease." Apparently before the government would approve the assignment of the old lease to Olund and issue a renewal lease, it required a waiver of all overriding royalties in excess of 5 per cent, and Stansbury so informed plaintiffs by letter in early May, 1946. Plaintiffs executed the desired disclaimer dated May 17, 1946, and sent it to Stansbury. It recites that plaintiffs have "heretofore abandoned and hereby disclaim any and all interest and rights including royalty reserved" under the operating agreement as executed by the original permittees, and that Olund or "any person or persons other than" plaintiffs may apply for renewal of the lease.

Gordon financed the purchase of the General Petroleum lease and pumping equipment for \$3,357, and arranged for the bond required by government regulations. In September, 1947, the lease was renewed to Olund, and he assigned it to Gordon. In June, 1948, Richfield Oil Company took over the lease, with an operating agreement with Gordon under terms and conditions somewhat similar to those of the General Petroleum agreement.

Stansbury diligently took care of the many details arising from the management of the project incident to the purchase of the equipment from General Petroleum, operation of the property until consumma-

tion of the agreement with Richfield, and negotiations with the government and with Richfield. Gillan had contributed some delay rental money but he would not enter into any agreement to share expenses in connection with renewal of the lease. Later when Gillan asserted a right to participate in the profits resulting from operation of the property after expiration of the old lease, he was restricted to royalties only. *Gillan v. Stansbury*, 97 Cal.App.2d 502, 217 P.2d 1016.

During negotiations in the early part of 1947 with Stansbury, Richfield's counsel examined plaintiffs' disclaimer, expressed dissatisfaction with its sufficiency, and advised Stansbury that an assignment should be procured. While disagreeing with Richfield's counsel as to the need for such further form of relinquishment from plaintiffs, Stansbury, also an attorney at law, in May, 1947, sent to plaintiffs a second instrument for execution, a disclaimer and assignment. As recompense for the nuisance of signing this additional document, he enclosed a check for \$800. In June, 1947, Stansbury conferred with plaintiffs in Chicago. When questioned at the trial as to the purpose of the meeting, Stansbury denied that it was to revive plaintiffs' interest in the application for the renewal lease. Defendants' counsel then objected to any further testimony along that line, and he was sustained. Thereupon plaintiffs made an offer to prove that (1) at the meeting Stansbury, on behalf of himself and Gordon, agreed that plaintiffs should retain their one-fourth interest in the oil venture, but stated that in order to satisfy Richfield, plaintiffs would be required to sign the assignment; (2) in pursuance of such understanding, plaintiffs were willing to execute the desired assignment and agreed to return the uncashed \$800 check; and (3) by letter a month later, July, 1947, Stansbury confirmed this arrangement with plaintiffs, suggesting that plaintiffs not return the letter which Stansbury had previously sent to them with the assignment because it stated that plaintiffs had "no further interest in the lease, legal or equitable," and "under the proposed arrangement that would not be

strictly true." In August, 1947, plaintiffs returned the \$800 check to Stansbury; and in September they sent him the executed assignment.

Following consummation of the operating agreement in June, 1948, with Stansbury and Gorden, Richfield undertook further well drillings, demonstrated that the oil property covered in the permit was potentially valuable, and paid the remaining permittees a bonus of \$100,000 for the right to operate under the renewal lease. See *Gillan v. Stansbury*, *supra*, 97 Cal. App.2d 502, 217 P.2d 1016.

Thereafter plaintiffs filed this action, claiming that their second instrument of disclaimer and assignment was secured by the fraud of Stansbury, that they signed such instrument upon his representation that it was only to clear title so Richfield would assume the obligations of the permit, and that they would still retain their one-fourth interest; and that they reposed great trust and confidence in Stansbury as the result of his years of friendly dealings with their parents with regard to this oil permit. Plaintiffs prayed for a declaration of their rights in the renewal lease and operating agreement with Richfield; an accounting as to the revenues received from operation of the property since the expiration of the old lease in January, 1944; and a declaration of trust in defendants for the benefit of plaintiffs as to their alleged continuing one-fourth interest.

At the trial it appeared that no written memorandum was made of the agreement which plaintiffs asserted Stansbury made with them for retention of their one-fourth interest in the oil property. The court held that the purported verbal agreement was within the provisions of the statute of frauds and in the absence of a written memorandum, it could not be established by the testimony of plaintiffs' witnesses. The court further held that defendants were not chargeable with fraud in the negotiations with plaintiffs, and granted defendants' motion for a nonsuit. From the ensuing judgment, plaintiffs appeal.

In clarification of the rights of the parties, attention is first directed to the case of *Gillan v. Stansbury*, *supra*, 97 Cal.App.

2d 502, 217 P.2d 1016. There the same original lease, renewal lease and operating agreement with Richfield were involved in determining the interests of Gillan as one of the original permittees. Gillan asserted a one-fourth interest in the renewal lease and in the profits from the oil produced, commensurate with his status under the original joint venture among the parties. The court analyzed the purport of the original lease to General Petroleum and its operating agreement for development of the property, and distinguished between the leasehold interest of the lessee and the overriding royalty interests retained by the joint adventurers. Gillan did contribute some renewal rental payments but he did not assume any obligations or enter into any agreement with Stansbury and Gordon for effecting a renewal of the original lease or locating a new operator for the property. The court held that the latter were not fiduciaries with respect to the purchase of the original lease, that Gillan had an opportunity to participate in that venture if he had chosen to so act, and that such purchase was a "new undertaking not within the scope of the joint venture". 97 Cal. App.2d at page 509, 217 P.2d at page 1020. However, while declaring that Gillan was not entitled to an interest in the renewal lease or any bonus received by virtue of the new operating agreement with Richfield, the court held that since Gillan had not abandoned or disclaimed his royalty interests in the oil production, he was entitled to his proportionate share of the royalty payments.

The instant case presents for determination the effect of the negotiations between plaintiffs and Stansbury in divesting plaintiffs of all interest in the property. On this appeal plaintiffs argue these points: (1) fraud in the negotiations on the part of Stansbury, particularly arising from an alleged relationship of attorney and client between them and him; (2) error by the court in sustaining objections to the offered testimony as to the asserted verbal agreement made between plaintiffs and Stansbury following their execution of the first disclaimer and prior to the execution of the second; (3) evidence of plaintiffs'



part performance of the undertaking to repurchase an interest in the permit, removing their claim from the interdiction of the statute of frauds; and (4) equitable estoppel effecting the enforcement of a constructive or resulting trust in plaintiffs' favor to a one-fourth interest in the permit.

[1] The record discloses no fraud or misrepresentation in Stansbury's dealings with plaintiffs. He appears to have had a long business association with plaintiffs' parents, looking after their interests in the oil investment in this state and acting for them under a power of attorney with regard thereto. The relationship seems to have been more akin to business men engaged in a joint venture rather than that of attorney and client. In any event there appears to have been no fiduciary duties owing by Stansbury to plaintiffs in succeeding property negotiations. Nevertheless, and assertedly because of his close relation with plaintiffs' parents, Stansbury made every effort to protect plaintiffs' interests in the investment. He fully advised them of their right to participate in keeping the permit in force and in the renewal of the lease; and of the contribution required of them for their continuance with the new undertaking. In fact, he urged plaintiffs to join in the proposed deal with the other permittees, expressed great concern lest he might not present it to them in the "best possible light" in conformity with his belief that it was an "excellent investment," and stated that he hoped that they would "decide to stay in" because it looked "quite promising" to him. Despite such express advice from Stansbury not to withdraw from the enterprise, plaintiffs decided not to "continue holding [their] interests," and they declined to contribute any part of the expenses required to finance the new development.

Plaintiffs now claim that Stansbury misrepresented the expenses required for renewal of the lease by including the purchase price of General Petroleum's pumping equipment on the property and requesting plaintiffs to advance one-fourth of that amount if they wanted to partici-

pate in the new undertaking on the same proportionate basis as prevailed in the original venture. But the purchase of this equipment was part of the arrangement with General Petroleum in exchange for its waiver of the right to renew the lease. Stansbury properly submitted to plaintiffs the full expenses which would be necessary for the successful undertaking of the new enterprise and a statement of the amount of their pro rata contribution if they wanted to share in the proceeds. In so advising plaintiffs, Stansbury was simply stating the terms of negotiation with General Petroleum and the basis upon which they might join in the new undertaking, and there is no evidence whatever of any misrepresentation with respect thereto.

Some two years later plaintiffs executed their formal disclaimer and abandonment of "any and all interest and rights including royalty reserved," again indicating their purpose to terminate all connection with the investment, including the right to royalty payments. Apparently they believed the property to have little value, and wishing to have no further obligations in the conduct of any new oil producing enterprise thereon, they were willing to have others proceed with it. Meanwhile it was only through the endeavors of Stansbury and his associates that the permit was kept alive, culminating in the renewal lease and operating agreement with Richfield. As was aptly said in *Gillan v. Stansbury*, supra, 97 Cal.App.2d 502, at page 511, 217 P.2d at page 1022: "One who has had a fair and equal opportunity with his associates to act with them and who refuses to do so, but 'sits tight' waiting for the others to pull the chestnuts out of the fire, has no grounds for complaint if \* \* \* he is left out of a new undertaking which they are obliged to launch."

[2,3] The alleged agreement between plaintiffs and Stansbury after execution of the disclaimer concerned incorporeal interests in real property. See *La Laguna Ranch Co. v. Dodge*, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. Such agreement, if it existed, is barred by the statute of frauds by reason of the absence of a "mem-



orandum thereof \* \* \* in writing and subscribed by the party to be charged". Civ.Code, § 1624, subd. 4. Accordingly, objections to testimony relative to the agreement were properly sustained. Code Civ.Proc., § 1973, subd. 4. The letter of July, 1947, which Stansbury wrote to plaintiffs a month after their Chicago meeting, and which allegedly confirmed his agreement there made that plaintiffs should retain a one-fourth interest in the permit, is clearly insufficient as a memorandum in satisfaction of the statute. It merely describes plaintiffs' interest in the new undertaking as something to be determined by "future developments," an agreement to negotiate further, but no specific terms are mentioned. With reference to the "proposed arrangement" to have plaintiffs come back into the deal, Stansbury stated in that letter that it "would not be strictly true" to say that plaintiffs had "no further interest in the lease, legal or equitable." In short, the letter manifests no more than a proposal that plaintiffs rejoin the enterprise on such basis as future discussion might indicate, but it does not constitute the required memorandum of terms of agreement between the parties.

[4,5] Nor may plaintiffs successfully invoke the doctrine of part performance to overcome the bar of the statute of frauds. Before a party can be estopped to assert the statute due to the other's part performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. *Mason v. Home Ins. Co.*, 10 Cal.App.2d 696, 698, 52 P.2d 491; see 23 Cal.Jur. § 33, pp. 464-465; annotation 101 A.L.R. 923. The only change of position cited by plaintiffs is (1) the return of the \$800 check and (2) execution and delivery of the second disclaimer and assignment following the alleged verbal agreement made with Stansbury at the Chicago meeting in June, 1947. The payment money is not "sufficient part performance to take the oral agreement out of the \* \* \* statute of frauds", *Shive v. Barrow*, 88 Cal.App.2d 838, 848, 199 P.2d 693, 700, for the party paying money "under an invalid contract \* \* \* has an adequate remedy

at law." *Woerner v. Woerner*, 171 Cal. 298, 301, 152 P. 919, 920; also *Paul v. Layne & Bowler Corp.*, 9 Cal.2d 561, 565, 71 P.2d 817; *Trout v. Ogilvie*, 41 Cal.App. 167, 171, 182 P. 333. The further act of execution of the second disclaimer, in relinquishment of a non-existent interest, clearly cannot qualify as the required unconscionable loss. By the first disclaimer in May, 1946, plaintiffs had expressly and completely divested themselves of all interest in the permit. At the trial plaintiff John Anderson admitted that the purport of the relinquishment was to state "in more formal language the same type of intent as expressed" in the letter to Stansbury some two years earlier—their decision not to "continue holding [their] interests." Having nothing left to assign, the second disclaimer could not have effected a change of position within the scope of the part performance principle.

[6] It is apparent from the foregoing discussion that there is no evidence of fraud, undue influence, unjust enrichment, or the like which would support plaintiffs' assertion of a constructive trust, nor is there evidence to support a finding of a resulting trust. Civ.Code, secs. 2223, 2224; *Simpson v. Gillis*, 1 Cal.2d 42, 53-54, 32 P. 2d 1071; *Bainbridge v. Stoner*, 16 Cal.2d 423, 428-429, 106 P.2d 423. Only passing reference need be made to the cases which plaintiffs cite for example of the imposition of a trust so as to prevent an unconscionable injury, *Webb v. Vercoe*, 201 Cal. 754, 258 P.2d 1099, 54 A.L.R. 1200; *Robertson v. Summeril*, 39 Cal.App.2d 62, 102 P.2d 347 and for application of the doctrine of equitable estoppel to preclude reliance on the statute of frauds. *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88; *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198. They are so basically dissimilar as to have no relevancy here. See *Shive v. Barrow*, 88 Cal. App.2d 838, 846-847, 199 P.2d 693. In line with these views, defendants had no duty to make an accounting to plaintiffs with respect to their operation of the property following the expiration of the old lease. *Simpson v. Gillis*, supra.

[7,8] From what has been said, it appears that the trial court properly granted

the nonsuit as to plaintiffs' alleged causes of action for an accounting and for a declaration of trust. However, plaintiffs' complaint also included a count for declaratory relief, and the disposition of such count would ordinarily require an express declaration of the rights of the parties. *Es-sick v. City of Los Angeles*, 34 Cal.2d 614, 624, 213 P.2d 492; *Kessloff v. Pearson*, 37 Cal.2d 609, 613, 233 P.2d 899. While the trial court therefore erred in entering a nonsuit rather than a declaratory judgment in disposition of the count for declaratory relief, such error cannot be deemed prejudicial here. Any declaration of the rights of the parties would necessarily have been unfavorable to plaintiffs in conformity with the disposition of the other two counts, which latter disposition constituted the equivalent of an express declaration that plaintiffs had failed to establish any rights. Under such circumstances, the procedural error of the trial court does not constitute ground for reversal of the judgment. Const. art. VI, sec. 4½.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



38 Cal.2d 659

**STATE COMPENSATION INS. FUND et al.  
v. INDUSTRIAL ACC. COMMISSION  
OF CALIFORNIA et al.  
S. F. 18366.**

Supreme Court of California, in Bank.  
March 25, 1952.

The State Compensation Insurance Fund and Clifford F. O'Connor, doing business as O'Connor Bros., filed a petition against Industrial Accident Commission of the State of California and Paul J. Hull, employee, for annulment of an award of workmen's compensation made to Hull for injuries he received in a fight with his superior. The Supreme Court, Carter, J., held that the injuries arose out of claimant's employment and

occurred in course of his employment so as to entitle claimant to workmen's compensation.

Award affirmed.

Shenk, Schauer and Spence, JJ., dissented.

For former opinion see 225 P.2d 944.

**1. Workmen's Compensation ⇨681**

A dispute between an employee and his superior in regard to latter's treatment of former in their relations as boss and worker is "incidental" to the employment within rule that employee must be engaged in some activity growing out of and incidental to his employment when he suffers injury in order to be entitled to workmen's compensation. Labor Code, § 3600.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Incidental".

**2. Workmen's Compensation ⇨615**

The term "course of employment" within provision of Workmen's Compensation Law that to be compensable an injury must arise out of and occur in course of employment has reference ordinarily to time and place. Labor Code, § 3600.

**3. Workmen's Compensation ⇨800**

Where claimant employee's superior transmitted order to claimant through another employee rather than giving claimant a direct order, and claimant complained to such superior and attempted to hit him with his fists, after which a fight in which claimant was injured occurred, plaintiff's injuries arose out of his employment and occurred in course of his employment so as to entitle claimant to workmen's compensation, and fact that claimant was the aggressor did not preclude recovery of compensation. Labor Code, §§ 3202, 3600, 4551; Const. art. 20, § 21.

Donald Gallagher and Royle A. Carter, San Francisco, for petitioners.

Edmund J. Thomas, Jr., T. Groezinger, Robert Ball, P. H. McCarthy, Jr., F. Nelson O'Hara, Herbert S. Johnson and Alfred C. Skaife, all of San Francisco, for respondents.

CARTER, Justice.

Compensation was awarded to Paul J. Hull under the Workmen's Compensation Law. The employer and his insurance carrier seek to have the award annulled.

Hull was employed as an oiler on road construction work west of Woodland, California. He had been working about three and a half days with an outfit of which William Hoover was foreman. While they were at work Hoover walked past Hull to a truck driver and directed the latter to tell Hull to help load a caterpillar. Hull received confirmation of the order by calling across to Hoover. Later Hull approached Hoover and inquired why he didn't give him a direct order instead of relaying it through the truck driver. Hoover asked, "What's the matter, don't you like your job?" Hull said he didn't mind the job, but he wanted to be talked to as man to man. Asked if he wanted to quit, Hull said he did not, but thought "it was a ——— way" to give an order after walking past him face to face. According to Hoover, Hull called him a bad name. Hoover told him he'd better take off his glasses if he was going to talk like that, to which Hull replied that he didn't need to remove them, and he "swung" at Hoover. He "missed" but a fight ensued in which he was hit several times by Hoover. He received injuries which incapacitated him for a period of about ten days and required medical treatment and dental work.

The commission's first order was a denial of compensation based on the finding that Hull was the aggressor in the fight. A petition for rehearing was granted by the commission to reconsider whether Hull was the aggressor and if so, whether an aggressor injured in an argument arising out of the employment was entitled to an award of compensation under the workmen's compensation law of this state. In its order on rehearing the commission found that Hull sustained injury occurring in the course of and arising out of the employment in an altercation in which he was the aggressor. An award of \$8.57 temporary disability and an additional award to cover the cost of medical and dental treatment followed.

The petitioners challenge the validity of the award on the ground that it is contrary to the decisions of the Industrial Accident Commission from the beginning of operation of the governing law in this state and contrary to definite intimations of this court in harmony with the decisions of the commission. The respondents concede that their present position is contrary to former decisions of the commission and of statements of this court, but they assert that "the modern trend" in industrial accident cases is to award compensation "irrespective of fault" and that although an aggressor may be at fault he is nevertheless entitled to compensation.

[1-3] The workmen's compensation law as declared in the Constitution and statutes compels affirmance of the award. The Constitution confers upon the Legislature power to establish a system of workmen's compensation and create and enforce a liability on employers to compensate their workmen for injury sustained in the course of their employment "irrespective of the *fault of any party*". (Emphasis added.) Cal.Const. Art. XX, § 21. The only requirements of the statute are, that to be compensable, an injury must "arise out of" and "occur in the course of" the employment. Labor Code, § 3600. That is to say the employee must be engaged in some activity growing out of and incidental to his employment at the time he suffers an injury in order to be entitled to compensation under the workmen's compensation law. It cannot be doubted that a dispute between an employee and his superior in regard to the latter's treatment of the former in their relations as boss and worker is incidental to the employment. There is no doubt that the injury occurred in the course of the employment, for that has reference ordinarily to time and place. Hull has satisfied both aspects. The crucial issue is whether it "arose out of" the employment, and that poses the question of whether there is a causal connection between the employment and the injury. That that is the only issue follows from the Workmen's Compensation Act which excludes fault and contributory negligence of the employee and assumption of risk as defenses. That is the *express* declaration.



of the Constitution and statutes relating to workmen's compensation. Indeed the statute compels that result inasmuch as it declares that "serious and wilful misconduct" on the part of the employee does not defeat his recovery; it merely cuts it in half, and not even that under certain conditions (Labor Code, § 4551), thus indicating clearly that misconduct on his part is not a defense. Hence the charge of aggressor cannot be a defense, for it is nothing more than an assertion that the employee was at fault—was to blame—brought it on himself.

These principles, including the negation of a requirement that the employee is doing something for his employer's benefit were clearly stated by this court in the recent case of Pacific Employers Ins. Co. v. Industrial Acc. Com., 26 Cal.2d 286, 158 P.2d 9, 10, 159 A.L.R. 313, where we abandoned the long standing rule in this state that the victim of "horseplay" was not entitled to compensation. The logic of that case is here compelling. We said: "As grounds for annulling the award, the insurer contends that, although the applicant's injury occurred in the course of her employment, it did not arise 'out of' her employment and, accordingly, is not a compensable injury within the jurisdiction of the Industrial Accident Commission. \* \* \* *'It is not indispensable to recovery, however, that the employee be rendering a service to his employer at the time of the injury.* [Citations.] The essential prerequisite to compensation is that danger from which the injury results be one to which he is exposed as an employee in his particular employment'. \* \* \* The petitioner concedes that if skylarking was customary and condoned by the employer \* \* \* or if, under similar circumstances, Miss Carmel had been injured through an altercation between fellow employees over their work \* \* \* she would be entitled to compensation. *These judicial distinctions lack realism. \* \* \* Certainly, a classification of assaults and altercations as incidental to employment, but placing accidents caused by playfulness and frolicking, in which the injured employee took no part and of which he had no knowl-*

*edge, in the category of those not 'proximately caused by the employment,' has no sound basis in law or fact.* \* \* \* Considering, as we may, the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay. \* \* \* Accordingly, an injury sustained by a nonparticipating employee through the horseplay of fellow workers arises 'out of' and 'is proximately caused by the employment' within the meaning of section 3600 of the Labor Code." (Emphasis added.) More recently this court dealt with the question of whether on the basis of *respondeat superior* an employer was liable for an assault by his employee on another workman, although he was the aggressor. In Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5, 6, the employee, following a dispute over work, threw a hammer and struck plaintiff with it. Plaintiff was another workman but not for the same employer. It was held that the assault was in the course of the employment, for it arose out of a dispute about the work being performed. We said: "Defendant contends that Enloe was not acting in the scope of his employment when he injured plaintiff, on the grounds that the throwing of the hammer did not further defendant's interests as an employer and that Enloe could not have intended by his conduct to further such interests. *It is sufficient, however, if the injury resulted from a dispute arising out of the employment.* Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in and as a part of' the principal's business. *'It is not necessary that the assault should have been made "as a means, or for the purpose of performing the work he (the employee) was employed to do."*' \* \* \* Such associations 'include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as

*emotional makeup.* In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for funmaking and *emotional flareup.* Work could not go on if men became automats repressed in every natural expression. \* \* \* *These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.* Hartford Acc. & Ind. Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 15." (Emphasis added.) Certainly if for the purposes of *respondeat superior* an employee is acting within the scope of his employment when committing an assault arising from a dispute as to his work because it is incidental to employment, it must follow that an injury he sustains while committing the assault is also within the course of his employment and incidental to it and compensable, especially when we remember that the workmen's compensation laws must be liberally construed in favor of the employee. Labor Code, § 3202. The Carr case was followed by Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525, where the employer was held liable for an assault by his truck driver employee resulting from an altercation following a collision. We held the assault to be in the scope of the employment.

It should be noted that in the Carr case the court cited and quoted with approval from Hartford Acc. & Ind. Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 14, certiorari denied 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (see portion of Carr case last quoted above). The Hartford case was written by Judge Rutledge, later an Associate Justice of the Supreme Court of the United States, and involved the issue of whether an employee who was assaulted because of vile language he used arising out of a work dispute could recover workmen's compensation under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. The court in an illuminating discussion held he could, stating: "No common denominator for the cases can be found in the nature of the specific act or event which is the immediate cause of the

injury. Whether it is 'natural' or abnormal, occurs on or off the employer's premises, consists in the action of physical or human agencies and, if the latter, is reflex or volitional, lawful or unlawful, by one deranged or responsible, the common element is to be found in a broader and more fundamental principle. It is stated by Cardozo, J., in Leonbruno v. Champlain Silk Mills, 1920, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522, as follows: 'The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life.' Not the particular or peculiar character of the associations and conditions, but that the work creates and surrounds the employee with them is the basic thing.

"Nor is it necessary, as these cases show, that the particular act or event which is the immediate cause of the injury be itself part of any work done for the employer by the claimant or others. Otherwise no award could be given for many injuries now compensated, such as those caused by stray bullets, unexplained falls, objects falling from outside the employer's premises and work, many street risks, horseplay, most assaults and many other causes. 'The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business.' Not that the act is in the line of duty, or forwards the work, or creates special risk, but that the work brings the employee within its peril makes it, for purposes of compensation, 'part of the work.'

"Recognition that this is so came more easily as to physical than as to human forces. As with street risks, the early disposition in cases of human action was to emphasize the particular act and its nature, except anomalously when it involved merely negligence of the claimant or fellow employees. The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i. e., non-culpable, but injurious) behavior was not difficult. So with that of strangers, including



assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. *In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up.* Work could not go on if men became automatons repressed in every natural expression. 'Old Man River' is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.

"But resistance to application of the broad and basic principle has been most obstinate perhaps where the particular act immediately causing injury involves *responsible volition by the claimant* or others. The extreme instances are those containing an element of illegality or criminality. The horseplay and assault cases are illustrative. Confusion and conflict still reign in these realms.

"Several factors have sustained the resistance. One is the hangover from common law conceptions of profiting by one's own wrong. But this applies as well, in logic, to contributory or one's own exclusive negligence. Another was the now thoroughly dissipated notion that voluntary responsible action cannot be accidental. The volitional character of the act also raised a supposed analogy to 'independent, intervening agency' in tort causation. There was, further, an assumed essential opposition between 'personal' acts and those of an 'official' (i. e., related to the work)

character. An assault necessarily involves emotional make-up and disturbance. In a broad sense nothing is more personal. Quarreling is always so. This accounts for the early disposition to regard all injuries from wilful assault as not compensable, a view also necessarily dictated, except rarely when duty requires fighting, if tendency of the particular act to forward the work or direct connection with line of duty are the tests of liability. But that view now is repudiated universally in recognition that work causes quarrels and fights. *That they involve volition and fault, have no tendency to forward the work, and are permeated with the personal element of anger no longer suffices to break the causal connection between work and injury.* Emotional disturbance is not of itself an 'independent, intervening cause' or a 'departure from the work.'

"But differences remain as to when work causes quarrels. So long as the claimant is merely the victim, not a participant, it makes little difference whether the fighting is by fellow employees or strangers to the work or what is the immediate occasion for the dispute. The same is true in horseplay. It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes. But conflict becomes acute when the claimant participates. There are two lines of division, which partially overlap. One is concerned with whether the claimant is the aggressor. Another turns on whether the dispute arises immediately over the work or about something else. One view limits compensable causation to quarrels relating directly to the work. It disconnects the precipitating incident from the working environment, though that alone may have produced it. So isolated, its immediate relevance to the work becomes the determinative consideration. Momentary lapses from duty, as in horseplay, kidding and teasing, which often explode into bursts of temper and fighting become 'departures from the work,' 'independent, intervening causes' or 'purely personal matters.' Their immediate irrelevance overcomes and nullifies the part played by the work in bringing the men together and creating



the occasion for the lapse or outburst. The other view rejects the test of immediate relevancy of the culminating incident. That is regarded, not as an isolated event, but as part and parcel of the working environment, whether related directly to the job or to something which is a by-product of the association. This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, *involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would introduce the conceptions of contributory fault, action in the line of duty, non-accidental character of voluntary conduct, and independent, intervening cause as applied in tort law, which it was the purpose of the statute to discard.* It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those resulting from negligent action, mechanical causes and the volitional activities of others.

"The limitation, of course, is that the accumulated pressures must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of 'independent, interven-

ing agency' applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: 'No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by *the willful intention of the employee to injure or kill himself or another.*' (Italics supplied.)

"This provision, reinforced by the statutory presumptions and the Act's fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely *inconsistent with reading into the statute the law of tort causation* and defense, where liability is predicated on fault and nullified by contributory fault." (Emphasis added.)

The modern trend is in accord. *Stark v. State Industrial Acc. Comm.*, 103 Or. 80, 204 P. 151; *Stulginski v. Waterbury Rolling Mills Co.*, 124 Conn. 355, 199 A. 653; *Commissioner of Taxation and Finance v. Bronx Hospital*, 276 App.Div. 708, 97 N.Y.S.2d 120; *Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69; see cases collected 41 Ill.L.Rev. 354-363; *Forty Years of American Workmen's Compensation*, Stefan A. Riesenfeld, Professor of Law, University of Minnesota (1951), 35 Minn.L. Rev. 525-548. Many writers on the subject have taken the same position (*Assaults and Horseplay under Workmen's Compensation Laws*, Samuel B. Horovitz, 41 Ill.L.Rev. 311; *Current Trends in Workmen's Compensation*, Samuel B. Horovitz (1947), p. 532.) In the above writings Mr. Horovitz ably presents the problem. At page 343 et seq. of 41 Ill.L.Rev. he says: "Why should it make any legal difference

under the compensation law whether the injured party was the aggressor? Certainly, no compensation statute expressly gives the employer the defense of 'aggressor.'

"Is there some good reason why so many courts, without knowing exactly why they do it, deny recovery to all types of aggressors? Where the aggression is deliberate and by murderous means, the reason is apparent. Assume that a quarrel starts on Monday over work tools. Tuesday one employee, still angered over that argument, steals up on the other and attempts to kill him with a hatchet, and instead trips and injures himself, or is killed by the intended victim in self-defense. The quarrel having its origin in a fight over tools, arises out of the employment.

"If he is to be denied compensation, it must, therefore, be on some other ground. Most acts supply that ground, by expressly providing that there shall be no recovery where the claimant is guilty of serious and wilful misconduct, or of wilful intention to injure or kill himself or another, or similar enactments. Certainly a deliberate hatchet-murder, attempted the following day when the excuse of high passion is gone, falls within the express exception, and no recovery is possible.

"But no such wilful intention or wilful misconduct can be spelled out of every aggressive act. A playful push, an angry curse, or even an impulsive punch with a fist is not what legislatures intended to punish, by depriving workers of compensation. And the burden of proof of such serious and wilful misconduct, or wilful intention to injure or any similar defense, is upon the employer or insurer. Where the board, commission or court does not expressly find such violation, what right has the court to read in a new exception for 'aggressors?' Why rule out negligence, contributory negligence, assumption of risk, etc., in all other types of compensation cases, and leave it in for assaults?

"Wilful misconduct or wilful intention to injure another usually denotes premeditated or deliberate misconduct. Serious and wilful misconduct does not cover mis-

conduct which is trivial, no matter how grave the result, or misconduct which is not intentional, e. g., misconduct which is impulsive, or inadvertent, or thoughtless, or as the result of an instinctive act. \* \* \*

"Many assaults result from impulsive, thoughtless or unintentional acts, often trivial in origin, although the result may be serious or even fatal. The 'explosive point is merely the culmination of antecedent pressures' in many instances. A worker tells his foreman he wishes to quit the gang and that the foreman is prejudiced against him. One word leads to another, and fists fly. *To create an artificial rule that he whose fist first made contact is an aggressor (and can never recover, even though the first fist did no harm, whereas the second fist permanently injured the fellow worker), is to forget the legislative command that injuries arising out of the employment be compensated, short of wilful misconduct or similar provisions.* And where the quarrel had its origin in the work or work-environment and was short of wilful misconduct, or short of any express defense in the act, *how can the court justify their own judicially-created defenses?* How are they justified in bringing into the compensation act the discarded principles of the common law as to contributory fault, independent intervening cause, and the like? That these tort theories have been discarded is too well recognized for further modern argument. That there is *a natural repugnancy to help a guilty party is no excuse for relieving industry of a liability and placing it on the worker or charity.*

"The moment courts properly admit that, for the non-aggressor, an assault, malicious or sportive, arises out of the employment, that the *same assault necessarily arises out of the employment for the aggressor.* It is the character and nature of the assault which determines whether it arises out of the employment, not the culpability or lack of culpability of the parties involved. It is the assault itself which arises out of the employment; and who initiates the altercation has no bearing on that question, relates to common law culpability considerations, and is of importance only in consid-



*ering the legislative defense of wilful misconduct and the like.*" (Emphasis added.)

Mr. William R. Schneider, in analyzing the cases states that the weight of authority supports the propositions that (1) assaults arising out of controversies over the manner and method of performing work are compensable as a general proposition, but may not be if the injured employee initiated the assault. (2) Those arising from personal animosity are not. (3) The aggressor in the assault may not recover. (Schneider, *Workmen's Compensation Text* [Perm.Ed.] § 1560.) There is no basis for distinguishing between the case where the employee initiated the assault and where he did not or that of an aggressor and non-aggressor, except in one the employee is at fault and in the other he is not. As seen, this cannot be a valid distinction, because the fault of the employee is no bar to recovery unless it is serious and wilful misconduct and then only to the extent of one half the compensation, and not at all if the employee is killed, suffers 70% or more disability, was under 16 years of age, or the employer failed to comply with a safety regulation. Labor Code, § 4551.

The contention is made that considerations of public policy require that recovery be denied in cases where the employee is injured while engaged in the violation of a penal statute, because, to allow recovery in such a case, would permit a person to benefit by his own wrong. That appears to be the real basis of many of the decisions denying recovery. The effect of such a holding is to deny recovery because of the fault of the employee contrary to the express provisions of the Constitution and statutes relating to workmen's compensation. The question of policy is for the people and the Legislature in the first instance and here they have spoken in no uncertain language, saying that fault, serious and wilful misconduct, and contributory negligence do not bar recovery. Hence to the extent such action by the employee is within a "wrong" by which he may not ordinarily benefit, the policy declared is that he may so benefit.

In the same connection, fear has been expressed that workmen will receive com-

pensation for injuries suffered while committing a serious crime and who may be imprisoned for the offense. This fear is unfounded. Situations are conceivable where all would probably agree that compensation should be awarded even though a crime was committed. Take the case where an employee is injured while driving a car with defective brakes or without lights at night while engaged in conducting his employer's business or is required to make fast deliveries and so operates it that he is guilty of speeding, reckless driving, or even manslaughter. There may be cases in which a crime (e. g., murder) is committed where the criminal act may not be said to be reasonably related to the employment—is not within the realm of those acts which may arise out of emotional conflicts engendered by frictions in employment. When such a case is presented it can be decided on its facts without violating sound rules of construction of the constitutional and statutory provisions relating to workmen's compensation. Rather than attempt to state a general rule with exact boundaries, the court should meet each case as it arises. Clearly, a simple assault, such as here involved, is not outside the boundary or in the category of an act having no reasonable connection with the employment.

The dictum contrary to the foregoing in *Globe Indemnity Co. v. Industrial Accident Comm.*, 193 Cal. 470, 225 P. 273 and *Globe Indemnity Co. v. Industrial Accident Comm.*, 2 Cal.2d 8, 37 P.2d 1039, is disapproved.

The award is affirmed.

GIBSON, C. J., and TRAYNOR, J., concur.

EDMONDS, J., concurs in the judgment.

SHENK, Justice.

I dissent. The crucial issue is conceded to be whether the injury "arose out of" the employment. The majority assumes to settle the question by the observation that the constitution declares that injury so sustained shall be deemed compensable "irrespective of the fault of any party"; that



since aggression is fault, it is therefore not a defense. This over-simplified solution is contrary to establish state policy and decisional law.

The holding in *Pacific Emp. Ins. Co. v. Industrial Accident Comm.*, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313, does not sustain the proposition. As the majority opinion points out, the court there abandoned the long existing rule that the non-participating "victim" of horseplay was not entitled to compensation. Here we are dealing with the aggressor, not his victim. Nor is reference to the result under the doctrine of respondeat superior in point. There again the injuries to another person are involved. In my opinion the words "without the fault of any party" apply, as the constitution indicates, *after* it is determined that the injury arises out of the employment. As the opinion concedes, an aggressive act has not uniformly been deemed to be an act coupled with and therefore arising out of employment. On the contrary the weight of authority has supported and still supports the view that an aggressor has stepped aside from his employment and at least as to his own injuries is not within the purview of the compensation acts.

It is true that the salutary provisions of Workmen's Compensation laws in this state and elsewhere generally have abolished the rule of assumption of risk, the fellow servant doctrine and contributory negligence as defenses in proceedings in behalf of an injured workman. But it does not follow that all other defenses have been abolished.

Regardless of the seemingly broad and all-inclusive language of our constitutional provision as an enabling act, it has always been recognized that certain facts must be established and conditions found to exist before the compensation law may be invoked. It is essential that the relationship of employer and employee be present at the time of the injury. It is also essential that the injuries must have been sustained by the workmen "in the course of their employment". Constitution, Article XX, sec. 21. In the exercise of its plenary power the legislature has imposed other conditions on the right of an employee to receive com-

pensation from his employer. Section 3600 of the Labor Code requires (a) that both the employer and the employee be subject to the compensation provisions of the code; (b) that, at the time of the injury, the employee be performing services growing out of and incidental to his employment and be acting within the course of his employment; (c) that the injury be proximately caused by the employment, either with or without negligence; (d) that the injury be not caused by the intoxication of the injured employee; or (e) that the injury be not intentionally self-inflicted.

The incidents of employment relationship and "course of employment" requirements of subdivisions (a), (b) and (c) cannot be seriously questioned; and the prohibitions against compensation, notwithstanding the concurrence of all other requirements, contained in subdivisions (d) and (e) have never been successfully attacked.

Furthermore section 4551 of the Labor Code denies compensation as to one-half where the employee is guilty of serious and wilful misconduct.

No one may rightfully question the power of the legislature to place proper restrictions on the right to compensation subject of course to the constitutional provisions. Whether an "aggressor" should be entitled to compensation and the extent if any to which he may be so entitled is a question of public policy, a subject on which the legislature might well provide appropriate regulations. The fact that it has not done so may be accounted for by the fact that in the history of the interpretation of the applicable law in this state both by decisions of the Commission and by language of this court, the rule has invariably been to deny compensation to the "aggressor" in assault cases.

In view of that history, interpretation and long standing public policy, it is not the province of this court to lay down a rule that an aggressor should be entitled to compensation under any and all circumstances. The offense might be of such a nature as to exclude the conduct of the aggressor-employee from consideration as action within the course of his employment.

Such conduct might be in violation of some penal law of the state involving conduct *malum in se* and of the most flagrant nature. It might even result in murder. In such a case, if the Commission's position be sustained, the perpetrator of the crime could be receiving compensation while confined in state's prison for the offense. Liberal construction of compensation laws should not go the length now established by the majority decision as the policy of the state that an aggressor should receive compensation benefits. It certainly should not be the rule that an employee committing a criminal assault on another should be deemed to be acting for his employer for the purpose of collecting from him compensation for injuries which he sustained as a result of his own criminal act. Whether the aggressor-employee's conduct would constitute such a penal offense as to entitle him to or exclude him from compensation should be determined in accordance with some legislative guide. If the acts of the aggressor-employee amount to serious and wilful misconduct compensation to the extent of one-half may in a proper case be awarded as provided by section 4551 of the Labor Code. But it has never been held that regardless of the seriousness of the offense, the offender is entitled to compensation—one-half or at all.

The decisions of the Commission which have denied compensation to the aggressor, with the sole exception of the order on rehearing in this proceeding, include the following: *Hemphill v. Ind. Acc. Comm.*, 20 I.A.C. 110; *Sosson v. Ind. Acc. Comm.*, 17 I.A.C. 120; *Turner v. Ind. Acc. Comm.*, 17 I.A.C. 119; *McGuirk v. Frank J. Klimm Co.*, 17 I.A.C. 12; *Wilson v. Carter*, 14 I.A.C. 78; *Challman v. State Harbor Com'rs*, 9 C.C.C. 120; *Galpin v. Ind. Acc. Comm.*, 2 C.C.C. 29.

Although an aggressor was not directly involved in *Globe Indemnity Co. v. Ind. Acc. Comm.*, 193 Cal. 470, 225 P. 273, and *Globe Indemnity Co. v. Ind. Acc. Comm.*, 2 Cal.2d 8, 37 P.2d 1039, the rule of non-compensability for injuries on behalf of an aggressor established and uniformly ad-

hered to by the Commission was not questioned and was approved by implication.

Numerous authorities elsewhere disclose the prevailing view to be that a claimant who is the aggressor in an assault steps aside from his employment for a purpose of his own even though the argument which precipitates the assault is work-incited. Such cases follow the general rule (see note, 112 A.L.R. at page 1270 with citation of cases), that where the claimant is the aggressor in provoking an assault upon himself, the injury does not arise out of the employment. *Vollmer v. City of Milwaukee*, 1948, 254 Wis. 162, 35 N.W.2d 304; *Riley v. Ind. Comm.*, 1946, 394 Ill. 126, 67 N.E.2d 172; *Kimbro v. Black & White Cab Co.*, 1934, 50 Ga. App. 143, 177 S.E. 274; *Merkel v. T. A. Gillespie Co.*, 1932, 162 A. 250, 10 N.J.Misc. 1081; *Davis v. Robinson*, 1932, 94 Ind.App. 104, 179 N.E. 797, 799-800; *Triangle Auto P. & T. Co. v. Ind. Comm.*, 1931, 346 Ill. 609, 178 N.E. 886; cf. *Horvath v. LaFond*, 1943, 305 Mich. 69, 8 N.W.2d 915; *Williams v. Ind. Comm.*, 1939, 63 Ohio App. 66, 25 N.E.2d 313; *Cherry v. Magnolia Petroleum Co.*, Tex.Com.App., 1932, 45 S.W.2d 555; *Fulton Bag & Cotton Mills v. Haynie*, 1931, 43 Ga.App. 579, 159 S.E. 781; *Martin v. Sloss-Sheffield Steel & Iron Co.*, 1927, 216 Ala. 500, 113 So. 578; *Curran v. Vang Const. Co.*, 1926, 286 Pa. 245, 133 A. 261; *Stillwagon v. Callan Bros. Inc.*, 1918, 183 App.Div. 141, 170 N.Y.S. 677; *Griffin v. A. Roberson & Son*, 1916, 176 App.Div. 6, 162 N.Y.S. 313, 314.) *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5; *Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525, and similar cases are consistent with that general rule. Those cases involve the right of third parties to recover from an aggressor's employer for injuries inflicted by the aggressor while acting in the course of his employment. Cf. *Hartford Acc. & Ind. Co. v. Cardillo*, 1940, 72 App.D.C. 52, 112 F.2d 11, certiorari denied 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415. In those cases it was not the aggressor-employee who was seeking recovery of benefits for injuries which he received. Such cases are not in point.



and should not be considered to have controlling effect here.

Cases which are said to indicate a "modern trend" to compensate the aggressor for his injuries are conceded in the majority opinion not to be in accord with the weight of authority. See *Schueler v. Armour & Co.*, 1935, 116 Pa.Super. 323, 328, 176 A. 526; *Traders & General Ins. Co. v. Mills*, Tex.Civ.App., 1937, 108 S.W.2d 219, 224; *Hartford Acc. & Ind. Co. v. Cardillo*, 1940, 72 App.D.C. 52, 112 F.2d 11, certiorari denied 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415; *Newell v. Moreau*, 1947, 94 N.H. 439, 55 A.2d 476, 479-480; *Dillon's Case*, 1949, 324 Mass. 102, 85 N.E.2d 69, 72; *Com'r of Tax. & Fin. v. Bronx Hosp.*, 1950, 276 App.Div. 708, 97 N.Y.S.2d 120, 122-123; cf. *Stulginski v. Waterbury Rolling Mills Co.*, 1938, 124 Conn. 355, 199 A. 653; *Haas v. Brotherhood of Trans. Workers*, 1945, 158 Pa.Super. 291, 44 A.2d 776, 780; see cases collected Horovitz Article, 41 Ill.Law Rev. 311, at p. 363, note 170. The applicable rule must necessarily depend on the law of the forum.

Because this court in *Pacific Emp. Ins. Co. v. Ind. Acc. Comm.*, supra, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313, overruled numerous earlier cases which denied compensation to a non-participating employee injured through the horseplay of a fellow worker is no reason now to disclaim adherence to the cases in this state which have impliedly approved the general rule heretofore followed by the Commission in aggressor assault cases. The decision in that case may properly lead to a holding of compensability for injuries suffered by the victim of the aggressor; but it is not authority for compensating the self-provoked injuries of an aggressor. The risk that an employee may receive injuries from his own act of aggression should not be considered incidental to his employment. If the rule as heretofore established in this state is to be relaxed and recovery be authorized under circumstances which do not otherwise offend the law, the change should be made by the legislature, not by the courts. In my opinion the award should be annulled.

SCHAUER and SPENCE, JJ., concur.

38 Cal.2d 676

**LERNER v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.**

S. F. 18448.

Supreme Court of California, in Bank.

March 25, 1952.

Petitioner brought prohibition proceedings against the Superior Court of the State of California, in and for the County of San Mateo, respondent, to prohibit respondent from entering an order modifying custody provisions of divorce decree. The Supreme Court, Traynor, J., held that respondent had no right to enter order modifying custody provisions while appeal by petitioner from a prior order changing custody provisions was pending, and that prohibition would issue to prevent respondent from acting in excess in its jurisdiction.

Peremptory writ of prohibition issued.

Prior opinion 236 P.2d 227.

**1. Divorce**  $\hookrightarrow$ 312.4

An appeal from a custody order in a divorce suit deprives trial court of jurisdiction to change custody status at time of appeal, even though parties consent to change. Code Civ.Proc. § 946.

**2. Divorce**  $\hookrightarrow$ 312.4

The essence of custody of child of divorced parents is the companionship of the child and the right to make decisions regarding his care and control, education, health and religion.

**3. Divorce**  $\hookrightarrow$ 312.4

Where divorce decree awarded legal custody of son and daughter to divorced wife and divorced husband jointly, and thereafter decree was modified to award custody of son to divorced husband, subject to condition that the son be kept enrolled in California school which he was presently attending, and divorced wife promptly appealed from order of modification, and her appeal was pending before the Supreme Court, trial court had no right to enter an order authorizing divorced husband to enter the son as a student in a school in a distant state. Code Civ.Proc. § 946.

**4. Divorce**  $\hookrightarrow$ 303(2)

Custody decrees in divorce suits are universally subject to modification on



showing of facts that require a change in the order to protect the welfare of the child.

#### 5. Divorce Ⓒ312.1

A litigant in an action dealing with custody of child of divorced parents is entitled to appellate review before his rights are finally determined.

#### 6. Prohibition Ⓒ10(2)

Where trial court acted in excess of its jurisdiction in modifying child custody provisions of divorce decree, writ of prohibition could issue to prevent the trial court from entering order modifying the custody provisions.

#### 7. Prohibition Ⓒ3(1)

An application to an appellate court for writ of prohibition is merely one of several means by which a litigant may obtain a review of action of threatened action by trial court.

#### 8. Divorce Ⓒ222

Divorced wife who instituted prohibition proceedings in Supreme Court to prohibit trial court in divorce suit from entering order changing custody provisions of divorce decree was entitled to counsel fees from divorced husband, though he was not actually a party to the prohibition proceedings, but the trial court was a proper court to pass on question as to amount of money that should be awarded to divorced wife. Civ.Code, § 137.3.

#### 9. Costs Ⓒ8

Trial court is not deprived of jurisdiction to award counsel fees because prohibition proceeding is an original proceeding before appellate court.

---

Marvin E. Lewis, Goldstein, Lewis & Barceloux, San Francisco, for petitioner.

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, and Frank V. Kington, Redwood City, for real party in interest and respondent.

TRAYNOR, Justice.

During their marriage, Clarence and Betty Lerner adopted two children, Gerald and Linda. The marriage failed, and a final decree of divorce was entered on May 10, 1948. The decree awarded legal custody of the children to Clarence and Betty jointly, and physical custody to Betty for the greater part of each year. No appeal was taken from the final decree. On May 25, 1950, both parties consented to an order modifying the custody provisions of the final divorce decree to allow Gerald to attend the Menlo School For Boys as a full-time student.

On March 9, 1951, after application by Clarence, the final decree was modified to award custody of Gerald to his father, subject to the condition that the boy "be kept enrolled in school as at present." Betty promptly appealed from the March 9th order and her appeal is presently pending before this court.

On July 16, 1951, Clarence served notice that he would seek an order from the trial court authorizing him to enter Gerald as a student in the Oxford Academy of Individual Education, Pleasantville, New Jersey. Court permission for removal of the boy was necessary because the March 9th order granting custody to Clarence was conditional on Gerald's attendance at the Menlo School. The motive for Clarence's action is in dispute. Clarence alleges that Gerald cannot adjust himself to class instruction and requires individual education, that the Menlo School refused to accept him for another term,<sup>1</sup> that educational authorities and a child psychiatrist recommend enrollment in the Oxford Academy, and that it will cost Clarence approximately \$10,000 annually to send the boy to the New Jersey school. Betty asserts, however, that Gerald is a bright normal boy, that educational authorities inform her that it is not only unnecessary but would be harmful for Gerald to attend the Oxford Academy, and that the real motive for the boy's removal to New Jersey is to transfer him 3,000 miles from Betty.

<sup>1</sup> Pending determination of the prohibition proceeding, however, the Menlo School has accepted the boy.

On July 23, 1951, at the hearing on Clarence's motion, Betty advised the trial court that the filing of the appeal from the March 9th custody order had deprived the trial court of jurisdiction to make further modifications of the custody provisions of the final divorce decree. Nevertheless, the trial court took the testimony of several witnesses in support of Clarence's motion. Betty then filed an application with this court for a writ of prohibition and, after transfer of the petition to the District Court of Appeal, the alternative writ issued on August 10th, and it is still in force.

#### Trial Court Jurisdiction Pending Appeal

The first question to be determined is whether the trial court had jurisdiction to enter any order allowing Gerald to leave the state pending appeal from the March 9th custody order.

[1] Section 946 of the Code of Civil Procedure provides: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein \* \* \*." It is therefore well established that an appeal from a custody order deprives the trial court of jurisdiction to change the custody status at the time of the appeal. *Vosburg v. Vosburg*, 137 Cal. 493, 495, 70 P. 473; *Ex parte Queirolo*, 119 Cal. 635, 636, 51 P. 956; *Browne v. Browne*, 60 Cal. App.2d 637, 642, 141 P.2d 428; *Moon v. Superior Court*, 59 Cal.App.2d 447, 449, 139 P.2d 84; *In re Browning*, 108 Cal. App. 503, 506, 291 P. 650; see 2 Cal.Jur. 416-418; 27 C.J.S., Divorce, § 324f. "An appeal from a judgment or order would be futile, and this court would be deprived of jurisdiction, if, pending the appeal, the judgment or order appealed from could be modified or changed into something radically different by a subsequent order of the lower court." *Vosburg v. Vosburg*, supra, 137 Cal. 493, 496, 70 P. 473, 474. The loss of jurisdiction is so complete that even the consent of the parties is ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal. *Kinard v. Jordan*, 175 Cal. 13, 16, 164 P. 894.

Clarence contends that the trial court may nevertheless allow "temporary" removal to New Jersey pending appeal, relying upon the provision in section 946 that "the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." Clarence points out that the "order appealed from" is the order of March 9th modifying the final decree by transferring custody of Gerald from Betty to Clarence. He states that his application to enroll the boy in the New Jersey school "has absolutely no relationship" to the custody order, but would merely change the locale of the boy's education from the Menlo School to New Jersey.

[2] The contention that the removal proceeding is not upon a matter embraced within the custody appeal disregards the factual setting of this action. At the time Betty perfected her appeal from the modification order of March 9th, the parents had joint legal custody and Gerald was enrolled full-time at Menlo School, where Betty wished him to be educated, where she could visit him, and where she could invoke the protection of California courts to enforce the provisions of the final divorce decree. The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion. See *Roche v. Roche*, 25 Cal.2d 141, 144, 152 P.2d 999. If the child could be removed 3,000 miles to a school in New Jersey, chosen by Clarence against Betty's will, the provisions of the custody decree favorable to Betty would be vitiated. The proposed New Jersey order, in fact, would be more severe from Betty's viewpoint than the order appealed from. Under the March 9th order Betty lost legal custody, but the court at least ordered that the boy remain at a California school where Betty could visit him. The New Jersey order, by contrast, would effectively end visitation rights. Although the removal is labelled "temporary," it would substantially destroy the custody status at the time the appeal was taken, in clear violation of the provisions of section 946. *Vosburg v. Vosburg*, supra, 137 Cal. 493, 495, 70 P. 473.

[3, 4] Moreover, an examination of the recognition given custody decrees in other states demonstrates that the phrase in section 946, "all further proceedings in the court below upon the judgment or order appealed from," must be interpreted to include action by a trial court giving "temporary" permission to take a child from the state pending appeal from a custody order. Although it may be assumed that the California decree would receive the same respect in other states that foreign custody decrees receive in our courts, see *Sampsell v. Superior Court*, 32 Cal.2d 763, 779, 197 P.2d 739, the physical presence of the child would give the foreign state jurisdiction to decide for itself what action would be in his best interests. *Sampsell v. Superior Court*, supra, 32 Cal.2d 763, 779, 197 P.2d 739; *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719; *Titcomb v. Superior Court*, 220 Cal. 34, 39, 29 P.2d 206; see *In re B's Settlement*, 1 Ch. 54 [1940]; 160 A. L.R. 408; 17 Am.Jur. 521. Custody decrees are universally subject to modification upon a showing of facts that require a change in the order to protect what the foreign court considers the welfare of the child. Even if the foreign forum eventually follows the California decision, protracted litigation is meanwhile inevitable. Thus, in the *Foster* proceedings the South Dakota decree was eventually enforced in this state, but only after the parent disobeying the South Dakota decree kept the children in this state for three years of trial and appellate litigation. See *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719; *Foster v. Foster*, 5 Cal.2d 669, 55 P.2d 1175; *Foster v. Superior Court*, 4 Cal.2d 125, 47 P.2d 701; *Foster v. Superior Court*, 4 Cal. App.2d 466, 41 P.2d 187. Again, in *Langan v. Langan*, 80 U.S.App.D.C. 189, 150 F.2d 979, the father disregarded the provisions of a California decree and fled with the child to Maryland. The mother followed him and was awarded custody by the Maryland court but the father moved on to the District of Columbia before the mother could obtain physical custody of the child. Despite the conduct of the father, the District of Columbia court awarded custody to the father on the ground of changed circumstances. The father thus shopped

from state to state until he found a court willing to award him custody. There are many other instances where parents violated court orders forbidding removal of a minor from the state with impunity. See *In re Memmi*, 80 Cal.App.2d 295, 300, 181 P.2d 885; *Cook v. Cook*, 77 U.S.App.D.C. 388, 135 F.2d 945, 946; *Gaunt v. Gaunt*, 160 Okl. 195, 196, 16 P.2d 579; *Crowell v. Crowell*, 184 Or. 467, 472, 198 P.2d 992; *Haynie v. Hudgins*, 122 Miss. 838, 853, 85 So. 99; *White v. White*, 77 N.H. 26, 30, 86 A. 353; *Commonwealth ex rel. Rogers v. Daven*, 298 Pa. 416, 423, 148 A. 524; *Goldsmith v. Salkey*, 131 Tex. 139, 146, 112 S. W.2d 165, 116 A.L.R. 1293; *Jones v. Bowman*, 13 Wyo. 79, 89, 77 P. 439, 67 L.R.A. 860; *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 51, 27 P.2d 1038; *Helton v. Crawley*, 241 Iowa 296, 41 N.W.2d 60; *Ex parte Peddicord*, 269 Mich. 142, 145, 256 N. W. 833. We do not mean to imply that the foregoing decisions were incorrectly decided. They are cited only to demonstrate that Betty cannot be adequately protected during her appeal if the trial court may enter orders allowing her child to be taken from the state.

Clarence contends that the trial court "has power to make all necessary orders needed for the child's welfare and is not to be blocked by an appeal based on mere partisan interest and desire." This contention assumes the question to be decided by the appeal: did the trial court correctly decide that the status of the child's custody as of March 9th was not in his best interests? The paramount concern in custody proceedings is the welfare of the child, *Puckett v. Puckett*, 21 Cal.2d 833, 839, 136 P.2d 1, but Betty has the right and duty to safeguard Gerald until determination of the appeal. Clarence asserts that the best interests of Gerald require his attendance at the New Jersey school, but Betty does not agree and, until custody is taken from her and the order affirmed on appeal, questions of the child's education are governed by provisions of the final divorce decree as modified by the consent order. It may be noted that if extraordinary circumstances requiring protection of the child during the appeal arise, ap-



plication may be made to the appellate court for appropriate relief. See *Gantner v. Gantner*, Cal.Sup., 242 P.2d 329.

Clarence invokes decisions to the effect that pending appeal a trial court has jurisdiction to require a father to make payments for child support. Civ.Code, § 137.2; *Dixon v. Dixon*, 216 Cal. 443, 444, 14 P.2d 498. The fact that a trial court has the power to protect the child during the appeal by continuing the natural obligation of a father to support his child does not mean that it has the power to issue orders that would render futile the appellate determination on the merits. *Vosburg v. Vosburg*, 137 Cal. 493, 496, 70 P. 473.

Clarence next contends that any order affecting Gerald's education is not a matter embraced in the appeal from the March 9th order, on the ground that Betty consented to the Menlo School provision in the final decree and a consent order cannot be appealed. See cases collected in 2 Cal. Jur. 225. The record does not indicate that the May 25th consent, as adopted in the March 9th decree, waived Betty's rights of physical custody for more than one semester, and there is nothing to show that Betty ever consented at any time that the child could be enrolled in any school other than the Menlo School. In any event, Betty has filed a valid appeal from that part of the March 9th order awarding custody to Clarence, and that appeal would be undermined by an order allowing the child to be taken from the state.

Clarence contends that the appeal did not operate to stay the New Jersey order on the ground that Betty had voluntarily delivered the boy to the Menlo School before perfecting her appeal. Clarence relies on *In re McKean*, 82 Cal.App. 580, 584, 256 P. 226, where the mother did not appeal until after execution of the order appealed from, which required her to give up custody to the father. The court properly refused to issue habeas corpus to return the child to the mother, on the ground that under section 946 the appeal stayed only future action by the trial court and did not undo action taken by the parties before the appeal. *De Lemos v. Siddall*, 143 Cal. 313, 315, 76 P. 1115; see *In*

*re Browning*, 108 Cal.App. 503, 507, 291 P. 650. The McKean decision is inapplicable here, since Betty enrolled the boy in the Menlo School pursuant to the May 25th modification of the final decree, and not in obedience to the March 9th decree, the subject of the present appeal.

[5] A litigant in a custody action is entitled to appellate review before his rights are finally determined. If the appellant is not protected from adverse action by the trial court that would destroy the fruits of his appeal, the right of appeal is illusory. In contending that the trial court can permit removal of the children pending appeal, Clarence in effect contends that custody orders should be immediately executed and not stayed by appeal. The statutes and decisions of this state are opposed to this contention, although some states have a contrary rule. See *Scheffers v. Scheffers*, 241 Iowa 1217, 44 N.W.2d 676, 679.

[6] In summary, at the time Betty perfected her appeal, she had custody of Gerald under a decree providing that the boy should attend the Menlo School. An order which so disturbs the custody of the child as to permit him to be taken out of this state, pending final determination of the appeal, would be an act in excess of the jurisdiction of the trial court. *Vosburg v. Vosburg*, supra; see *State ex rel. Cash v. District Court*, 58 Mont. 316, 318, 195 P. 549; *Nolan v. Nolan*, 257 Ill.App. 401, 403; cases collected in 163 A.L.R. 1320; 3 Am. Jur. 192; 27 C.J.S., Divorce, § 324f. The writ of prohibition may therefore issue to prevent the trial court from entering the New Jersey order. *Foster v. Superior Court*, 4 Cal.2d 125, 127, 47 P.2d 701.

#### Motion for Attorney Fees and Costs

On September 14, 1951, Betty applied to the District Court of Appeal for attorney fees and costs incurred in the prohibition proceeding. The application will be considered as addressed to this court after the hearing was granted following the District Court decision. Betty alleges that she does not have the financial resources to prosecute the prohibition proceeding, that Clarence has a financial worth of \$1,000,000, and that he has a yearly income of \$100,000.

The petition for a writ of prohibition was filed July 31, 1951, and the alternative writ issued on August 10, 1951. Insofar as the present application is for counsel fees for services performed before September 14th, the date of the application, the motion must be denied. *Warner v. Warner*, 34 Cal.2d 838, 840, 215 P.2d 20. The application for services after that date, however, may be granted if the statute governing allowance of attorney fees applies to original proceedings in prohibition.

Civil Code, § 137.3, enacted in 1951, provides that, "During the pendency of any action for divorce \* \* \* the court may order the husband \* \* \* to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees." Section 137.3 is a recodification of the first sentence of former Civil Code, § 137. It was settled under section 137 that the phrase therein, "When an action for divorce is pending," embraced many diverse proceedings growing out of the divorce action and arising after entry of the final decree. *Wilson v. Wilson*, 33 Cal.2d 107, 115, 199 P.2d 671 (proceeding to enforce distribution of community property); *Reynolds v. Reynolds*, 21 Cal.2d 580, 585, 134 P.2d 251 (modification of allowance for child support); *Lamborn v. Lamborn*, 190 Cal. 794, 796, 214 P. 862 (motion to modify alimony); *Grannis v. Superior Court*, 143 Cal. 630, 633, 77 P. 647 (motion to set aside final decree under Code Civ.Proc. § 473); *Kohn v. Kohn*, 95 Cal.App.2d 722, 724, 214 P.2d 80 (construction of property settlement); *Parker v. Parker*, 22 Cal.App.2d 139, 142, 70 P.2d 1003 (mandamus to enter judgment for delinquent alimony); *Moore v. Gosbey*, 130 Cal.App. 70, 73, 19 P.2d 995 (motion to modify alimony, made ten years after final decree); see cases collected in *McDonald v. McDonald*, Mont., 218 P.2d 929, 15 A.L.R.2d 1270.

On principle, there is no difference between actions in which a woman is compelled by her former husband to resist by an appeal a proceeding brought by him to modify a custody or alimony award and actions in which she is compelled to seek

prohibition to prevent improper modification of such awards. In either case she may be unable to retain counsel to represent her, and the policy underlying section 137.3 and the cases above cited are controlling.

[7] In maintaining that section 137.3 does not apply to prohibition proceedings, Clarence first contends that Betty can recover suit money only when he is the other party to the litigation, and that here the respondent is the Superior Court. The statute does not support this contention. Section 137.3 is not framed to limit its application to actions in which the other spouse is a "plaintiff" or "defendant." Instead, it applies during the "pendency of any action for divorce" and payments are to be made by the "husband." Moreover, the adverse party in the present proceeding is clearly Clarence, the "real party in interest," and not the Superior Court, the nominal respondent. The same attorneys represent Clarence and the respondent. The prohibition action is directed against Clarence, since Betty's success would preclude the trial court from making the custody order that he requests. In the early development of the writ of prohibition, it is true, the writ was used by the King's courts to increase their authority at the expense of the ecclesiastical courts, 1 Holdsworth, *History of English Law*, 3rd ed., pp. 229, 594, and the lower court was thus a party to the litigation in a substantial sense. In California practice, however, an application to an appellate court for the writ is simply one of several means by which a litigant may obtain a review of action or threatened action by a trial court. See 36 Cal.L.Rev. 75, 101-105; 23 So.Cal.L.Rev. 530, 533-537. The objective is the same as in an appeal, to prevent the trial court from taking action favorable to the other party. Thus the Rules on Appeal recognize the adversary character of prohibition proceedings by providing that the petition for the writ must disclose the name of the real party in interest, Rule 56(a), that points and authorities must be served upon him, Rule 56(b), and that he may demur or answer to the petition, Rule 56(c). Further, it is established that

counsel fees may be recovered in mandamus proceedings in which the Superior Court is the nominal respondent. *Parker v. Parker*, 22 Cal.App.2d 139, 142, 70 P.2d 1003.

Clarence relies on *McCarthy v. Superior Court*, 65 Cal.App.2d 42, 43, 149 P.2d 871, holding that a successful applicant for a writ of prohibition cannot recover costs against the state under Code of Civil Procedure Section 1095. The *McCarthy* case would be in point only if Betty attempted to recover counsel fees from the state or the Superior Court. Clarence also invokes *Havemeyer v. Superior Court*, 84 Cal. 327, 372, 24 P. 121, 10 L.R.A. 627, which held that the real party in interest should receive notice of the prohibition matter by being served with copies of the petition and being given a reasonable time to appear. The record shows that Clarence received ample notice and filed an answer to the petition. Nothing in the *Havemeyer* case supports Clarence's assertion that any order requiring him to pay counsel fees would be "without due process."

[8] No reason thus appears why the fact that the Superior Court is the nominal respondent in this proceeding bars an award of attorney fees against the real party in interest under section 137.3.

Clarence contends finally that the Supreme Court is not the proper forum for this proceeding. This contention must be sustained. Assuming that we have jurisdiction to entertain an application for counsel fees, as a power necessarily incident to our original jurisdiction to issue the writ of prohibition, we should not pass upon an application involving questions of fact on the basis of the printed record and affidavits when a more satisfactory alternative exists.

In *Parker v. Parker*, 22 Cal.App.2d 139, 70 P.2d 1003, the trial court awarded the wife counsel fees during the pendency of mandamus proceedings within the original jurisdiction of the District Court of Appeal. This procedure has many advantages.

The trial court, with the parties before it for examination, is better qualified than the appellate court to pass on the amount of suit money, if any, that should be awarded. See *Bobbitt v. Bobbitt*, 297 Ky. 28, 29, 178 S.W.2d 986; *Craig v. Craig*, 115 Va. 764, 765, 80 S.E. 507.

[9] The trial court is not deprived of jurisdiction to award counsel fees because the action is an original proceeding before the appellate court. The decision whether the peremptory writ should issue is only a part of the whole litigation between Clarence and Betty on the custody matter. In the analogous situation of an appeal from a custody or alimony order, the lower court retains power to order payment of counsel fees to enable the wife to prosecute her appeal, and such order is not considered in excess of the trial court's jurisdiction as a "further proceeding in the court below upon the judgment or order appealed from". Code Civ.Proc. § 946; *Reilly v. Reilly*, 60 Cal. 624, 626; *DeLeshe v. DeLeshe*, 80 Cal.App.2d 517, 518, 181 P.2d 931. Like a stay on appeal, the alternative writ protects the moving party and the appellate court by maintaining the status quo pending decision by the appellate court. It does not deprive the trial court of jurisdiction to determine that both litigants are fairly represented.

Under the circumstances of this case, Betty should not be penalized because her application was erroneously made to the appellate court. Accordingly, the denial of her motion for attorney fees will be without prejudice to application to the trial court for attorney fees and costs incurred since the date of the motion, September 14, 1951.

The motion for attorney fees and costs is denied without prejudice. Let the peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 688

**GANTNER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.**

S. F. 18512.

Supreme Court of California, in Bank.  
March 25, 1952.

Petitioner brought habeas corpus proceedings against the Superior Court of the State of California, in and for the City and County of San Francisco, respondent, to prohibit respondent from entering an order modifying custody provisions of divorce decree. The Supreme Court, Traynor, J., held that respondent acted in excess of jurisdiction in entering the order of modification while appeal was pending.

Peremptory writ of prohibition issued.

Prior opinion 236 P.2d 220.

**1. Divorce** ☞312.4

Where superior court granted wife a divorce and gave joint legal custody of children to divorced wife and to divorced husband and provided that neither should remove children from state without approval of court, and thereafter divorced wife made a motion for permission to take children to Australia, and divorced husband filed a motion requesting Superior Court to modify provisions of divorce decree so as to award custody of children to him, and Superior Court denied application of divorced husband for modification of divorce decree and husband immediately appealed, Superior Court lacked jurisdiction to enter order permitting divorced wife to take children on vacation trip to Australia because of pendency of divorced husband's appeal. Code Civ.Proc. § 946.

**2. Prohibition** ☞10(2)

Prohibition would lie to prohibit Superior Court from acting in excess of its jurisdiction in modifying custody provision of divorce decree while appeal by divorced husband from order denying his application for modification of custody provisions of decree to give him custody was pending. Code Civ.Proc. § 946.

Young, Rabinowitz & Chouteau and John E. Anderton, San Francisco, for real party in interest and respondent.

TRAYNOR, Justice.

This action involves problems similar to those discussed in *Lerner v. Superior Court*, Cal.Sup., 242 P.2d 321.

In 1941 Vallejo Gantner, petitioner in this application for a writ of prohibition, and Neilma Gantner, real party in interest, were married in Australia. Thereafter they resided in this state where their two children were born. Following marital difficulties Neilma filed suit for divorce in San Francisco, and Vallejo cross-complained for divorce. Before the action came to trial, the court entered an order allowing Neilma to have custody of the children pending trial but restraining her from taking the children more than fifty miles from San Francisco without the written consent of Vallejo or an order of the court. On August 9, 1949, the trial court entered an interlocutory decree granting Neilma a divorce and granting joint legal custody to the parents. Neilma was granted physical custody and Vallejo rights of visitation. The decree vacated the fifty mile order but provided that neither parent should remove the children from California without approval of the court. The trial court denied Neilma's request that she be allowed to remove the children to Australia to reside there permanently with Neilma and her family, stating in a memorandum opinion: "The Court feels that it would be for the best interests and welfare of the children for them to be in their mother's physical custody, but to remain in California, to be raised in our American way of life. The Australian family of plaintiff [Neilma] can well afford to make numerous visits to California so as to give the children the benefit of their comfort and society if they so desire." The final decree, entered August 15, 1950, contained the same provisions as the interlocutory decree. No appeal was taken from either decree.

On March 1, 1951, Neilma served notice of a motion seeking an order from the trial court permitting her to take the children to Australia for a vacation trip during the

---

Morris Lowenthal and Juliet Lowenthal, San Francisco, for petitioner.

children's summer recess from school. Court permission was necessary because the final divorce decree restrained both parents from taking the children from the state. Vallejo filed affidavits vigorously opposing this motion on the ground that once the children reached Australia they would not be returned by Neilma and would be beyond the process of California courts. In addition to his opposition to Neilma's motion, Vallejo, on April 17, 1951, filed a notice of motion requesting the trial court to modify the provisions of the final decree of divorce so as to award Vallejo physical custody of the children.

The two motions were heard together in a five-day trial before the same judge who heard the divorce proceedings. The matter was submitted. On June 5, 1951, before any decision had been entered by the trial court, Vallejo filed a petition seeking a writ of prohibition restraining the trial court from entering any order allowing Neilma to take the children to Australia, until such time as the order in the custody proceedings became final. The District Court of Appeal issued a temporary stay order on the same day. On June 6, 1951, the trial court denied the application of Vallejo for modification of the final divorce decree. Vallejo immediately appealed from the adverse decision and his appeal is presently pending before this court. In the same decision, on June 6, 1951, the trial court stated that it would be in the best interests of the children to travel with their mother to Australia, that the filing of a cash bond by the mother would be sufficient assurance that the removal would be only temporary, and that an order permitting the removal for the vacation would be entered whenever the appellate court discharged the stay order. On June 18, 1951, the District Court of Appeal issued an alternative writ of prohibition, which is still in force.

[1] The Australian vacation order presents the same problem as the New Jersey removal order in *Lerner v. Superior Court*, Cal.Sup., 242 P.2d 321. Neilma had custody of the children under a decree restraining her from removing the children from the state. An order allowing a "temporary" vacation trip to Australia would be a pro-

ceeding upon a matter embraced within the appeal from the order denying Vallejo's application for modification of the custody provisions of the final divorce decree. Code Civ.Proc. § 946; *Lerner v. Superior Court*, supra. Accordingly, the trial court lacks jurisdiction to enter the Australian vacation order during the pendency of the appeal.

[2] Let the peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 691

# GANTNER v. GANTNER.

S. F. 18513.

Supreme Court of California, in Bank.  
March 25, 1952.

As Modified April 18, 1952.

Petitioner brought proceedings for modification of custody provisions of divorce decree to permit petitioner to take the children of her and her divorced husband to Australia on vacation trip. The Supreme Court, Traynor, J., held that petitioner was not entitled to modification of custody provisions of divorce decree.

Petition denied.

Prior opinion 236 P.2d 220.

## 1. Divorce ⇨312.4

The effect of an appeal from an order modifying custody provisions of divorce decree is to remove the subject matter of the appeal from the jurisdiction of the trial court. Code Civ.Proc. § 946.

## 2. Divorce ⇨298(1)

The welfare of a child of divorced parents must be protected by court action. Civ.Code, § 138.

## 3. Divorce ⇨312.4

In exercise of its appellate jurisdiction, Supreme Court clearly has power in custody

matters involving children of divorced parents to protect the subject matter of the order or judgment appealed from during pendency of appeal.

#### 4. Divorce $\S$ 312.4

Where Superior Court had no jurisdiction to modify custody provisions of divorce decree in order to permit divorced wife to take children outside of the state for vacation trip because appeal by divorced husband was pending, Supreme Court had jurisdiction to entertain petition of divorced wife for modification of custody provisions of divorce decree and to enter order permitting divorced wife to take children outside the state.

#### 5. Divorce $\S$ 312.7

Supreme Court would not modify custody provisions of divorce decree forbidding either divorced wife or divorced husband to take children outside the state in order to permit divorced wife to take the children on a vacation trip to Australia to visit the children's aged great-grandmother.

---

Young, Rabinowitz & Chouteau and John E. Anderton, San Francisco, for petitioner.

Morris Lowenthal and Juliet Lowenthal, San Francisco, for respondent.

TRAYNOR, Justice.

This action is a companion case to *Gantner v. Superior Court*, Cal.Sup., 242 P.2d 328. The factual and procedural events leading to this proceeding are described in that opinion. After we granted a hearing in the prohibition proceeding, Neilma filed a petition with this court, requesting that it issue an order, pending determination of Vallejo's appeal from the custody modification action, permitting Neilma to take the two minor children to visit her relatives in Australia, conditional upon such undertaking as might be required by the court.

In *Gantner v. Superior Court*, supra, we issued a peremptory writ of prohibition, on the ground that the appeal from the custody modification action deprived the trial court

of jurisdiction to enter an order permitting Neilma to take the children out of this state.

[1-4] The first question presented is whether this court has jurisdiction to enter the requested order. The effect of an appeal is to remove the subject matter of the appeal from the jurisdiction of the trial court. Code Civ.Proc.  $\S$  946; *Lerner v. Superior Court*, Cal.Sup., 242 P.2d 321; *Vosburg v. Vosburg*, 137 Cal. 493, 496, 70 P. 473. At all times, however, the welfare of the child must be protected by court action. Civ.Code,  $\S$  138. In the exercise of its appellate jurisdiction, this court clearly has the power in custody matters "to protect the subject-matter of the order or judgment appealed from during the pendency of such appeal." In re *Browning*, 108 Cal.App. 503, 508, 291 P. 650, 651; see *Kjellander v. Kjellander*, 90 Kan. 112, 132 P. 1170, 45 L.R.A.,N.S., 943; *Gotthelf v. Fickett*, 37 Ariz. 322, 294 P. 837; *Casebolt v. Casebolt*, 170 Ky. 88, 185 S.W. 510; cases collected in *Pike v. Pike*, 24 Wash.2d 735, 167 P.2d 401, 163 A.L.R. 1319. Accordingly, we have jurisdiction to entertain the present petition and to enter the requested order.

The determinative question, therefore, is whether the requested order should be made. In support of her motion, Neilma has pointed out that circumstances might arise where the welfare of a child would require our action during the pendency of an appeal. For example, it might be necessary for a mother to remove her child from the state for an operation necessary to save the life of the child that could be performed only in another state or country.

[5] Such extraordinary circumstances are not presented here. The affidavits in support of the motion and the allegations in the motion itself make it clear that the purpose of the Australian vacation trip is to visit the children's aged great-grandmother in Melbourne. Without a showing that serious evils threaten the welfare of the children, the status quo at the time the appeal was taken will not be disturbed.

Neilma has requested costs and counsel fees incurred in this proceeding. As pointed out in *Lerner v. Superior Court*,



Cal.Sup., 242 P.2d 321, the trial court has jurisdiction to award suit money in original proceedings in this court arising out of divorce actions in the trial court. The motion will be denied without prejudice to its renewal in the trial court.

The petition for an order permitting the minor children to leave the state temporarily pending appeal is denied. The motion for counsel fees and costs is denied without prejudice.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



110 Cal.App.2d 310

PEOPLE v. MIMMS.

Cr. 2786.

District Court of Appeal, First District,  
Division 1, California.

April 8, 1952.

Rehearing Denied April 23, 1952.

Hearing Denied May 22, 1952.

Defendant was convicted in the Superior Court for the County of Contra Costa, Harold Jacoby, J., with the possession and unlawful sale of narcotics, and defendant appealed, *in propria persona*, from judgment and from order denying his motion for a new trial. The District Court of Appeals, Peters, P. J., held that evidence sustained conviction on both counts.

Judgment and order affirmed.

#### 1. Poisons ☞9

Evidence sustained conviction of defendant for unlawful possession and unlawful sale of marijuana. Health and Safety Code, § 11500.

#### 2. Criminal Law ☞641(1)

Right of an accused, in a criminal case, to assistance of counsel, may be waived, but pressure must not be brought to bear on accused to compel a waiver, and court must be assured that defendant has an intelligent understanding of what he is doing.

#### 3. Criminal Law ☞641(1)

In prosecution for unlawful possession and sale of narcotics, where record showed not only that defendant fully understood what he was doing in waiving right to assistance of counsel but defendant handled his case with ability, and was protected by trial judge, and evidence produced by prosecution clearly proved both possession and sale, and record also showed that defendant had had at least four prior encounters with law, and also that he had had a pretty good general knowledge of court procedure, and that defendant had insisted on representing himself after court had informed him that a continuance would be granted if he wanted time to secure new counsel, waiver was a valid one and defendant's rights were not infringed.

#### 4. Criminal Law ☞507(1)

The purchaser of narcotics is not an accomplice of the seller, because not liable to prosecution for identical offense charged against the seller. Pen.Code, § 1111.

#### 5. Poisons ☞4

In prosecution for the unlawful possession and sale of narcotics, possession of the narcotics by the two parties who purchased them from defendant was not same identical possession as that of defendant, the two possessions were separate and distinct, and the offenses were separate and distinct. Pen.Code, § 1111.

Edward E. Mimms, in pro per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant, Edward Mimms, was charged with two counts of sale and one count of possession of narcotics in violation of section 11500 of the Health and Safety Code. At his trial, one of the counts charging an unlawful sale was dismissed. He was convicted, after jury verdicts, of the two remaining counts, and judgment was entered accordingly. He appeals, *in propria persona*, from the judgment and from the order denying his motion for a new trial.

Appellant challenges the sufficiency of the evidence. An examination of the record demonstrates that the finding of guilt on both counts is amply supported.

In March of 1951 appellant lived in Port Chicago, Contra Costa County. There is a Naval Magazine located near the town. Because of complaints that marijuana was being sold nearby, two officers at the Magazine asked for volunteers to try to locate the source of supply. Creason and Whiting, Coast Guard seamen, volunteered. The officers promised to reimburse the seamen for any expenditures made by them for the purchase of marijuana. The two seamen, on the evening of March 9, 1951, proceeded to town pursuant to this arrangement. They ascertained, from an unidentified soldier, that marijuana could be secured at the Harlem Club. The soldier did not name the person from whom the marijuana could be secured, but described him.

About 10 p. m. the two seamen arrived at the Harlem Club. Mimms was sitting at the bar talking to the bartender. The two seamen recognized Mimms from the description given them by the soldier. Creason and Whiting sat down next to Mimms. Creason testified that he asked Mimms if he had any marijuana; that Mimms said that he did, and offered to sell him three "sticks," or cigarettes, for \$2; that Mimms left the club and shortly returned with the three cigarettes for which Creason paid him the \$2; that Creason then asked if Mimms had any more and Mimms said "yes"; that Mimms again left the club and returned with six cigarettes, for which Creason paid him \$4. Whiting was present when the above events took place, and corroborated the story told by Creason. Mimms was arrested a few hours later. He had no marijuana on his person, in his automobile, or in his rooms.

Upon examination, the cigarettes purchased from Mimms were found to contain a total of 32 grains of *cannabis sativa*, commonly known as marijuana.

Mimms testified on his own behalf. For the most part, he corroborated the story told by the two seamen. He admitted that Creason had asked him for marijuana. He denied, however, giving or selling Creason

any cigarettes, and denied being in possession of the drug.

[1] It is obvious that the evidence of the two seamen supports the finding of unlawful possession and unlawful sale of marijuana by Mimms.

Appellant's next major contention is that he was denied due process in that he did not validly waive his right to counsel. The record shows that at different times prior to trial appellant was represented by two lawyers. At his arraignment, and when the cause was set for trial, he was represented by James Hoey. At the beginning of the trial the following occurred:

"Mr. Hoey: If Your Honor please, I am informed by the defendant that he desires to proceed with the trial by himself. I don't propose to be in the trial—is that correct?"

"The Court: Do you want to try it yourself, Mr. Mimms?"

"Mr. Mimms: Your Honor, the bail bondsman said that he was going to surrender me to the jail today if I didn't go ahead with the case.

"The Court: Well, that isn't any of the Court's concern. I have nothing to do with that. All I want to know is, do you want to proceed without counsel? Apparently you have discharged Miss Preston, and Mr. Hoey isn't your attorney any more, so what do you want to do, Mimms? It has been continued once—otherwise I would have to continue it and appoint counsel for you. Mr. Hoey, I understand you are not his counsel?"

"Mr. Hoey: That is right.

"The Court: All right. Either be his counsel, or don't be his counsel.

"Mr. Mimms: Let's proceed with it, Your Honor.

"The Court: You want to proceed representing yourself?"

"Mr. Mimms: Yes.

"The Court: All right. Let's proceed then, call the Jury. Let the record show—

"Mr. Mimms: Say, Mr. Hoey, could I have that file there?"

"The Court: The record may show then that Mr. Hoey and Miss Preston are not his attorney[s], is that correct?"

"Mr. Hoey: Correct, if Your Honor Please.

"The Court: All right."

Thereafter, Mimms represented himself. The record shows that he cross-examined all of the prosecution's witnesses, presented and examined witnesses of his own, and when he insisted on testifying on his own behalf, was permitted to tell his complete story in his own way. The record also shows that the trial judge carefully preserved all the legal rights of appellant. Every objection of the prosecuting attorney was overruled, and Mimms was allowed to testify, over objection, just about as he pleased and as to many facts that were not admissible. The record shows that Mimms knew what he was doing, and that he represented himself with intelligence and ability.

[2, 3] It is of course true that both the federal and state Constitutions guarantee an accused, in a criminal case, the right to the assistance of counsel. But that right may be waived. Pressure must not be brought to bear upon the accused to compel a waiver, and the court must be assured that the defendant has an intelligent understanding of what he is doing. *People v. Chesser*, 29 Cal.2d 815, 178 P.2d 761; *In re Tedford*, 31 Cal.2d 693, 192 P.2d 3; *In re James*, 38 Cal.2d 302, 240 P.2d 596. In the instant case the record not only shows that Mimms fully understood what he was doing, handled his case with ability, and was protected by the trial judge, but the offenses charged—possession and sale of narcotics—are relatively simple offenses, and the evidence produced by the prosecution clearly proved both possession and sale. The record also shows that Mimms had had at least four prior encounters with the law, and also that he had a pretty good general knowledge of court procedure. Mimms insisted on representing himself after the court had informed him that a continuance would be granted if he wanted time to secure new counsel. Under the circumstances, the waiver was a valid one and appellant's rights were not infringed.

[4, 5] Appellant's last major contention is that the two seamen were accomplices

under the law, and that the jury should have been instructed that their testimony had to be corroborated. By section 1111 of the Penal Code an accomplice is defined "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." So far as the charge of sale of narcotics is concerned, the purchaser is not an accomplice of the seller, because not liable to prosecution for the identical offense charged against the seller. *People v. Abair*, 102 Cal.App.2d 765, 228 P.2d 336. It is equally clear that, so far as the possession charge is concerned, the possession of Creason and Whiting was not the same identical possession as that of appellant. The two possessions were separate and distinct, and the offenses were separate and distinct. *People v. Galli*, 68 Cal.App. 682, 230 P. 20. While in such cases there is a similarity of offenses they are not identical. *People v. Lein*, 204 Cal. 84, 266 P. 536; *People v. Baskins*, 72 Cal.App.2d 728, 165 P.2d 510.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



**CAL-DAK CO. v. SAV-ON DRUGS, Inc. \***  
Civ. 18842.

District Court of Appeal, Second District,  
Division 2, California.

April 3, 1952.

Hearing Granted May 29, 1952.

Action by the Cal-Dak Company, a corporation, against Sav-On Drugs, Inc., a corporation, to restrain defendant from selling a commodity at a price less than the retail fair trade price, and for damages. The Superior Court, Los Angeles County, Frank G. Swain, J., entered an order denying a preliminary injunction, and plaintiff appealed. The District Court of Appeal, McComb, J.,

\* Subsequent opinion 254 P.2d 497.



held that the sales were interstate in character and hence state fair trade laws were not applicable.

Order affirmed.

### 1. Commerce ⇐40(3)

Where California manufacturer sold and distributed clothes baskets throughout the United States to jobbers or distributors selected in conformity with interstate marketing arrangement and price fixing plan nation-wide in scope, sale of baskets manufactured in California and sold through California jobber to California retailer for resale to consumer public in Los Angeles had effect upon interstate commerce.

### 2. Commerce ⇐40(3)

Where sales of clothes baskets manufactured in California and sold through California jobber to California retailer for resale to consumer public in Los Angeles had effect upon interstate commerce because sales were part of general national merchandising and price fixing plan, fair trade laws of the state were not applicable, and sales were subject to control of Congress. Business and Professions Code, § 8702; Gen.Laws, Act 8702; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

### 3. Commerce ⇐40(3)

In determining whether sales of clothes baskets manufactured in California and sold through California jobber to California retailer were subject to state fair trade price laws, fact that products never left the state and did not enter stream of interstate commerce was not controlling since it was enough if interstate commerce was influenced by local sales. Business and Professions Code, § 8702; Gen.Laws, Act 8702.

O'Connor & O'Connor, Los Angeles, for appellants.

Wright, Wright, Green & Wright, Loyd Wright and Herschel B. Green, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff instituted an action for an injunction to restrain defendant from selling plaintiff's commodity at a price less than

the retail fair trade price and for damages as a result of sales made by defendant. From an order denying a preliminary injunction, plaintiff appeals.

*Facts:* Plaintiff, a California corporation, with its principal place of business in the City of Colton, California, manufactures a waist-high aluminum tube clothes basket under the trade name of "Sav-ur-Bak" Clothes Basket. Plaintiff also maintains an office in the City of Chicago, Illinois, and sells and distributes its commodity throughout the United States through jobbers and/or distributors selected by plaintiff in conformity with an interstate marketing arrangement and price fixing plan nationwide in scope.

Prior to the sales, by a California jobber, of plaintiff's commodity to defendant, a California corporation with its principal place of business in the City of Los Angeles, plaintiff had executed contracts with retailers in California for the sale of its basket, type 610 at a stipulated fair trade price of \$3.95, and type 614 at a stipulated fair trade price of \$5.45. There was no contract between plaintiff and defendant for the sale of plaintiff's commodity at the stipulated fair trade price.

Defendant purchased from one of plaintiff's jobbers in California baskets manufactured by plaintiff at its Colton plant which were delivered from the plant to defendant. This merchandise was offered for sale and was sold by defendant at less than the stipulated fair trade price, to wit, type 610 was sold for \$3.05 and type 614 for \$4.89.

*Question:* Were the sales of the commodity manufactured by plaintiff in California and sold through its California jobber to defendant for resale to the consuming public in Los Angeles an intrastate transaction subject to control by the state legislature, or did the transactions have an effect upon interstate commerce as sales which were a part of plaintiff's general national merchandising and price fixing plan for the sale of its commodity subject to the control of the United States Congress?

[1, 2] The sales were interstate in their character, subject to the control of the United States Congress, and the fair trade

laws of the state of California are inapplicable.

Plaintiff relies principally upon the decision in *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 55 P.2d 177, in support of his contention that the transactions here involved were intrastate, subject to the fair trade laws of California<sup>1</sup> and were not interstate, subject to regulation by Congress.

In *Max Factor & Co. v. Kunsman*, supra, it was held that the resale of cosmetics in California which were manufactured in an

eastern state and brought into this state for resale did not influence interstate commerce and were governed by the California Fair Trade Practice Act and not by the Sherman Act. The decision was affirmed by the United States Supreme Court. It is to be noted this case was decided in 1936, prior to the adoption of the Miller-Tydings Amendment in 1937<sup>2</sup> to the Sherman Anti-Trust Act<sup>3</sup> and before the decision in *Schwegmann Bros. v. Calvert Distillers Corp.* (1951) 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035.

1. The applicable statutes of California are:

A. The Cartwright Anti-Trust Law (Stats.1907, p. 984; amended by Stats. 1909, p. 593 [Deering's Gen.Laws 1931, Act 8702]),

B. Section 16902 of Chapter 3 of the Business and Professions Code which reads in part as follows:

"No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

\* \* \*

C. Section 16904 of Chapter 3 of the Business and Professions Code which reads thus: "Advertisements and sales of commodities below contract price. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

2. The Miller-Tydings Amendment, 15 U.S. C.A. § 1, reads: "\* \* \* Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which

bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."

3. The Sherman Anti-Trust Act, 15 U.S. C.A. § 1, reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: \* \* \*"

Plaintiff contends that, since the transactions occurred within the State of California, the cause is controlled by the decision in *Max Factor & Co. v. Kunsman*, supra, 5 Cal.2d 446, 55 P.2d 177. Such contention is unsound for the reason plaintiff's California and interstate sales are interdependent. For example, plaintiff's profits on its sales in the State of California, if all its commodities were sold at the fair trade prices fixed by it, might be sufficiently great to permit it to sell its commodity in other states at a price below the cost of manufacture in competition with manufacturers in other states and thus remain in business; on the other hand, it might fix a resale price below the cost of manufacture but because of the sales in other states where it did not have competition it might make a sufficiently large profit to stay in business. It is obvious that in either event its various transactions are interrelated and each transaction irrespective of the state has a bearing upon the transactions in other states and thus influences interstate commerce.

Plaintiff's method of operation when viewed as a whole constitutes interstate commerce. Its product is manufactured in California; its sales are made to jobbers and distributors throughout the United States for resale therein; a substantial portion of its commodity is sold to Jewel Tea Company in Illinois for resale throughout the several states; its commodities are all made at the same plant by the same employees and out of the same raw materials. Thus it is evident that its intrastate and interstate operations are so interlocked it is not possible, so far as their "effect" on interstate commerce is concerned, to segregate and isolate sales made to California jobbers as distinguished from sales made to other jobbers and distributors in the various states. All these sales pertain to interstate commerce.

[3] Plaintiff's argument that the products they seek to enjoin defendant from selling at reduced prices were manufactured in California and never left the state and thus have not entered the stream of interstate commerce is not controlling here since it is sufficient if interstate commerce is in-

fluenced by plaintiff's sale to defendant. (*United States of America v. Frankfort Distillers*, 324 U.S. 293, 296, 65 S.Ct. 661, 89 L.Ed. 951, 956; *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 68 S.Ct. 996, 92 L.Ed. 1328, 1339.)

Although price fixing agreements by plaintiff, engaged in interstate commerce, may purport to touch only resales within the State of California, it does not follow that they do not influence interstate commerce and bring the transactions within the scope of the Sherman Act. The tendency of permitting plaintiff to keep up the price of their product within this state is to enable them similarly to keep up the price of the same product in other states. Conversely, if plaintiff is unable to maintain the price level fixed by them within this state, the effect may well be to lower the price at which their product is resold in adjoining states.

In *Mandeville Island Farms v. American Crystal Sugar Co.*, supra, the United States Supreme Court held the Sherman Act was violated by a restraint relating to *intrastate* or local activities because of its actual or threatened effect upon interstate commerce. The court said, 334 U.S. at page 234, 68 S.Ct. at page 1005, (92 L.Ed. 1328, 1339), "For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, \* \* \*."

Because plaintiff was engaged in interstate commerce and its intrastate business had an effect upon interstate commerce, so called fair trade prices may not be enforced against nonsigners of agreements with plaintiff and the rule announced in *Schwegmann Brothers v. Calvert Distillers Corp.*, supra, hereinafter discussed is applicable.

*Schwegmann Bros. v. Calvert Distillers Corp.* (1950), supra, is a case in which merchandise was shipped from without the state in which it was sold to wholesalers and jobbers in another state who in turn



sold to retailers in that state, who then sold to consumers. The court considered the entire problem as to the source and origin of the merchandise, as well as the transactions in the state where they were ultimately sold in determining whether the transactions involved interstate commerce. In holding that they did, and that enforcement of a price fixing arrangement against a nonsigner violated the Sherman Anti-Trust Act, Mr. Justice Douglas, speaking for the court, 341 U.S. 384, 71 S.Ct. at page 746, 95 L.Ed. at page 1043 said: "It is clear from our decisions under the Sherman Act [July 2, 1890], 26 Stat. 209, [ch. 647] 15 U.S.C.A. §§ 1-7, 15 note, that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259. Resale price maintenance was indeed struck down in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502. The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress."

In the *Schwegmann* case in answering the argument that the producers' agreements with retailers to sell their products at a minimum price were binding upon non-signers who sold the manufacturer's product at a cut rate price by virtue of the Miller-Tydings Amendment, enacted in 1937, the court said, 341 U.S. 384, 71 S.Ct. at page 747, 95 L.Ed. at page 1045, "\* \* If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. Their contract, combination, or conspiracy—hitherto illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. *When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is*

*price fixing by compulsion.* That is not following the path of consensual agreement; that is resort to coercion." (Italics added.)

It is evident that the decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, supra, insofar as the facts here involved are concerned, overrules the earlier result reached in *Max Factor & Co. v. Kunsman*, supra.

The foregoing conclusion is in accord with decisions in the following cases: *National Labor Rel. Board v. Cowell Portland Cement Co.*, 9 Cir., 148 F.2d 237; *Loveman, Joseph & Loeb v. National Lab. Rel. Board*, 5 Cir., 146 F.2d 769; *J. L. Brandeis & Sons v. National Lab. Rel. Board*, 8 Cir., 142 F.2d 977; *National Labor Relations Board v. Richter's Bakery*, 5 Cir., 140 F.2d 870; and *Butler Bros. v. National Labor Relations Board*, 7 Cir., 134 F.2d 981.

In *National Labor Relations Board v. Gluek Brewing Co.*, 8 Cir., 144 F.2d 847, the court said in discussing the scope of the National Labor Relations Act, at page 854: "The scope of the Act is as broad as the power of Congress over commerce. (Citations omitted.) It expressly covers all situations 'affecting' interstate commerce. § 2(7), 29 U.S.C.A. § 152(7). The dividing line is not whether a particular business is essentially intrastate but, in the situation in that business before the court, 'what is the relation between the activity or condition and the effect' on interstate commerce. (Citations omitted.) Thus 'it follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power'".

In *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732, the court said: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of

the granted power to regulate interstate commerce."

Also, 315 U.S. 110, 62 S.Ct. at page 529, 86 L.Ed. at page 736 it stated, "We think it clear that Congress, by the provisions of § 8c(1) [7 U.S.C.A. § 608c(1)], conferred upon the Secretary authority to regulate the handling of intrastate products which by reason of its competition with the handling of the interstate milk so affects that commerce as substantially to interfere with its regulation by Congress; and that the statute so read is a constitutional exercise of the commerce power. Such was the view expressed in *United States v. Rock Royal Co-operative, Inc.*, supra (Citations omitted.) We adhere to that opinion now."

Again in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 at page 88, 87 L.Ed. 122 at pages 134, 135, in discussing the commerce clause, the court said:

"Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.' The present Chief Justice has said in summary of the present state of the law: 'The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. \* \* \* The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. \* \* \* It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.' (Citations omitted.) \* \* \*

"In the *Shreveport Rate Cases* (citations omitted) the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of 'matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.'" (Citations omitted.)

Finally in *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 5 Cir., 178 F.2d 453, in discussing the question of the effect of the Sherman Act it was stated at page 457: "It may not any longer be doubted that the power of Congress and the scope of the Sherman Act's coverage 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.' It remains true, however: that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power'; and that the question of whether the effect on interstate commerce is substantial is still a determining one."

In the foregoing cases the courts held the various acts in which the parties engaged influenced interstate commerce. Since the facts involved in the case at bar had even a more obvious effect on interstate commerce than those mentioned above, the trial court, in line with the policy of our government, of not drawing invidious distinctions between its citizens, properly held plaintiff in the present case was engaged in interstate commerce and rightly denied its ap-

plication for an injunction against defendant.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and FOX, J., concur.



110 Cal.App.2d 269

**MORRIS v. MUNICIPAL COURT OF CITY  
AND COUNTY OF SAN FRANCISCO.**

Civ. 14965.

District Court of Appeal, First District,  
Division 1, California.

April 7, 1952.

Petition for peremptory writ to prohibit the Municipal Court of City and County of San Francisco from further proceeding in an action against petitioner on complaint which charged three violations of the Health & Safety Code, the dissemination of false advertisement of drugs. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment on the sustaining of a general demurrer to the petition and the petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that the complaint presented issues under statute other than the one challenged by the petitioner and therefore Municipal Court had jurisdiction to proceed.

Judgment affirmed.

**1. Druggists ☞12**

Complaint charging violations of provision of Health and Safety Code prohibiting dissemination of false advertisements of drugs presented issues of fact under provision of Code declaring that an advertisement of a drug is deemed false if it is false or misleading in any material particular and as it did not charge that defendant represented a drug as having an effect in any of the diseases or ailments enumerated in section declaring false advertisement of any drug if represented to have an effect in certain enumerated diseases or ailments, peti-

tion did not challenge or put in issue jurisdiction of municipal court to proceed. Health and Safety Code, §§ 26270, 26271, 26286.

**2. Druggists ☞12**

Where second and third counts of complaint alleged that the defendant committed crime of misdemeanor by violating section of Health and Safety Code in that defendant and another did disseminate a false advertisement of a drug, in that in an advertisement defendant represented that drug had effect in ulcers of stomach and in another advertisement represented that drug had effect in goiter and dental caries, such counts presented issues under section declaring that an advertisement of a drug is deemed false if it is false or misleading in any material particular as well as under section declaring false advertisement of any drug if represented to have an effect in certain enumerated diseases or ailments and therefore municipal court had jurisdiction to proceed under the count, when viewed as charging false advertising as defined in section declaring advertisement of drug false if false or misleading in any material particular. Health and Safety Code, §§ 26270, 26271, 26286.

**3. Druggists ☞5**

Section of Health and Safety Code declaring false advertisement of any drug if represented to have an effect in certain enumerated diseases or ailments does not operate as an absolute and arbitrary prohibition of advertising which it defines but must be read with other provisions of Pure Drugs Act, particularly those which appear in article on advertising, and as thus read, operates as a prohibition against advertising, to laity, of drugs not found safe for self-medication. Health and Safety Code, §§ 26200-26385, 26270-26275, 26271.

**4. Constitutional Law ☞46(2)**

Where defendant was charged with violations of Health and Safety Code prohibiting dissemination of false advertisements of drugs but did not allege that any of drugs mentioned in complaint had been brought to attention of State Board of Public Health for consideration and determination under statute directing board to au-



thorize advertisement of drugs having curative or therapeutic effect for any disease mentioned in another section whenever it determined that an advance in medical science had made any type of self-medication safe as to any of the diseases named, defendant by failing to allege an attempt to avail himself of that administrative remedy and by failing to allege that drug had beneficial effect as advertised did not show that statutes declaring false advertisement of any drug if represented to have effect in certain enumerated diseases was injurious to him and he failed to plead right to put constitutionality of such statute in issue. Health and Safety Code, §§ 26271, 26273.

---

Andrew J. Eyman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., B. Abbott Goldberg, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Janet Aitken, Asst. Dist. Atty., San Francisco, for respondent.

FRED B. WOOD, Justice.

E. S. Morris has appealed from a judgment of the Superior Court which denied his petition for a peremptory writ to prohibit the municipal court from further proceeding in an action against him upon a complaint filed February 20, 1950. The complaint charged three violations of section 26286 of the Health and Safety Code, the dissemination of false advertisements of drugs.

The judgment was entered upon the sustaining of a general demurrer to the petition. The petition states that appellant duly objected to the jurisdiction of the municipal court upon the ground, asserted by him, that the statute is unconstitutional, and that the municipal court has threatened to and will proceed with the trial of the cause. The petition is silent on the question whether or not the representations made in the advertisements were true or false in fact.

Appellant contends: (1) section 26286 prohibits, but does not define, the dissemination of a false advertisement of a drug; (2) section 26271 of the Health and Safety Code declares false the advertisement of any drug if represented to have an effect

in certain enumerated diseases or ailments, irrespective of the truth or falsity in fact of the representation, thus creating (contrary to the due process clauses of the State Constitution, art. 1, § 13, and the Fourteenth Amendment to the Constitution of the United States) a purely arbitrary presumption which the accused is not permitted to dispel; (3) the complaint charges violations of section 26271 because it alleges that appellant advertised that certain drugs had an effect in ulcers of the stomach, goiter, and dental caries, diseases or ailments enumerated in section 26271; (4) therefore, because of the asserted unconstitutionality of section 26271, the complaint does not charge a public offense.

[1] The vice of this argument inheres in the fact that it ignores section 26270 of the Health and Safety Code (in the same article as section 26271), which declares that an advertisement of a drug is deemed "false if it is false or misleading in any material particular." The first count of the complaint presents issues of fact under section 26270, none under section 26271. It does not charge that appellant represented a drug as having an effect in any of the diseases or ailments enumerated in section 26271. Manifestly, the petition does not challenge or put in issue the jurisdiction of the municipal court to proceed under the first count. This alone is sufficient to require denial of the petition.

[2] Moreover, neither the second nor the third count necessarily depends upon the constitutionality of section 26271. The second count alleges that appellant committed the "crime of misdemeanor to wit: Violating Section 26286 of the Health and Safety Code \* \* \*, in that the said defendants [appellant and another] did \* \* \* disseminate a false advertisement of a drug, in that in an advertisement \* \* \* he represented that a certain drug \* \* \* had an effect in ulcers of the stomach." This count presents issues under section 26270 as well as 26271. The only difference is that under section 26270 the state must prove the representation was in fact "false or misleading" in a "material particular." It is clear that the municipal court has jurisdiction to proceed under this

count, when viewed as charging false advertising as defined in section 26270.

The third count is a replica of the second count save only as to the date of the offense, the name of the drug, and the representation that the drug had "an effect in goiter and dental caries." It likewise presents issues under section 26270 as well as under 26271, demonstrating that the municipal court has jurisdiction to proceed with the trial on this count, irrespective of the constitutionality of section 26271.

[3] From the fact that we find it unnecessary to determine the constitutionality of section 26271, no inference is to be drawn that we doubt its constitutionality. It does not operate as an absolute and arbitrary prohibition of the advertising which it defines. As a part of the California Pure Drugs Act, sections 26200-26385 of the H. & S. Code, it must be read with other provisions of that Act, particularly those which appear in the article on "Advertising", sections 26270-26275. As thus read, it operates as a prohibition against advertising, to the laity, of drugs not found safe for self-medication. Section 26272 permits dissemination to members of the medical, dental, pharmaceutical and veterinary professions, also in the scientific journals of those professions, and, by persons not commercially interested in the sale of the drugs, for the purpose of public health education. Section 26273 directs the state board of public health to authorize the advertisement of a drug having curative or therapeutic effect for any disease mentioned in section 26271 whenever it determines that "an advance in medical science" has made any type of "self-medication safe as to any of the diseases" named in the article of which section 26271 is a part.<sup>1</sup> See *People v. Ryan*, 101 Cal.App.2d 927, 226 P.2d 376.

[4] We note that the petition is silent on the question whether or not any of the drugs mentioned in the complaint had been brought to the attention of the state board of public health for consideration and determination under and in accordance with

the provisions of section 26273. Petitioner by failing to allege an attempt to avail himself of that administrative remedy and by failing to allege that the drugs have a beneficial effect as advertised, does not show that the questioned statute is injurious to him, has failed to plead a right to put the constitutionality of the statute in issue. See *Neslen v. Board of Health*, 70 Cal.App. 2d 202, 160 P.2d 862.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



110 Cal.App.2d 194

**HART v. BRISKMAN et al.**

Civ. 14873.

District Court of Appeal, First District,  
Division 1, California.

April 1, 1952.

Hearing Denied May 29, 1952.

Action by Pauline Pearl Hart, administratrix of the estate of George D. Knight, deceased, against Abraham L. Briskman, Robert H. Winter and Pacific Truck Service Corporation for personal injuries suffered by deceased in a collision between him and Briskman. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for plaintiff and from an order granting Winter and Pacific Truck a new trial, plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence would have justified instruction qualifying statutory duty to approach for left turn in right half of highway nearest center line, and granting of the motion for a new trial for failure to give such instruction was not an abuse of discretion.

Order affirmed.

#### 1. New Trial 39

A new trial may be granted upon the ground that the jury was erroneously instructed upon matters of law.

1. We refer to the sections cited as they read in 1949. The complaint charges that appellant disseminated the advertise-

ments in question on March 23, August 29, and November 27, 1949, respectively.

**2. Appeal and Error** ⇨978(1)**New Trial** ⇨6

The granting or denial of a new trial is a matter resting largely in discretion of trial court and an order granting new trial on ground that erroneous instructions were given will not be disturbed on appeal unless there appears to be an abuse of discretion.

**3. Automobiles** ⇨246(46)

In action for negligence based on alleged violation of section of Vehicle Code relating to making a left turn, weather conditions and other circumstances beyond the control of the defendant may require the giving of instruction qualifying statutory duty to approach for left turn in right half of highway nearest center line. Vehicle Code, § 540.

**4. Automobiles** ⇨246(46)**New Trial** ⇨39

In action for personal injuries sustained when plaintiff while proceeding south on a four lane highway during a heavy wet fog, after passing a truck which was making a left turn across the two northbound traffic lanes from the west shoulder of the southbound lane, collided with a truck which had been proceeding north and had skidded over into the outside southbound lane, evidence would have justified instruction qualifying statutory duty to approach for left turn in that portion of right half of highway nearest center line, and granting of new trial for failure to give such instruction was not an abuse of discretion. Vehicle Code, § 540.

---

Dana, Bledsoe & Smith, San Francisco (Morton B. Jackson, San Francisco, of counsel), for respondents.

Frank B. Blum, Wm. A. Lahanier, San Francisco (Guernsey Carson, San Francisco, of counsel), for appellant.

PETERS, Presiding Justice.

George D. Knight, now deceased, was injured in an accident. He brought an action against Abraham L. Briskman, the driver of the truck that collided with his car, and Robert H. Winter, the driver of another

truck that was involved in the events immediately preceding the accident. The Pacific Truck Service Corporation, employer of Winter, was also joined as a defendant. The jury brought in a verdict of \$40,000 against all defendants. They all moved, on all of the statutory grounds, for a new trial. The motion of Briskman was denied. The motions of Winter and Pacific Truck were granted on the sole ground of error in failing to give a proffered instruction. Knight has appealed from the order insofar as it granted a new trial to Winter and Pacific Truck. Subsequently, Knight died, and Pauline Hart, the administratrix of his estate, has been substituted as the appellant.

[1,2] The law applicable to such an appeal is well settled. In *Scott v. Renz*, 67 Cal.App.2d 428, 432, 154 P.2d 738, 740, it is summarized as follows:

"Of course, a new trial may be granted upon the ground that the jury was erroneously instructed upon matters of law. Code Civ.Proc. § 657; *Mazzotta v. Los Angeles R. Corp.* [25 Cal.2d 165, 170], 153 P.2d 338. This court has recently set forth the rules applicable to such an appeal in *Conroy v. Perez* [64 Cal.App.2d 217, 220] 148 P.2d 680, 682, as follows: 'The rule governing reviewing courts on appeals of this kind may be stated as follows: "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter." 2 Cal.Jur. 905; *Pettigrew v. O'Donnell*, 32 Cal.App.2d 502, 90 P.2d 93. And where the subject of erroneous instructions is involved, it is held that a wide discretion should be allowed to the trial court and that the order granting the new trial must not be disturbed unless there appears to be an abuse of discretion. [Citing three cases.]'

"The Supreme Court, in the case of *Mazzotta v. Los Angeles R. Corp.* [25 Cal. 2d 165, 169], 153 P.2d 338, 340, had the following to say concerning the discretion conferred upon the trial courts in



such cases: 'It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. [Citing 11 cases].'" See, also, *Brignoli v. Seaboard Transportation Co.*, 29 Cal.2d 782, 178 P.2d 445; *People ex rel. Dept. of Pub. Wks. v. McCullough*, 100 Cal.App.2d 101, 223 P.2d 37; *Pezzoni v. City & County of S. F.*, 101 Cal.App.2d 123, 225 P.2d 14; *Ridenour v. Scarcella*, 107 Cal.App.2d 554, 237 P.2d 322.

The basic facts are as follows: The accident happened between 7:30 and 8 a. m. on December 18, 1947, on Highway 101 about a mile south of Petaluma. This is a level four-lane divided highway running north and south, the north and southbound lanes being divided by a five-foot dividing strip covered with diagonal concrete ribs. At the scene of the accident a dirt road comes into Highway 101 from the east, and on the northeast corner of the dirt road and 101 is a gasoline service station and cafe, catering to the trucking trade. Directly opposite where this dirt road comes into 101 there is an opening in the dividing strip to permit ingress and egress to and from the gasoline station.

At the time and place here involved there was a heavy wet fog. Between 7:30 and 8 a. m., Winter, in the course and scope of his employment with Pacific Truck, was driving an oil truck and trailer about sixty feet long, both empty, south on Highway 101, traveling about thirty miles per hour. His windshield wipers were working, his headlights were lit, and there were lighted clearance lights on each side of the equipment. Both windows of the cab of the truck were closed. The rear view mirror extending from the left side of the cab of the truck was filmed with fog, so that Winter could not see to the rear. The cab was also equipped with a state-approved reflector type arm signal which was controlled from inside the cab.

As Winter was proceeding south on 101 he decided to enter the service station, where his company had an account, to get gasoline for his truck. To get to the sta-

tion, Winter had to make a left turn and thus cross the two northbound traffic lanes. Because his rear view mirror was filmed over so that he could not see to the rear, Winter pulled off the highway onto the shoulder to his right and brought his equipment to a full stop a short distance north of the gasoline station. He then opened the door of the cab to see if there were any vehicles approaching from the north. He observed none. He thereupon closed the cab door, put the vehicle into gear, and started to make his left turn. As he started up he noticed headlights in front of him approaching from the south. These were the headlights of the Briskman truck. Winter estimated that these headlights were 500 or 600 feet away when first observed by him. He then operated his arm signal to indicate a left turn, and proceeded to make the turn and to drive into the service station at a speed of eight to ten miles per hour. When the cab of the Winter truck was just entering onto the shoulder of the highway adjoining the service station, he noticed the approaching lights about 250 to 300 feet away. Winter could not estimate the speed of the approaching vehicle. He completed his turn into the service station and brought his equipment to a stop without mishap. The equipment was then completely off the highway. He did not know that there had been an accident until one of the operators of the service station informed him of that fact.

While these events were taking place, Knight, the plaintiff, was also driving south on 101 some distance behind the truck and trailer, at a speed of thirty-five miles per hour. He was driving in the right lane of traffic. He had his headlights on and his windshield wipers operating. When about 150 feet north of the opening in the highway he saw Winter engaged in making the left-hand turn. The truck and trailer were then at approximately a right-angle to the highway moving very slowly, and he could see the side lights on the equipment. Knight slowed down to ten or twenty miles per hour and safely passed the equipment of Winter. At that moment the rear of the trailer still covered the in-

side southbound lane of traffic. Just as he passed the truck and trailer he observed headlights coming from the south.

Briskman was driving a flat-bed truck loaded with empty chicken coops north on 101. He was in the outside lane for northbound traffic. He testified that he was going but twenty-five miles per hour as he approached the service station; that he first observed the truck-trailer when about 150 feet from it; that at that time it was still in the inside lane traveling south; that when he was about 125 feet away, the truck-trailer started to make a left turn, right in front of him; that he applied his brakes; that his truck started to skid and skidded across the northbound lanes, across the dividing strip, and over into the outside southbound lane, where it hit Knight's car, resulting in the injuries to Knight. Much of Briskman's testimony is contradicted by prior inconsistent statements, by other witnesses, and by the physical facts. There were skid marks on the highway showing that Briskman's truck skidded 184 feet before hitting Knight's car. Briskman is not a party to this appeal so that the evidence relating to his liability need not be further considered.

As already pointed out, the jury brought in a verdict against Briskman, Winter and Pacific Truck. All of the defendants moved for a new trial. The trial court denied Briskman's motion, and then entered its order granting the motions of Winter and Pacific Truck "on the sole grounds of error in law committed by the Court's failure to give either defendant, Robert H. Winter[']s, requested Instruction No. 6 or, in the alternative, B.A.J.I. Instruction No. 149."

Winter's proposed Instruction 6, referred to above, reads as follows:

"I instruct you that while it is generally and ordinarily true that the approach for a left-hand turn shall be made in that part of the right half of the roadway nearest to the center line thereof and that said turn shall thereafter be made so as to leave the intersection to the right of the center lane of the roadway being entered, that it is nevertheless true that under certain circumstances and conditions where a different

course is required in the interests of reasonable safety and where a person, because of peculiar conditions, is required to act differently and where, in the exercise of ordinary and reasonable care, such person does act differently that under such circumstances it is not negligent to follow a course which in the interests of safety is required by the surrounding circumstances.

"In this case, therefore, if you find that certain conditions existed which in the exercise of ordinary care and for the purpose of reasonable safety required a different course of conduct on the part of defendant Winter, and you find that said defendant, in the exercise of such care, followed such course of conduct, then I instruct you that he was not guilty of any negligence in acting contrary to the provisions of the Code section. It is for you to determine from the surrounding circumstances all factual issues in this case and you must therefore resolve this question from a just and fair consideration of all the relevant and pertinent evidence relating thereto."

B.A.J.I. Instruction No. 149, referred to by the trial court, reads as follows: "Conduct which is in violation of \* \* \* just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he [or] [she] was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise." This instruction, where applicable, has been held to contain a correct statement of law. *Combs v. Los Angeles Railway Corp.*, 29 Cal.2d 606, 177 P.2d 293.

Instead of giving either of these instructions, the trial court, at the request of Briskman, instructed that: "Section 540 of

the Code provides that the driver of a vehicle intending to turn left at an intersection shall approach for such left turn in that portion of the right half of the roadway nearest the center line thereof and, after entering the intersection, the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. A violation, if any, of said sections is *prima facie* evidence of negligence on the part of one so violating such vehicle code."

It is a conceded fact that Winter started his left turn from the west shoulder of the southbound lane. The question is whether there is evidence that would have warranted or required the trial court to give either one of the proposed qualifying instructions.

There can be no doubt that in a proper case, that is, where the evidence warrants it, such a qualifying instruction should be given. One of the leading cases on this subject is *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279, a case involving a collision between plaintiff's automobile and defendant's bus. The evidence showed that plaintiff had not complied with the Vehicle Code section relating to the right of way between cars approaching an intersection. Defendant requested an instruction to the effect that, if the jury should find that plaintiff violated this section, such negligence constituted negligence *per se*, and, if a proximate cause, barred plaintiff from recovery. The trial court refused these instructions, instructed generally on the rights of drivers of vehicles entering intersections at the same time, and added an instruction to the effect that under certain circumstances a person who has the right of way may be negligent. The Supreme Court found that although plaintiff entered the intersection in violation of the code section, the evidence would support a finding that, under the circumstances, he was excused or justified. The court then, after stating the rules applicable to the doctrine of negligence *per se*, stated 29 Cal.2d at page 588, 177 P.2d at page 283: "However, in an emergency, or under unusual conditions, it is generally held that circumstances may be

shown to excuse the violation. The rule has been aptly stated in *Jolley v. Clemens*, 28 Cal.App.2d 55, 67, 82 P.2d 51, 58, where it was said (quoting from 1 *Shearman & Redfield on Negligence*, § 13): "'\* \* \* violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive \* \* \*'". Continuing, the court said: 'But unless and until justification or excuse for such conduct appear \* \* \* the general rule applies and it must be treated as negligence *per se*.'"

[3] Weather conditions and other circumstances beyond the control of the defendant may require the giving of the qualifying instruction. *Ornales v. Wigger*, 35 Cal.2d 474, 218 P.2d 531; see, also, *Fietz v. Hubbard*, 59 Cal.App.2d 124, 138 P.2d 315; *Emery v. Los Angeles Ry. Corp.*, 61 Cal.App.2d 455, 143 P.2d 112.

[4] Thus, the real question is whether there was any evidence in the instant case that would have warranted the trial court in giving such a qualifying instruction. If so, under the rules already stated, the action of the trial court in granting a motion for a new trial for failure to give this instruction must be upheld.

The solution of this problem turns upon whether or not there is any evidence that would support a finding that Winter acted in a reasonable and prudent fashion in pulling off the road, looking back, and then making his left turn. Under section 544 of the Vehicle Code it is provided that no turn shall be made "unless and until such movement can be made with reasonable safety". Here, Winter was driving equipment about sixty feet in length. It was very foggy, and visibility was poor. The rear view mirror was filmed over with fog. Under these circumstances, and out of an abundance of caution, Winter pulled off to his right, stopped his equipment, opened the cab door and looked back to see if there were any approaching cars. Having ascertained that he could negotiate the left turn safely so far as southbound cars were concerned, he made his left turn.



That he estimated this correctly is demonstrated by the fact that his equipment did not prevent Knight from safely passing the truck and trailer. Winter saw the northbound car approaching and believed that he had plenty of time to make the turn. If his testimony is believed, he did have such time if Briskman was approaching at a lawful speed. It is a possible and reasonable inference that Briskman was approaching much too fast, and that this was the proximate cause of the accident. Thus, whether or not Winter acted as a reasonably prudent man in pulling off the highway before making his left turn was for the jury to determine.

Appellant argues that the reason given by Winter for pulling off the road was that his rear view mirror was filmed over, and contends that it would have been a simple matter for Winter to have reached out and wiped off the mirror. In this connection, appellant relies on the following language of the Satterlee case, *supra*, 29 Cal.2d at page 589, 177 P.2d at page 283: "However, the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.' [Citing many cases.]" Appellant also relies on the rule that, where no justification for the violation of the statute appears, it is not error to refuse the qualifying instruction. *Cavagnaro v. City of Napa*, 86 Cal.App.2d 517, 195 P.2d 25. But if there is any conflict on this issue, if reasonable minds may differ on the question, the validity of the excuse offered presents a question of fact for the jury. The proper rule was stated as follows in the Satterlee case, *supra*, 29 Cal.2d at page 590, 177 P.2d at page 284: "In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in *Scaif v. Eicher*, *supra*, 11 Cal.App.2d [44] at page 54, 53 P.2d [368] at page 373: 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the

violation was excusable or justifiable are questions of fact except in a case where 'the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'" [Citing many cases.]"

It is quite apparent that Winter was not responsible for the weather conditions then existing. He was required, under the law, to ascertain whether he could make a left turn safely. He could, perhaps, have slowed down, opened the cab window, and wiped off the rear view mirror. This might be a dangerous thing to do while the equipment was moving. He chose the other alternative—to drive off the highway and look back. Whether what he did under the circumstances was or was not reasonable, was a question of fact for the jury. Reasonable minds may differ on the matter. This being so, the trial court was justified in finding that it should have given the qualifying instruction, and in granting the motion for a new trial for its failure to do so.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.



**FAROLE v. EICHMAN et al. \***

Civ. 18628.

District Court of Appeal, Second District,  
Division 2, California.

March 31, 1952.

Rehearing Denied April 15, 1952.

Hearing Granted May 26, 1952.

Action by Eugene Farole, a minor, by his guardian ad litem, Ann Bennett, against Carl J. Eichman, and another, for injuries sustained when plaintiff, while riding on handle bars of friend's bicycle, in violation of ordinance, was struck on crosswalk at intersection by truck being driven by named defendant.

\* Subsequent opinion 249 P.2d 261.

ant. The Superior Court, Los Angeles County, Percy Hight, J., rendered judgment on verdict for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held that plaintiff was guilty of contributory negligence *per se*, and that his negligence was one of proximate causes of accident.

Judgment reversed.

#### 1. Negligence ⇨6, 65

Violation of statute or ordinance constitutes negligence *per se* and also contributory negligence if failure to comply with statute or ordinance contributes directly to injury.

#### 2. Automobiles ⇨212, 226(2)

Where plaintiff, while riding on handle bars of friend's bicycle in violation of ordinance, was struck on crosswalk at intersection by truck being driven by defendant, plaintiff was guilty of contributory negligence *per se*, and, since accident could not have occurred had plaintiff obeyed ordinance, his negligence was one of proximate causes of the accident.

C. F. Jorz, Los Angeles, for appellants.  
No appearance for respondent.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiff after trial before a jury.

Viewing the evidence most favorable to plaintiff, the facts are as follows:

At about 7:40 p. m. in dry weather plaintiff and a friend riding on a bicycle arrived at the intersection of Junipero and Broadway streets in Long Beach. Junipero proceeds in a northerly and southerly direction, while Broadway runs easterly and westerly.

Plaintiff and his friend entered a drug store on the northeast corner, leaving the bicycle on which they had been riding in front of the store. Plaintiff was 14 years old, weighed about 150 pounds and was approximately five feet, ten inches in height. His friend was 15 years old and of approximately the same weight.

On the southeast corner of the intersection was a "malt shop." After remaining

in the drug store about five minutes they decided to go across the street to the malt shop. After plaintiff's friend had mounted the bicycle, plaintiff climbed on the handle bars and sat upon it with his feet hanging down. There were no lights on the bicycle. They proceeded in a southerly direction in the crosswalk on the east side of the intersection. At about five feet south of the center line of Broadway they were struck by an eastbound truck driven by defendant Eichman.

Question: *Was plaintiff guilty of contributory negligence as a matter of law in riding upon the handle bars of the bicycle at the time the accident occurred?*

[1, 2] Yes. The law is settled that (1) the violation of a statute or ordinance constitutes negligence *per se*, and (2) it constitutes contributory negligence if the failure to comply with the statute or ordinance contributes directly to the injury. (*Leek v. Western Union Tel. Co.*, 20 Cal.App.2d 374, 376 [1], 66 P.2d 1232.)

In the present case at the time of the accident Ordinance No. C-2022 of the City of Long Beach read:

"Section 28—Riding Only on Seats. *No Riding.*

"A. No person operating a bicycle shall ride other than upon or astride the permanent regular seats attached thereto, or carry any other person upon such bicycle other than upon a permanent attached and regular attached seat thereon, *nor shall any person ride upon a bicycle other than as permitted above.*

"B. No bicycle shall be used to carry more persons at one time than the number for which it is designed and equipped." (*Italics added.*)

As plaintiff violated the italicized provision of the foregoing ordinance by riding upon the handle bars of the bicycle, he was guilty of contributory negligence *per se*. Since the accident could not have occurred had plaintiff obeyed the ordinance his negligence was one of the proximate causes of the accident. Therefore he cannot recover for his injuries, and the judgment in his favor was erroneous. (*Leek v. Western*

Union Tel. Co., supra, 20 Cal.App.2d 376 [2], 66 P.2d 1232.)

Reversed.

MOORE, P. J., and FOX, J., concur.



110 Cal.App.2d 4

**PEOPLE v. SULLIVAN.**

**Cr. 848.**

District Court of Appeal, Fourth District,  
California.

March 24, 1952.

Defendant was convicted of conspiracy to commit acts injurious to public morals and in obstructing justice. The Superior Court, San Diego County, imposed sentence after denying defendant's motion for new trial, application for probation, for bail, and for stay of execution of the judgment pending appeal. Defendant filed application to admit her to bail and to stay execution of judgment pending appeal in the District Court of Appeal. The District Court of Appeal, Griffin, J., held that there was no abuse of discretion in the trial court's denial of defendant's applications and that no extraordinary circumstances occurring since the trial authorized a different order.

Application denied.

**1. Criminal Law** ⇨1148

Trial court's denial of application for bail will not be disturbed where no abuse of discretion appears and where no extraordinary circumstances authorizing a different order have occurred since the trial. Rules on Appeal, rule 32(b).

**2. Criminal Law** ⇨1084

Defendant appealing from a felony conviction is not entitled to stay of execution of the judgment as a matter of right but only on showing that trial court unjustifiably denied an application properly made. Rules on Appeal, rule 32(a).

**3. Criminal Law** ⇨1144(19)

On defendant's application for stay of execution of judgment, where transcript on appeal was not before it, reviewing court would presume that judge presiding at trial was thoroughly familiar with the evidence produced, the points involved in the appeal, and the merits of the appeal.

**4. Criminal Law** ⇨1141(1)

Until the appeal from a conviction of felony is determined, the presumption is that the defendant was properly convicted.

**5. Criminal Law** ⇨1084

Where defendant did not make showing sufficient to controvert presumption that she was properly convicted, it could not be said that trial court abused its discretion or unjustifiably denied application for stay of execution pending appeal.

**6. Criminal Law** ⇨982

Trial judge considering defendant's application for probation is not bound by reasons advanced in report of probation officer recommending against probation. Pen.Code, § 1203.

---

Richard E. Adams, San Diego, A. Brigham Rose, Los Angeles, of counsel, for appellant.

James Don Keller, Dist. Atty., Cliff Duke, Jr., Deputy Dist. Atty., San Diego, Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Applicant was convicted by a jury in the Superior Court of San Diego county on a grand jury Indictment charging her with conspiracy to commit acts injurious to public morals and in obstructing justice, a felony. The trial judge imposed a prison sentence after denying her application for probation, denied her motion for new trial, and, after hearing had, denied her application for bail and for stay of execution of the judgment pending appeal. In this court she filed this application to admit her to bail and to stay execution of judgment pending appeal.



The basis of her application is that her conviction was secured on uncorroborated testimony of an accomplice, and that the evidence, as a whole, failed to show any unlawful purpose, and that in the opinion of applicant's counsel the judgment will be reversed on appeal. In support of her application she cites *In re Torres*, 80 Cal. App.2d 579, 582, 182 P.2d 573; *In re Adams*, 81 Cal. 163, 164, 22 P. 547; and *Ex parte Hoge*, 48 Cal. 3.

This application is somewhat similar to the application of her codefendant, See Application of Fishman, Cal.App., 241 P.2d 603, except applicant here claims no physical impairment justifying bail, as was advanced by Fishman, and as indicated in *Re Pan-ages*, 209 Cal. 535, 291 P. 831.

[1] The trial court's action in reference to her application for bail does not appear to be unreasonable nor does it indicate that the application was unjustifiably denied. There is no abuse of discretion appearing and there is no showing of any extraordinary circumstances occurring since the ruling of the trial court denying her previous application which would authorize this court to enter a different order. Rule 32b Rules on Appeal; *People v. Davis*, 67 Cal. App.2d 837, 839, 155 P.2d 675, and cases cited; *People v. Eiseman*, 69 Cal.App. 143, 230 P. 669; *Ex parte Turner*, 112 Cal. 627, 629, 45 P. 571.

[2, 3] Applicant is not entitled to a stay of execution of the judgment on appeal as a matter of right in this felony conviction. Rule 32a of the Rules on Appeal provides that an application to a reviewing court for a stay of execution of a judgment of conviction on an appeal pending therein shall include a showing that proper application for a stay was made to the Superior Court, "and that such court *unjustifiably* denied the application." (Italics ours.) We do not have the benefit of what will be a voluminous transcript on appeal and which is now in preparation, so that we might predetermine the merits of the appeal. We must presume that the trial judge, who presided at the trial, was thoroughly familiar with the evidence produced, the points that might be involved on the appeal and with the merits of the appeal.

[4] After conviction of a felony, until the appeal is determined, the presumption is that the defendant was properly convicted. In *re Burnette*, 35 Cal.App.2d 358, 360, 95 P.2d 684.

[5] There is no sufficient showing here made to controvert this presumption. Accordingly, it cannot be said that the trial court abused its discretion or *unjustifiably* denied the application for stay of execution pending appeal. *People v. Cox*, 65 Cal. App.2d 712, 151 P.2d 269.

[6] Some complaint is made that the trial court did not give due consideration to the report of the probation officer which recommended that probation be denied, because one or two of the reasons advanced for his recommendations were not "in legal contemplation, grounds for denial of the application". We see no merit to this argument in connection with this application. The trial judge was not bound by any particular reason or reasons advanced by the probation officer recommending against probation, particularly where it is indicated that the court fully considered the application and report in its entirety. Sec. 1203, Penal Code.

Application denied.

BARNARD, P. J., and MUSSELL, J., concur.



110 Cal.App.2d 279

**PEOPLE v. SHIPMAN.**

**Cr. 4738.**

District Court of Appeal, Second District,  
Division 1, California.

April 7, 1952.

Conviction in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of manslaughter, and defendant appealed. The District Court of Appeal, Doran, J., held that the record did not support contention that denial of probation was improperly based on statute prohibiting probation where great

bodily injury is inflicted in the perpetration of a crime.

Judgment affirmed.

#### Criminal Law ⇨982

Record failed to support contention that denial of probation after conviction of manslaughter was improperly based on statute prohibiting probation where great bodily injury is inflicted in the perpetration of a crime, and judgment sentencing defendant to prison for the term prescribed by law would be affirmed. Pen.Code, § 1203.

---

Cletus J. Hanifin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment. Defendant was charged with murder. A jury was waived and the case submitted on the transcript of the preliminary hearing. "The only testimony given at the trial was that given by defendant Jack Wayne Shipman, on his own behalf". Defendant was adjudged guilty of manslaughter and a request for leave to file an application for probation was granted. At the hearing on the application it was duly considered but denied and judgment pronounced.

According to appellant, the issue on appeal is "Did the court err in denying defendant probation".

It is argued by appellant that "At the time fixed for passing judgment and sentence, the question was raised by the defense attorney as to whether or not probation was permissible under Penal Code, Section 1203. It was the contention of the defense attorney that it was permissible, and in the discretion of the trial Judge. However, the Court, while admitting there was no premeditation or intention to kill, indicated that it felt the defendant brought himself within the provisions of Penal Code, Section 1203, by exhibiting a gun which he knew to be loaded, and by the

fact said gun was discharged, killing the deceased. Penal Code, Section 1203, provides that one who 'in the perpetration of a crime inflicted great bodily injury' may not have probation. Accordingly, the Court denied probation to defendant and sentenced him to State prison for the term prescribed by law.

"It is the contention of your appellant that this case is not of the type referred to in the Penal Code, Section 1203, wherein probation is prohibited. \* \* \* Here the gun discharged 'accidentally'. It was not wilfully nor intentionally aimed or fired at the deceased. It was displayed in what appeared to have been a jocular manner and not with malice.

"That there was negligence, thoughtlessness, imprudence and lack of caution will not be denied, but these elements do not singularly nor collectively amount to willfulness and intent."

However, the record fails to support appellant's contention in this regard. As pointed out by respondent, the record reveals that an application for probation was filed. At the hearing on the application the record shows that the deputy probation officer was present. At that time defendant's counsel urged the court to grant probation. At that time counsel stated, "The question solely in this case for your Honor's judicial determination in considering this application for probation is whether or not this defendant is eligible for probation", and "It is that explanation of my viewpoint of the case that I ask your Honor for favorable consideration of the application for probation. With your Honor's understanding of the circumstances, I submit the matter to you."

There is nothing in the record to indicate that the court's determination of the issue was based on the provisions of section 1203 of the Penal Code. That section was not mentioned at the hearing either directly or indirectly.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

**BETTER FOOD MARKETS, Inc. v. AMERICAN DIST. TEL. CO. et al.\***

Civ. 18525.

District Court of Appeal, Second District,  
Division 3, California.

March 28, 1952.

Rehearing Denied April 15, 1952.

Hearing Granted May 26, 1952.

Better Food Markets, Incorporated, brought action against the American District Telegraph Company, a corporation, and others, for damages alleged sustained as result of alleged breach of contract whereunder the named defendant had duty to promptly dispatch guards or call the police upon receiving a burglary signal. The Superior Court of Los Angeles County, Arthur Crum, J., after jury failed to agree, directed judgment in favor of defendants, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that question of breach and whether same was proximate cause of loss was for trier of fact, but that in view of fact that plaintiff's recovery would be limited to \$50 under liquidated damages provision of contract, judgment would be reversed with qualification that if defendant files consent thereto, judgment should be entered against it for sum of \$50.

Judgment reversed with qualification.

**1. Appeal and Error ⇨927(7)**

On plaintiff's appeal from judgment for defendants on their motion for directed verdict, evidence would be viewed in light most favorable to plaintiff.

**2. Telegraphs, Telephones and Radio ⇨32**

Where telegraph company which installed and maintained burglar alarm system in plaintiff's store agreed to upon receiving alarm at central station send representative with authority to make arrest and transmit alarm to police, company was under duty to dispatch representative and notify police promptly upon receiving alarm, and delay in so doing would constitute failure of performance.

**3. Telegraphs, Telephones and Radio ⇨53**

In action for damages allegedly sustained when telegraph company which installed and maintained burglar alarm system failed to perform agreement to promptly dispatch representative and notify police upon receiving alarm, probabilities as to whether prompt measures would have pre-

vented burglary would be weighed in light of common experience in such matters.

**4. Telegraphs, Telephones and Radio ⇨73(3)**

In action for damages allegedly sustained when telegraph company which installed and maintained burglar alarm system failed to perform agreement to promptly dispatch representative and notify police upon receiving alarm, questions of whether company could reasonably have foreseen that burglar would be successful unless company responded promptly to alarms, and whether it was probable that by acting promptly company could have prevented loss, were for trier of fact.

**5. Telegraphs, Telephones and Radio ⇨53**

If telegraph company which installed and maintained burglar alarm could reasonably have foreseen that burglar would be successful unless company responded promptly to alarms by sending representative and notifying police pursuant to contract, and if it was probable that by acting promptly company could have prevented loss, loss by burglary would be proximate result of delay in responding to alarms.

**6. Damages ⇨78(1)**

Provision in contract whereunder telegraph company was to send representative and notify police upon receiving burglar alarm, that upon failure to perform service, company's liability would be limited to and fixed at sum of \$50 as liquidated damages, and not as penalty, and that liability should be exclusive, was not a mere limiting of liability but purported to call for liquidated damages.

**7. Damages ⇨79(1)**

Code provision that contract for payment of liquidated damages may be made when from nature of case it would be impracticable or extremely difficult to fix actual damages, is merely statement of universal principle that valid agreement may be made for payment of liquidated damages, whereas agreement for payment of penalty is invalid. Civ.Code, § 1671.

**8. Damages ⇨77**

Whether an agreement is one for liquidated damages or one for a penalty is almost exclusively question of intention of

\* Subsequent opinion 253 P.2d 10.



parties as derived from agreement, their relations and surrounding circumstances.

#### 9. Damages ⇐79(1)

Promise to pay money for breach of agreement will be regarded as penalty unless there is great uncertainty or extreme difficulty with respect to forecasting actual damage that would result from breach. Civ.Code, § 1671.

#### 10. Damages ⇐79(1)

Provision in contract limiting and fixing sum as liquidated damages, and stating that it was impracticable and extremely difficult to fix damages that would result from failure to render service under contract, was entitled to much weight in ascertaining intention of parties as to whether agreement was for liquidated damages or penalty. Civ.Code, § 1671.

#### 11. Damages ⇐79(1)

In determining whether there is impracticability and extreme difficulty in fixing actual damages for breach of contract so as to make certain sum payable upon breach a provision for liquidated damages rather than penalty, ability of parties, not of court, to fix actual damage controls, and court should place itself in position of parties at time contract was made, and should consider nature of breaches that might occur and any consequences that were reasonably foreseeable. Civ.Code, § 1671.

#### 12. Damages ⇐78(2)

Fact that parties to contract stipulated that \$50 was to be paid for each breach of contract as liquidated damages and not as penalty was not conclusive, though it expressed their judgment and understanding of situation as to which they had superior knowledge. Civ.Code, § 1671.

#### 13. Damages ⇐83

Although question as to whether it was impracticable or extremely difficult to fix damages so as to render provision in contract for payment of certain sum upon breach thereof a provision for liquidated damages rather than penalty is one upon which finding is necessary, question becomes one of law where facts are not in

dispute and question admits of but single answer. Civ.Code, § 1671.

#### 14. Damages ⇐79(1)

Where impracticability or extreme difficulty in ascertaining damages if contract should be breached appears as matter of law, and parties have expressly agreed upon sum as liquidated damages, it cannot be said that they contracted for penalty if sum agreed upon would exceed loss in some circumstances and fail to equal it in others. Civ.Code, § 1671.

#### 15. Damages ⇐79(1)

Where telegraph company agreed to upon receiving alarm at central station send representative and transmit alarm to police, and agreement provided that it is impracticable and extremely difficult to fix actual damages which might result from failure to perform service and that in case of such failure and resulting loss, company's liability shall be limited to and fixed at sum of \$50 as liquidated damages and not as penalty, and that liability shall be exclusive, there was sufficient uncertainty as to nature and amount of loss in case service should not be performed so as to make it impracticable and extremely difficult for parties to foresee and fix actual damages, and hence provision was valid as one for liquidated damages. Civ.Code, § 1671.

#### 16. Damages ⇐85

Where plaintiff alleged that there was breach of agreement and that failure to perform was negligence and sought damages therefor, only breach of duty was failure to perform, and whether such failure was willful or negligent, it would be breach of contract and liquidated damages provision in contract would be applicable.

#### 17. Damages ⇐85

Under contract providing that in case of failure to perform and resulting loss, defendant's liability would be limited to and fixed at sum of \$50 as liquidated damages, and not as penalty, and that liability should be exclusive, agreement for liquidated damages would not be enforceable against defendant unless plaintiff suffered loss as proximate result of breach.

**18. Trial** ⇐180

Order directing entry of judgment for defendant was, in effect, an order directing verdict for defendant, although made after jury had failed to agree. Code Civ.Proc. § 630.

**19. Appeal and Error** ⇐927(7)

Order directing entry of judgment for defendant which was in effect an order directing verdict for defendant would be presumed to have been made upon every ground that would support such order. Code Civ.Proc. § 630.

**20. Appeal and Error** ⇐934(1)

All intendments are in favor of correctness of judgment.

**21. Appeal and Error** ⇐927(7)

Where, in action for alleged negligent failure to perform under agreement calling for liquidated damages, trial court directed entry of judgment for defendant after jury failed to agree, it would be presumed that court determined either that defendant did not violate agreement or that if there was breach it was not proximate cause of loss. Code Civ.Proc. § 630.

**22. Appeal and Error** ⇐1176(1)

Where, in action for loss of over \$35,-000 allegedly caused by negligent failure to perform agreement containing provision for liquidated damages of \$50, trial court directed entry of judgment for defendant after jury failed to agree though evidence would have supported finding for plaintiff, if court was in error in so doing,

such error would not warrant reversal of judgment for retrial, and judgment would be reversed with qualification that if defendant files written consent, judgment would be entered against it for \$50, the amount of liquidated damages, but defendant could if it desired exercise right to defend on issues of breach of contract and proximate cause. Code Civ.Proc. § 630.

Eugene S. Ives, Los Angeles, for appellant.

Lawler, Felix & Hall and Reed A. Stout, all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff brought this action against American District Telegraph Company (hereafter referred to as defendant), and six of its employees for damages allegedly sustained as the result of alleged breach of contract under which defendant had a duty to promptly dispatch guards or call the police, or both, when a burglary signal was received in its central station from plaintiff's Wilmington market. In one cause of action it was alleged that defendant negligently installed, maintained and operated its system and failed to promptly notify the police; in a second cause of action it was alleged that defendant violated its contract in that it failed to send its representative as it had agreed to do and failed to promptly notify the police after it had received a burglary alarm. The agreement, so far as pertinent, reads as follows.<sup>1</sup> Two trials

1. "Under this agreement made June 12, 1947, the American District Telegraph Company, hereinafter called the 'Contractor,' agrees to install and maintain or cause to be installed and maintained, during the term of this agreement, in the premises of Better Food Markets Inc., hereinafter called the 'Subscriber,' at 744 Marine Avenue, in the City of Wilmington, State of California, a Central Station Burglar Alarm and Holdup Alarm System, as specified in the schedule on the reverse side hereof, including transmission boxes and wire connections, necessary to transmit signals from the premises of the Subscriber to the Contractor's Central Station, and will, subject to the terms and conditions hereof, until the termination of this agreement, maintain such system

in good working order, with the understanding that the entire system, including all devices, instruments, appliances and all connections, wires, conduits, foils, screens, cabinets, springs and other materials associated therewith, are and shall be and remain the personal property of the Contractor.

"The Contractor, on receipt of a burglar alarm signal from the Subscriber's premises, agrees to send to said premises, its representative to act as agent of and in the interest of the Subscriber. If provided with a key by the Subscriber for such purpose, the representative will enter the premises and search them. The Subscriber hereby authorizes and directs the Contractor to cause the arrest of any person or persons unauthorized to enter

were had. At the first the jury found for plaintiff in the sum of \$35,930 but the court granted a new trial on the ground of insufficiency of the evidence. At the second trial the jury could not agree and was dismissed. Pursuant to Code of Civil Procedure, section 630, judgment was entered for defendants on their motion for a directed verdict theretofore made. Plaintiff appeals, contending that since there was sufficient evidence of defendants' negligence and breach of contract, and damage proximately resulting therefrom, to sustain a jury verdict it was error to grant defendants' motion. Defendant contends that there was insufficient evidence to prove that

the acts or omissions of its employees proximately caused any damage to plaintiff. It also contends that its liability was limited by the contract to the sum of fifty dollars.

[1] Viewing the evidence in the light most favorable to plaintiff, Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826, the following facts were established: On November 16, 1947, at about 7:30 p.m. Mr. Horton, assistant manager of plaintiff's Wilmington store, set the burglar alarm system, locked the doors and walked to the parking lot accompanied by another employee of plaintiff. As he entered his car, Mr. Horton was accosted by an armed robber and at gun point forced to open the

his premises and to hold him or them until released by the Subscriber or an authorized known representative, and in such cases to indemnify the Contractor against any liability, cost or expense in consequence of such arrest.

"The Contractor, on receipt of a holdup alarm signal from the Subscriber's premises, agrees to transmit the alarm promptly to headquarters of the public police department.

"The Subscriber agrees to furnish the Contractor a list of the names and individual signatures of all persons who shall have the right to enter the premises of the Subscriber between the regularly scheduled times for closing and opening the premises and who may be called upon for a key to enter the premises of the Subscriber, during such periods.

"The Contractor agrees to furnish the Subscriber daily, a report in writing showing the times the Subscriber's premises were irregularly opened the preceding day (between the regularly scheduled times for closing and opening the premises) and if requested by the Subscriber a weekly report in writing showing the times said premises were regularly opened and closed each day.

"The Subscriber hereby agrees to pay the Contractor, its agents or assigns, the sum of Six Hundred Sixty and no/100 Dollars (\$660.00) upon the completion of the said installation, and to pay in addition, the sum of Five Hundred Ninety-five and no/100 Dollars (\$595.00) per annum, monthly in advance, for the period of five years from the date such system is operative under this agreement, and thereafter the Subscriber shall pay the said sum per annum, monthly in advance, until the termination of this agreement, which is terminable not less than thirty days after written notice of desire to ter-

minate is given by either party to the other at any time after the expiration of the five-year period. Any advance payments made for service to be supplied subsequent to the date of such termination shall be refunded to the Subscriber.

"This agreement may be cancelled, without previous notice, at the option of the Contractor, in case the Contractor's Central Station, connecting wires or equipment are destroyed by fire or other catastrophe or so substantially damaged that it is impracticable to continue service and may likewise be cancelled at the option of the Subscriber in the event that the Subscriber's plant is so destroyed or damaged. \* \* \*

"It is understood and agreed that the Contractor's obligation relates to the maintenance solely of the specified protective signaling system and that it is in no way obligated to maintain, service, replace, operate or assure the operation of the property, system or any device or devices of the Subscriber or others to which the Contractor's said system is attached, nor to repair or redecorate any portion of the Subscriber's premises upon removal of Contractor's said protective signaling system. It is agreed by and between the parties that the Contractor is not an insurer, that the payments hereinbefore named are based solely on the value of the service in the maintenance of the system described, that it is impracticable and extremely difficult to fix the actual damages, if any, which may proximately result from a failure on the part of the contractor to perform such service and in case of failure to perform such service and a resulting loss its liability hereunder shall be limited to and fixed at the sum of fifty dollars as liquidated damages, and not as a penalty, and this liability shall be exclusive."



store, the inner office and the safe. The robber took the contents of the safe, taped Mr. Horton so he could not follow, and left. At the time the robber taped Mr. Horton he threw the latter's watch to the floor, it broke and the hands were stopped at 7:50. Approximately 14 minutes elapsed from the time Mr. Horton re-opened the front door until the robber left the market with the loot, some \$35,000 in money and checks. While this was transpiring at the market signals were received at the ADT central station. At 7:42 defendant Mysel made a report that signals had come in from station 321 in sequence of 1-4-4-3. Since the opening of a door sent 3 rounds of signals and closing sent 1, the interpretation of this sequence would be closing of door at 7:30 (1 round), opening and closing of outside door (4 rounds), at 7:35 opening and closing of office door (4 rounds), and opening of safe (3 rounds) all between 7:30 and 7:42. Although the evidence of the defendants indicated that the signals came somewhat later, we may not weigh conflicting evidence or hold as a matter of law that defendant's employees acted promptly after the signals were received. Defendant Garber (service supervisor at the central station) did not call a guard until 7:51 and defendant Bushman called the police at the same time. At 7:49 Garber had called the market and at about 7:50 Mr. Horton got to the phone, knocked it off the hook and called for help. Police officers reached the premises at 7:52, within one minute after receiving a call. Defendant Nead, an ADT guard, lived 9 blocks from the market and arrived there in 5-10 minutes. Defendants Clay and Van Hooser, also ADT guards, arrived just after 8:00. Between 7:30 and 7:50 Nead had been at home in reach of the telephone and the police officers had had their radios on.

[2] Although plaintiff did not have the holdup alarm service, the agreement did authorize defendant to cause the arrest of persons who entered the premises without authority, defendant did call the police and it had, in the past, made a practice of calling the police upon receipt of burglar alarms. In view of these facts, the am-

biguity of the agreement with respect to calling the police, and the repeated signals received, it would have been reasonable to conclude that defendant had that duty. If not, the need to send guards promptly was all the more imperative. Irrespective of a duty to call the police there was a duty to send defendant's representative to the premises "upon receipt of a burglar alarm." Promptness was of the essence of defendant's obligation. The service would be of little value in case of a burglary if defendant's employees do not act at once upon receipt of an alarm. If they assume that the entry is a legal one and take their own time in making an investigation they do so at defendant's peril. Their tactics, as related above, could reasonably be classed as an omission to render the agreed service, and consequently, a failure of performance. This is true with respect to their delay in sending a representative to plaintiff's premises as well as to delay in notifying the police.

[3-5] With respect to the question of proximate cause it is to be kept in mind that the breach alleged was the failure to take prompt measures which might have prevented a burglary that was under way. Defendant contends that there is no way of knowing whether the burglary could have been prevented, and that any attempt to determine this question would involve speculation and guesswork. Cases are cited from other jurisdictions in which it was held that the burglaries were not the proximate result of the failure of alarm systems to register signals, and that it was purely speculative whether if alarms had been given the burglaries could have been prevented. This is a question that cannot be answered without regard to the facts in evidence in the particular case. In the present case the probabilities were to be weighed in the light of common experience in such matters and presented a triable issue of fact. The questions of fact were whether it could reasonably have been foreseen that the burglar would be successful unless defendant responded promptly to the alarms by sending a representative and notifying the police, and whether it was probable that by acting promptly defendant

could have prevented the loss. Such questions are for the trier of fact. *Gibson v. Garcia*, 96 Cal.App.2d 681, 687, 216 P.2d 119; *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 218 P.2d 17. If these questions are answered in the affirmative the loss would be deemed the proximate result of defendant's delay in responding to the alarms. Upon the evidence that was before the court we think it would have been reasonable to conclude that if defendant's employees had used the diligence the circumstances demanded the burglar could have been intercepted and the theft could have been prevented. It would seem that the parties believed that defendant's service would prevent burglaries, at least under some circumstances. Here there was but one individual committing the burglary. He was acting deliberately, and there was reason to believe he would have been captured by the police if they had been called to the scene before he left the building. We therefore conclude that there was evidence from which the court would have been warranted in finding that plaintiff's loss was the proximate result of defendant's breach of its contract.

[6] The remaining question is whether there was a valid agreement for liquidated damages. Defendant contends that the concluding provision of the agreement quoted above is merely an agreement for limitation of liability, and cites *American District Telegraph Co. v. Roberts & Son*, 219 Ala. 595, 122 So. 837, 838, as a case exactly in point. In that case a provision for liquidated damages identical with the one in our case, with an exception which does not change the sense of it, was held to be merely a limitation of liability. We are unable to reach the same conclusion. It is true the agreement reads that the liability "shall be *limited to* and fixed at the sum of \$50.00 as liquidated damages, and not as a penalty, and this liability shall be exclusive", but plaintiff's agreement to this limitation is inseparable from defendant's obligation to pay the sum as liquidated damages. Fifty dollars is payable if a loss results by reason of defendant's breach, whether the amount be more or less than fifty dollars. If, there-

fore, this liability is not enforceable, there is no limitation of liability.

[7-10] We believe that the parties entered into a valid contract for the payment of liquidated damages. Under section 1671, Civil Code, such an agreement may be made "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Our statutory law is merely a statement of the principle universally recognized that a valid agreement may be made for the payment of liquidated damages, whereas an agreement for the payment of a penalty is invalid. The question of validity depends upon whether the agreement is for one thing or the other. The distinction between a valid and an invalid agreement is the distinction between an agreement for liquidated damages and one for a penalty. It is almost exclusively a question of the intention of the parties as derived from the agreement, their relations and the surrounding circumstances. *Hanlon Drydock & Shipbuilding Co. v. G. W. McNear, Inc.*, 70 Cal.App. 204, 232 P. 1002; *Wright v. Rodgers*, 198 Cal. 137, 141, 243 P. 866; 25 C.J.S., *Damages*, § 103, page 659; 3 *Williston on Contracts*, sec. 778 at p. 2188 (Rev.Ed. 1936); 1 *Sedgwick on Damages*, sec. 420b (9th Ed. 1913). Section 1671 is in harmony with the rule that the promise to pay money for a breach of an agreement will be regarded as a penalty unless there is great uncertainty or extreme difficulty with respect to forecasting the actual damage that would result from the breach. Section 1671 uses the words "impracticable" and "extremely difficult," but they are not particularly significant inasmuch as the rule, however it may be stated, allows the parties to contract for liquidated damages if it is necessary to do so in order that they may know with reasonable certainty the extent of liability for breach of the agreement. Necessarily, business judgment enters into their negotiations and the limitations which they see fit to agree upon. The agreement here provides that it was impracticable and extremely difficult to fix the damages that might result from defendant's failure to render its service. This



provision is entitled to much weight in ascertaining the intentions of the parties. *Consolidated Lumber Co. v. City of Los Angeles*, 33 Cal.App. 698, 166 P. 385.

[11] Before discussing the facts of the present case we should dispose of plaintiff's contention that the questions of impracticability and extreme difficulty are to be considered as relating to the evidence which is available to prove the extent of the damage after the loss has occurred. It is not contended that the amount of any loss that might be suffered could be measured by any knowledge that the parties had at the time they contracted, or by any conditions that could be foreseen with any degree of certainty. It is claimed that it is immaterial that impracticability or extreme difficulty exist at the time of the agreement, and that there is certainty as to the amount of damage whenever it is susceptible of proof after the injury has occurred. Plaintiff says: "Now how or in what way is it impracticable or extremely difficult for a court to fix the actual damage? It is, of course, easy to do so, the amount of money stolen is the damage. This amount is easily ascertainable either when the contract was entered into or later at the time of the loss. The technique of determining the amount is the same at both times." This is not the rule. It is the ability of the parties, not of the court, to fix actual damage that controls. In determining the question of practicability and extreme difficulty the court should place itself in the position of the parties at the time the contract was made, and should consider the nature of the breaches that might occur and any consequences that were reasonably foreseeable. In *Hanlon Drydock & Shipbuilding Co. v. G. W. McNear, Inc.*, supra, 70 Cal.App. 204, 232 P. 1002, the contention was advanced that a valid agreement cannot be made for liquidated damages unless it is extremely difficult to ascertain the amount of damage after the loss has been suffered. In rejecting this theory the court said, 70 Cal.App. at page 211, 232 P. at page 1005: "If adopted it would practically destroy the power given contracting parties under section 1671 of the Civil Code in any case to make a binding agreement as to stipulated damages, and

would in effect be adding to that code section a proviso, namely, 'provided such impracticability continues up to and exists at the time of the breach.' Appellant's theory is manifestly contrary to authorities of other jurisdictions, notably the federal jurisdiction, it finds no support in the text-books so far as our attention has been called, and if inference may be indulged in, we think the cases of the local jurisdiction clearly indicate that there is no intention to depart from the universal rule established elsewhere." Numerous authorities were cited supporting the general proposition quoted from *City of New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 50 A. 881, 1015: "It is the look forward, and not backward, that we are called upon to take". See also *Kimbrow v. Wells*, 112 Ark. 126, 165 S.W. 645. This proposition is too well settled to admit of further discussion.

[12] The fact that the parties stipulated that fifty dollars was to be paid for each breach of contract as liquidated damages and not as a penalty is not conclusive. *Dyer Bros. Golden West Iron Works v. Central Iron Works*, 182 Cal. 588, 592, 189 P. 445; 25 C.J.S., *Damages*, § 105, page 662. But at the same time, it expresses their judgment and understanding of a situation as to which they had superior knowledge.

[13] It has been said that the question whether it is impracticable or extremely difficult to fix damages is largely one of fact, *Dyer Bros. Golden West Iron Works v. Central Iron Works*, supra, 182 Cal. at page 593, 189 P. 445, also that it is necessary to allege and prove facts from which the court can say as a matter of law that the contract is valid, *Thomas v. Anthony*, 30 Cal.App. 217, 221, 157 P. 823, *McInerney v. Mack*, 34 Cal.App. 153, 157, 166 P. 867. But if the trial court finds that it was impracticable or extremely difficult to fix the damages and it appears from the nature of the detriment that would be suffered that the damages could be fixed without difficulty, a judgment based on the finding will be reversed, *Stark v. Shemada*, 187 Cal. 785, 204 P. 214. Although the question is one upon which a finding is necessary, *Consolidated Lumber Co. v. City of Los Angeles*,



supra, 33 Cal.App. 698, 166 P. 385, it becomes one of law where the facts are not in dispute and the question admits of but a single answer. Such is the present case. When the court places itself in the position of the contracting parties and considers the uncertainty as to what might happen if plaintiff's store should be entered, it will satisfactorily appear that there is no basis whatever for a conclusion that it would have been practicable or reasonably possible for the parties to fix the probable damage. The question, upon the admitted facts, is clearly one of law.

[14] Where impracticability or extreme difficulty appears as a matter of law, and the parties have expressly agreed upon a sum as liquidated damages, it cannot be said that they contracted for a penalty if the sum agreed upon would exceed the loss in some circumstances and fail to equal it in others. Such is the present case.

[15] Defendant was to send a representative to plaintiff's store whenever a signal was received which indicated that a door had been opened or closed while the system was in operation, namely, outside business hours. It was to report all such occurrences to plaintiff. Failure to receive the signals, or to respond to them, or to report, would be a violation of the agreement. Such entrances of the building might be made by persons having authority as well as by burglars or by persons bent upon mischief. They might or might not cause damage. There might be the theft of a ham, or of a truckload of goods, or the contents of a safe. There might be a breaking in for the purpose of theft and no theft. If money was taken it might be a few dollars or many thousands. Books might be tampered with, or papers abstracted. Damage might be caused in many ways that were not foreseeable. By what method could the parties have ascertained at the time of the contract what the nature of an entry might be, or its consequences. And if burglary was anticipated, how could it have been foretold what the loss would probably be. The answer is that what might happen as a result of the failure of defendant's service was a matter of utmost uncertainty. Defendant was furnishing

service and obligating itself to a limited extent to compensate plaintiff for loss due to failure of the service. There was no limitation as to the nature of the loss to which liability would attach, but only as to the amount. But for this limitation defendant would have been in effect an insurer to the extent of plaintiff's losses resulting from failure of defendant to render the agreed service. Even if it had been possible, we think it would have been impracticable and extremely difficult to foretell what would happen on plaintiff's premises while they were without the protection which defendant's service afforded. And even if the nature of the injury could have been foreseen, the extent of the damage could have been determined only after it had been sustained. As said in 70 Cal.App. 204, 215, 232 P. 1002, 1006, supra: "The uncertainty contemplated by the rule is an uncertainty as to the extent and amount, not as to the proper measure of damages. Sedgwick on Damages, p. 769." From the standpoint of defendant it was important that it should know the extent of its liability. For the small annual compensation received it could not, of course, afford to assume heavy responsibility for losses through burglaries or other depredations. On the other hand plaintiff, while entitled to same compensation for defendant's breaches of contract, would have no means of knowing either the nature or the extent of any losses that might result. It could not expect defendant to furnish it with the security which burglary insurance would afford. And in view of the fact that neither party could foresee what the consequence of a breach would be, it was entirely reasonable for them to agree upon the sum of \$50 which would be paid whether defendant's loss for a given breach was greater or less than that amount. We do not see how the court could reject the altogether reasonable agreement of the parties that they were contracting for liquidated damages, and yet it would be necessary to do this in order to construe the agreement as one for a penalty. Not only this, but there would have to be sound reasons for regarding it as a penalty. An indispensable reason would be that the amount provided to be paid bore no reasonable relation to the losses the parties

thought might be sustained. We cannot say this is the case without assuming knowledge on the subject superior to that of the parties. The court can have no such superior knowledge.

We do not find it necessary to analyze the cases relied upon by plaintiff in which agreements claimed to be for liquidated damages were held to be agreements for penalties. A number of those cases were discussed and distinguished in 70 Cal.App. 204, 232 P. 1002, *supra*. It may be observed, however, that in all the cases relied upon by plaintiff, it was within the power of the obligor, by his partial performance, to limit the amount of damages that might result from a breach of his agreement. For illustration, in *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 P. 36, defendant was to pay three cents for every burlap bag he failed to deliver to plaintiff; in *Stark v. Shemada*, 187 Cal. 785, 204 P. 214, the agreement was to deliver furniture for a price; in *Rice v. Schmid*, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589, it was for the sale of flour; in *Robert Marsh & Co., Inc. v. Tremper*, 210 Cal. 572, 292 P. 950, a stipulated sum was to be paid to compensate a broker for his time, trouble and expense in negotiating a sale; in *Eva v. McMahon*, 77 Cal. 467, 19 P. 872, the agreement was to deliver possession of land; in *Sherman v. Gray*, 11 Cal.App. 348, 104 P. 1004, a contractor agreed to pay a stipulated sum if he failed to grade and level earth and make a fill. In each case the parties could foresee the consequence of the obligor's failure to fulfill his agreement and could fairly estimate the amount of the damage. In each case the function of the agreed sum was to insure performance by the obligor. The so-called liquidated damages were therefore properly held to be penalties. The *Hanlon Drydock* case, 70 Cal.App. 204, 232 P. 1002, 1004, *supra*, supports our views with respect to the present contract. The Drydock Company was to pay a sum for each day's delay in repairing a tanker. The agreement was held to be a valid one for liquidated damages upon evidence that at the time the agreement was made "owing to fluctuating rates and unsettled shipping conditions, the value of the use of oil tank-

ers or any other vessels could not be prophesied." The parties made a bona fide attempt to estimate compensation for delay. In the present case the parties had no control over, and could not foresee, what might happen to plaintiff's premises, and it would have been impossible to approximate the possible damage. Furthermore, the fifty dollar sum does not in any way act as a penalty to insure performance of the contract.

We must therefore conclude that the parties agreed upon a price to be paid for defendant's service, well understanding and intending that plaintiff would be compensated in a limited amount for damage sustained through failure of the service without the necessity of proof as to the extent of the damage. It was a proper case for an agreement for liquidated damages.

[16] Plaintiff further contends that its action is for negligence and that the agreement for liquidated damages does not apply to liability for negligence. No authority is cited which supports this position. The second cause of action of the complaint alleged that the failure to send a representative to plaintiff's premises and notify the police promptly was a breach of the agreement. Allegations of the first cause of action were that the same failure was negligence. Damages in both causes were alleged to be the value of the property that was stolen. It thus appears that no breach of duty was alleged other than failure to render the agreed service. Whether this failure was wilful or negligent, it would be a breach of contract and the liquidated damage provision would apply.

[17] As we construe the agreement for liquidated damages it is not enforceable against defendant unless plaintiff suffered a loss as a proximate result of defendant's breach.

[18-22] The order directing entry of judgment for defendant was, in effect, an order directing a verdict for defendant, although it was made after the jury had failed to agree. It must be presumed to have been made upon every ground that would support such an order, under the familiar rule that all intendments are in

favor of the correctness of the judgment, 2 Cal.Jur. p. 864. It will therefore be presumed that the court determined either that defendant did not violate its agreement, or that, if there was a breach, it was not a proximate cause of the loss. These were questions of fact which might have been decided in plaintiff's favor. But if this was error it would not warrant a reversal of the judgment for a retrial. If plaintiff should prevail upon these issues its recovery would be limited to fifty dollars. Defendant has a right to defend upon the issues of breach of contract and proximate cause.

The judgment is reversed, with the qualification that if, within 20 days after filing of the remittitur, defendant files written consent thereto, judgment shall be entered against it for the sum of fifty dollars. No costs of appeal.

PARKER WOOD and VALLÉE, JJ.,  
concur.



110 Cal.App.2d 345

**RUBIN v. DE LAO et al.**  
Civ. 18396, 18397, and 18617.

District Court of Appeal, Second District,  
Division 2, California.

April 9, 1952.

Rehearing Denied April 29, 1952.

Action by Jacob Rubin against David Daniel De Lao and others, for injuries sustained when plaintiff was run down at night by defendant's automobile while crossing street intersection. The Superior Court, Los Angeles County, J. A. Smith, J. (assigned), entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Moore, P. J., whether plaintiff was contributorily negligent in continuing to proceed in cross-walk on presumption that defendant would yield right of way after having seen automobile when it was approximately one-half block away and had seen automobile commence left-hand turn was a question for the trier of facts.

Order and judgment affirmed.

Appeal from first judgment dismissed.

## 1. Judgment ⇨360, 381

Recital in first judgment that findings were waived by defendant was merely a clerical error and court had inherent power, either under its own motion, or on ex parte application, or on notice, to set aside erroneous judgment signed through inadvertence.

## 2. Judgment ⇨306

Where some provision of, or omission from, an order or judgment as rendered is due to inadvertence or mistake of court, it is properly treated as a clerical misprision rather than as a judicial error.

## 3. New Trial ⇨102(7)

Where defendant moved for new trial on ground that he had newly discovered evidence which consisted of pleadings in a suit filed by plaintiff against a third party for injuries allegedly suffered by the plaintiff and complaint in that action alleged damages facts of which substantially duplicated claims made in suit against defendant but defendant did not claim that he had evidence that suit against third party was a fraudulent attempt of plaintiff to collect money from innocent party or that plaintiff's action against him was fraudulent and suit against third party was filed some eight months before trial of action against defendant, motion for new trial was properly denied for failure of defendant to show that by exercise of reasonable diligence he could not have discovered existence of complaint against third party prior to trial. Code Civ.Proc. § 657, subd. 4.

## 4. Automobiles ⇨245(72)

In action by pedestrian for injuries sustained when he was run down at night by defendant's automobile while pedestrian was attempting to cross street intersection in cross-walk, whether pedestrian was contributorily negligent in proceeding forward after having seen automobile when it was approximately one-half block away and had seen automobile commence left-hand turn, was a question for the trier of fact.

## 5. Appeal and Error ⇨1008(1)

Only when reviewing court concludes that reasonable minds could not conscien-



tiously have found to contrary will it interfere with findings of trier of facts.

David G. Kling, Los Angeles, for appellant.

Melvin Simon and Richard G. Rattner, Los Angeles, for respondent.

MOORE, Presiding Justice.

Here is the record of an unfortunate episode in the life of Jacob Rubin. He was a pedestrian, 52 years of age at 9:15 p. m. on March 2, 1949. While in the act of crossing Alvarado street, a north-south thoroughfare in Los Angeles, he was run down by appellant. The latter, driving westerly on 12th street, came to a stop at Alvarado. It was dark; the streets were paved, wet and sleek. As respondent stood on the southwest corner ready to cross Alvarado to its east side, he observed appellant's car approaching Alvarado at a distance of about a half block to the east. Its headlights were visible over 200 feet away. Giving signal for a left turn, appellant started westward in low gear. When he had almost completed the turn, respondent clad in dark clothes having started easterly with the green light, suddenly loomed before appellant about six feet west of the vehicle. Respondent had not continued to watch the car as he started to make the crossing. He testified he saw it next when it was within two feet of him in the cross-walk. Basing the decision upon its determination of the facts proved, the court, evidently under the misapprehension that findings had been waived, entered judgment in favor of respondent. Appellant made his motion for a new trial. At the time of hearing that motion, appellant insisted that he had not waived findings. The court ordered the motion off calendar and granted respondent's request to vacate the judgment. While appellant was appealing from the first judgment (Appeal No. 18396) and from the order vacating it (Appeal No. 18397) the court prepared and filed its findings that defendant did so negligently operate his automobile as to cause it violently to strike and collide with respondent,

knocking the latter down. Judgment was entered upon such finding awarding damages to respondent. From that judgment comes the instant appeal. (No. 18617.) The second motion for a new trial based upon the second judgment was duly denied.

By these appeals appellant seeks first a reversal of the order setting aside the first judgment. Also, he demands a reversal of the second judgment on three grounds, to wit: (1) the court had no jurisdiction to vacate the first judgment and to order the preparation of findings and entry of the second judgment; (2) error in denying a new trial on the ground of newly discovered evidence; (3) plaintiff's actions constituted contributory negligence as a matter of law.

[1,2] The recital in the first judgment that findings were waived was merely a clerical error. Where some provision of, or omission from, an order or judgment as rendered was due to the inadvertence or mistake of the court it is properly treated as a clerical misprision rather than as a judicial error. *Morgan v. State Board of Equalization*, 89 Cal.App.2d 674, 677, 201 P.2d 859. Accordingly the court has inherent power either on its own motion, or on *ex parte* application, or on notice, to set aside the erroneous judgment signed through inadvertence. In *re Estate of Costa*, 37 Cal.2d 154, 157, 231 P.2d 17; *Morgan v. State Board*, *supra*, 89 Cal.App. 2d at page 677, 201 P.2d 859.

[3] The asserted basis of appellant's motion for a new trial was that he had newly discovered evidence. It consisted of the pleadings in a suit filed by respondent Rubin against Clifton's Cafeteria for damages resulting from personal injuries allegedly suffered by Rubin. The complaint in that action alleged damages which substantially duplicated the claims made in the instant suit against De Lao. Appellant does not claim that he had evidence that the Clifton suit was a fraudulent attempt of respondent to collect money from an innocent party. Neither does he aver that the instant action was fraudulent. But conceding the discovery to have been proof of a vicious attempt by respondent

to abuse the processes of the court for illegal gain the motion was properly denied for the reason that appellant had utterly failed to show that by the exercise of reasonable diligence he could not have discovered the existence of the complaint against Clifton prior to the trial. Code Civ.Proc., sec. 657(4). The Clifton suit was filed on September 10, 1949, some eight months before the trial of the present action. From that fact it is clearly inferable that appellant did not use due diligence or exert himself in the least to ascertain the existence of that record. Searching court records is a popular method of acquainting a litigant with the true character or the evil practices of his adversary.

[4] The third proposition advanced as the basis for a reversal of the judgment is that the evidence of respondent's conduct compels a finding that he was guilty of contributory negligence as a matter of law. Although in the absence of a brief on behalf of respondent we are privileged to accept as true the statement of facts appearing in appellant's brief, Rules on Appeal, rule 17(b), yet the record reveals that respondent's actions do not necessarily indicate negligence on his part. The established facts prove that respondent was struck in a crosswalk by appellant's vehicle while respondent was attempting to cross Alvarado street. Respondent admitted having seen the automobile when it was approximately one-half block east of Alvarado. There was further testimony that respondent stated that he had seen the car commence the left-hand turn, but that he apparently proceeded easterly in the crosswalk on the assumption that appellant would yield the right of way.

[5] While such evidence could have sustained a determination that respondent was negligent in proceeding forward as he did, the reviewing court cannot say that the trier of fact necessarily must as a matter of law have derived such finding. The instances in which it must be held that one is guilty of contributory negligence as a matter of law are extremely rare. Only when we conclude that reasonable minds could not conscientiously have found to the contrary will the re-

viewing court interfere with the findings of the trier of facts. *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826. Inasmuch as reasonable minds would not be required to make a determination contrary to the findings of the trial court, interference with the judgment would not be warranted. See Vehicle Code, § 560(a).

Order and judgment affirmed. Appeal from first judgment (18396) dismissed.

McCOMB and FOX, JJ., concur.



110 Cal.App.2d 73

In re MAGNUSON.

Cr. 2346.

District Court of Appeal, Third District,  
California.

March 26, 1952.

Proceedings to declare a minor a ward of the Juvenile Court. The Superior Court, San Joaquin County, George F. Buck, J., adjudged the minor to be a ward and he appealed. The minor applied to the District Court of Appeal for release on bail pending appeal. The District Court of Appeal, Van Dyke, J., held that the minor was not entitled to bail.

Application for bail denied.

#### 1. Bail ⇨43

##### Infants ⇨16.5

An order adjudging a person to be a ward of the juvenile court is not a conviction of a crime, and proceedings to have such a wardship declared are not criminal proceedings, and hence constitutional provisions relating to bail in connection with offenses and cases where there may be a conviction therefor, and penal code provisions relating to bail, do not apply to such proceedings. Welfare and Institutions Code, §§ 580, 736, 828; Pen. Code, §§ 1271, 1272; Const. art. 1, § 6.

#### 2. Bail ⇨3

The statute providing that pending hearing in the juvenile court the judge may admit person so brought before him to bail.

or may otherwise provide for his temporary custody does not cover an application for bail pending an appeal after an order has been made adjudging a minor to be a ward of the court, but concerns bail pending a hearing. Welfare and Institutions Code, § 828.

### 3. Bail ☞44

The statutory provision for bail pending a hearing when a minor has been certified to juvenile court after accusation of law violations, the absence of any other provisions for bail, and the statutory declaration that an appeal does not stay an order declaring a person to be a ward of the court impel toward the conclusion that the legislature, not being bound in matters of bail in juvenile court wardship matters by constitutional provisions thereon, has intentionally omitted any provision for bail pending an appeal after an order has been made adjudging a minor to be a ward of the court. Welfare and Institutions Code, §§ 580, 736, 828.

### 4. Infants ☞16.12, 16.12

A proceeding to declare a minor a ward of the court is for the benefit and protection of the minor when such protection is needed by the occurrence of causes for wardship, and the result of a declaration of wardship, far from being a conviction of crime, is more in the nature of a guardianship. Welfare and Institutions Code, §§ 580, 736, 828.

### 5. Infants ☞16.12

The control of a ward exercised by the juvenile court and by the persons or agencies in whose immediate custody the ward may be placed is akin to the former parental control for which it is a substitute. Welfare and Institutions Code, §§ 580, 700 (b, m).

### 6. Bail ☞44

Allegations that conditions under which minor was kept endangered his health, welfare and worked a suspension of his regular educational progress and would result in the retarding thereof were not proper grounds for an application for bail pending an appeal after an order had been made adjudging minor to be a ward of the juvenile court, but would have been proper

under statute relating to application for other custody. Welfare and Institutions Code, §§ 550-911, 1737.

### 7. Bail ☞44

#### Infants ☞16.12, 16.14

Statute which provides that after court has committed a person to the Youth Authority such court has no power to suspend execution of the commitment, and that a person convicted and committed to the Youth Authority may be admitted to bail under the Penal Code or in discretion of the court may be left at liberty, and which also provides that commitment to the Youth Authority is a judgment within the Penal Code and is appealable, is not applicable to proceeding to declare a minor a ward of the juvenile court, but relates to the creation of the Youth Authority for the express purpose of protecting society by more effectively substituting for retributive punishment methods of training and treatment directed towards the correction and rehabilitation of young persons found guilty of public offenses. Welfare and Institutions Code, §§ 550-911, 1737; Pen. Code, § 1191 et seq.

---

Chargin & Briscoe, Stockton, Richard Gibson, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Dois H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

As a result of proceedings under the Juvenile Court Law, begun by petition of the probation officer of San Joaquin County, charging that Ronald G. Magnuson, 17 years of age, came within the provisions of subdivisions (b) and (m) of Section 700 of the Welfare and Institutions Code, said minor was, on December 21, 1951, adjudged to be a ward of the juvenile court. It was ordered that he be removed from the custody of his parents and committed to the Youth Authority, which commitment was suspended upon condition that the minor complete a course of schooling in the California Junior Republic. The minor is presently held in the said school. He has appealed from the order adjudging him to



be a ward of the court, and the appeal is pending in this court.

The minor, through his attorney, applied to the juvenile court for an order releasing him on bail pending the appeal, and on February 25th, after a hearing, the application for bail was denied without prejudice to any further application that might be made to the court pursuant to the provisions of Section 580 of said Welfare and Institutions Code. Thereupon said minor applied to this Court to be released on bail pending appeal. An order to show cause was issued and the matter has been argued and submitted for decisions.

[1] An order adjudging a person to be a ward of the juvenile court is not a conviction of crime, sec. 736, Welf. & Inst. Code, and proceedings to have such a wardship declared are not criminal proceedings. It follows that the provisions relating to bail contained in Article I, Section 6, of the California Constitution, and Sections 1271 and 1272 of the Penal Code, do not apply to such proceedings. "Where the provisions of the constitution relate only to offenses, and to cases where there may be a conviction therefor, they do not apply to proceedings under a juvenile court statute which does not relate to offenses or permit a conviction in the ordinary sense of the term." 8 C.J.S., Bail, § 34, p. 53. See, also, cases annotated in 160 A.L.R. 284; 31 Am.Jur., 1951 Supp., p. 68.

[2] Turning to the Juvenile Court Law itself, we find that Section 828 of the code provides that: "Pending hearing in the juvenile court the judge thereof may admit the person so brought before him to bail or may otherwise provide for his temporary custody in any manner provided in this chapter for the care of a ward of the juvenile court." This section concerns bail pending a hearing and does not cover the situation presented here, that is, an application for bail pending appeal after an order has been made adjudging the minor to be a ward of the court.

Section 580 of the code provides for an appeal from an order adjudging a person to be a ward of the juvenile court and from any subsequent order made after judgment,

but specifically provides that "no such order or judgment shall be stayed by such appeal, unless suitable provision is made for the maintenance, care, and custody of such person pending the appeal, and unless such provision is approved by an order of the juvenile court."

[3] The provision for bail pending a hearing when a minor has been certified to the juvenile court after accusation of law violations, Sec. 828, supra, the absence of any other provision for bail, and the declaration that an appeal does not stay an order declaring a person to be a ward of the court, all impel toward the conclusion that the legislature, not herein bound in matters of bail by the constitutional provisions thereon, has intentionally omitted any provision therefor during these proceedings.

[4, 5] These conclusions are fortified by a consideration of the general purposes to be served by proceedings to declare a minor a ward of the court. Such proceedings are for the benefit and protection of the minor when such protection is needed by the occurrence of causes for wardship, as set forth in the pertinent code sections. The result of a declaration of wardship, far from being a conviction of crime, is more in the nature of a guardianship such as is provided for in the Probate Code. To consider that such restraint as the court, acting as guardian of its ward, finds necessary for the protection and benefit of the minor, amounts to imprisonment, is to ignore the beneficent purposes of the law. The control exercised by the court and by the persons or agencies in whose immediate custody the ward may be placed is akin to the former parental control for which it is a substitute. Indeed, it would be surprising to find in this statute provisions for bail.

[6] As grounds for the application for bail, the applicant urges that the conditions under which the minor is being kept endangers his health, his welfare and his morals, works a suspension of his regular educational progress, will result in the retarding thereof, and that the California Junior Republic is not a fit and proper

place for him. If these things be true, then, as the juvenile court judge stated in his order denying bail, application may be made under Section 580 of the code for other custody.

[7] Applicant further contends that the minor is entitled to bail as a matter of right under the provisions of Section 1272, subsection 2, of the Penal Code which states that a defendant who has appealed may be admitted to bail "As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor." The argument is that this section of the Penal Code is made applicable herein by virtue of Sections 1737 and 1739(c) of the Welfare and Institutions Code. These sections provide that "After a court has committed a person to the Authority such court has no power to suspend execution of the commitment"; and that "A person convicted and committed to the Authority may be admitted to bail under the provisions of Section 1272 of the Penal Code, or in the discretion of the court, may be left at liberty, under such conditions as in the court's opinion will insure his cooperation in reasonable expedition of the appellate proceedings and his submission to the control of the Authority at the proper time." Section 1737.5 also provides that a commitment to the Authority is a judgment within the meaning of Chapter 1 of Title 8 of Part 2 of the Penal Code, and is appealable. The argument runs that when the juvenile court ordered the minor to be committed to the Youth Authority and then purported to suspend the commitment the suspension was void, the minor stood committed to the Youth Authority, and therefore may now be admitted to bail under the sections above referred to. These provisions so relied upon are found in that portion of the Welfare and Institutions Code dealing with the creation of the Youth Authority for the expressed purpose of protecting society by more effectively substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation "of young persons found guilty of public offenses". They are not a part of the Juvenile Court Law which is embraced within

Sections 550 to 911, inclusive, of the Code. They have no application to a proceeding to declare a minor a ward of the juvenile court. Indeed, Section 1737, so much relied on by applicant, expressly states: "Nothing in this section shall limit or restrict the jurisdiction and powers of the juvenile court under Section 745 of this code."

The application for bail is denied.

PEEK, J., and SCHOTTKY, J. pro tem., concur.



110 Cal.App.2d 166

**BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. WESTERN UNITED CONSTRUCTORS, Inc., et al.**

**MIGLIETTA et al. v. CHARLAN et al.**  
Civ. 18563.

District Court of Appeal, Second District,  
Division 1, California.

March 31, 1952.

Hearing Denied May 26, 1952.

Action by Bank of America National Trust and Savings Association against Western United Constructors, Inc., and others, wherein Nando Miglietta and Rose Miglietta, defendants, filed a cross-complaint against George E. Charlan and another for fraud. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgments sustaining demurrers, general and special, interposed by the cross-defendants. The District Court of Appeal, Hanson, J. pro tem., held that the oral misrepresentations alleged to have been made by the cross-defendants for their own benefit and not that of a third person to induce a loan of money to such person were not actionable.

Judgments affirmed.

#### **I. Frauds, Statute of §40**

A test for determining whether a misrepresentation is within statute providing that no evidence is admissible to charge a person upon a representation as to credit of third person, unless such rep-

resentation is in writing is whether the representation induced the recipient thereof to enter into a transaction which resulted in a debt due to him from the third person. Code Civ.Proc. § 1974.

## 2. Frauds, Statute of ☞40

If representation as to the credit of a third person induced recipient thereof to enter into a transaction which resulted in a debt due to him from the third person, then any benefit that accrued thereby to person making the fraudulent representation is a false quantity, evidence of which is barred by statute providing that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless such representation is in writing. Code Civ.Proc. § 1974.

## 3. Frauds, Statute of ☞42

Oral representations alleged to have been made by cross-defendants for their own benefit and not that of a third person to induce a loan of money to such third person were not actionable, in view of statute providing that evidence with respect to oral misrepresentations as to the credit of a third person is not admissible and claim that cross-defendants conspired to effectuate their misrepresentations, concealments, and promises added nothing to their want of liability. Code Civ.Proc. § 1974.

## 4. Frauds, Statute of ☞41

Allegation in cross-complaint to the effect that the cross-defendants orally promised to so control and apply funds, once they were provided by the cross-complainants to a construction company, that they would not be diverted contrary to the representations made by the cross-defendants, failed to state an actionable cause of action. Code Civ.Proc. § 1974.

## 5. Conspiracy ☞1

If individually alleged conspirators are not liable, they are not liable individually or collectively by reason of their alleged conspiracy.

Mitchell, Johnson & Bates, and Elbert J. Sheffield, all of Los Angeles, for respondent Charlan.

Anderson, McPharlin, & Conners, Los Angeles, Arthur E. White, Los Angeles, of counsel, for respondent Continental Casualty Co.

HANSON, Justice pro tem.

The decisive question in this case is whether oral misrepresentations alleged to have been made by the cross-defendants for their own benefit and not that of a third person to induce the loan of money to such third person are or are not actionable in view of a statute of this state which provides that evidence with respect to oral misrepresentations as to the credit of a third person are not admissible in evidence.

The trial court sustained demurrers, general and special, interposed by the cross-defendants, who are respondents here, without leave to amend and entered its judgments accordingly.

The second cross-complaint here involved is a blanket indictment against all the cross-defendants named in that it charges each one of them with having made all of the representations alleged notwithstanding it is clear from the language of the cross-complaint taken as a whole that the representations, if in fact made, were made by only one of the cross-defendants. The endeavor, so often made, to charge under oath all persons involved in a group transaction with the self-same offense in order to bring them all to a trial on the merits is becoming altogether too commonplace. We need not elaborate on the point here as it did not succeed in the trial below and likewise is unsuccessful here.

The cross-complaint, stating its allegations most favorably to the pleader and ignoring the numerous conclusions therein, avers that the respondents with intent to defraud made certain oral misrepresentations to the appellants concerning the financial responsibility of a third person—a construction company—and that in reliance thereupon and the promise of the respondents that any moneys provided by appellants would be used by the company

S. L. Kurland, Los Angeles, for appellants.



only for certain purposes the cross-complainants supplied the moneys and sustained a complete loss thereof. It is further averred that the respondents did not intend that the moneys should be used for the purposes represented by them, but instead that it should be used to liquidate the debts and liabilities of the company directly beneficial to the respondents and that this fact was concealed by them from appellants.

Assuming, without deciding, that the cross-complaint states a cause of action for fraud at common law, we are at once confronted with the provisions of Section 1974, Code of Civil Procedure, which reads as follows: "No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged."

The foregoing statute is patterned in part upon Lord Tenterden's Act, 9 Geo. IV, c. 14, sec. 6, which was enacted in England in 1828 to obviate the decision in *Pasley v. Freeman* (1789), 3 T.R. 51, wherein it was held that the existing English Statute of Frauds did not apply to a deceitful misrepresentation concerning the credit of a third person. The English Statute of Frauds as amended by Lord Tenterden's Act expressly makes "misrepresentations as to another person's 'character, conduct, credit, ability or trade or dealings,' \* \* not actionable unless made in writing and signed by the party to be charged." 5 Williston on Contracts, Rev. ed., 1937, sec. 1520A, p. 4257. Less than a dozen states including California have adopted the enactment in whole or in part. In this state and Idaho the Statute by its language is limited to representations as to credit. Williston on Contracts, *supra*.

The cross-complainants seek to detour around the roadblock imposed by this statute by contending that it does not apply, in view of the facts alleged by them which charge that the cross-defendants did not primarily or otherwise seek a credit or moneys for the construction company, but instead sought the advancement of the moneys involved exclusively for their own

selfish purposes. We fail to see that this fact, even if it be true, takes the case out of the statute. To be sure two of the dozen states mentioned, i. e., Michigan and Missouri hold that the statute is not applicable where the parties making the misrepresentation derive a benefit therefrom, but this is not the rule in California. We think it may not be adopted here in view of the language of the statute. To do so would involve judicial legislation. Moreover, to hold that evidence tending to show a willful intent to deceive is admissible would be to limit the application of the statute solely to negligent misrepresentations. The danger of permitting oral evidence to show intentional deceit is that it opens the gate to a finding that the deceit was intentional where in fact it was only negligent. 22 Cal.L.Rev. 358.

In the case before us the representations were made to induce the cross-complainants to lend \$25,000 to the construction company. The purpose was achieved not by a direct loan of cash by the cross-complainants to the construction company evidenced by a note from the latter to the lender, but by the execution of a note by the construction company to a bank which was indorsed or guaranteed by the cross-complainants resulting in a deposit credit to the company on the bank's books which was exhausted by checks drawn on it by the company.

[1-3] A test, if not the sole test, for determining whether a misrepresentation is within the statute is whether the representation induced the recipient thereof to enter into a transaction which resulted in a debt due to him from the third person. If so, then any benefit that accrued thereby to the person making the fraudulent representation is a false quantity—evidence of which is barred by the statute. Cf. *J. Loring in Walker v. Russell*, 186 Mass. 69, 71 N.E. 86.

[4] The allegations to the effect that the cross-defendants promised to so control and apply the funds, once they were provided by the cross-complainants to the construction company, that they would not be diverted contrary to the representations made by the cross-defendants equally fails to state

an actionable cause of action for the reason that it was made orally and not in writing as required by Code of Civil Procedure, sec. 1974.

[5] Necessarily the claim that the cross-defendants conspired to effectuate their misrepresentations, concealments and promises adds nothing to their want of liability. If individually the alleged conspirators are not liable, they are not liable individually or collectively by reason of their alleged conspiracy.

The most recent case, on the question before us, and which supports the conclusion here reached is *Baron v. Lange*, 92 Cal. App.2d 718, 207 P.2d 611, hearing denied by the Supreme Court. As that case cites the controlling cases in this state and discusses many of them, it is unnecessary for us to cover the same ground.

For the foregoing reasons the judgments should be and they are affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 170

**HANSEN v. BERNSTEIN.**

Civ. 18611.

District Court of Appeal, Second District,  
Division 1, California.

March 31, 1952.

E. C. Hansen, assignee of a note, sued Sol Bernstein, maker of the note. The Superior Court, Los Angeles County, Joseph M. Maltby, J., gave judgment for plaintiff after trial without presence of defendant or his counsel, and defendant appealed from judgment, and also from order denying motion to vacate judgment on ground that it was taken through his mistake, inadvertence, surprise and excusable neglect. The District Court of Appeal, White, P. J., held that trial court did not abuse its discretion in denying defendant's motion.

Judgment and order denying motion affirmed.

#### 1. Judgment ⇨143(3)

Sound policy favors determination of actions on the merits and on application for relief from judgment on grounds of mistake, inadvertence, surprise or excusable neglect, any doubts which may exist should be resolved in favor of the applicant. Code Civ.Proc. § 473.

#### 2. Judgment ⇨363

On an application for relief from judgment grounded on mistake, inadvertence, surprise and excusable neglect, trial court's decision must be rooted in sound discretion, based upon fair consideration of the total evidence and grounded upon principles of justice and fair dealing, and the discretion is an impartial discretion guided by fixed legal principles to be exercised in conformity with spirit of the law, and in manner to subserve and not to impede or defeat the ends of substantial justice. Code Civ.Proc. § 473.

#### 3. Appeal and Error ⇨982(2)

Where applications for relief from judgment grounded on mistake, inadvertence, surprise, or excusable neglect are denied, such denials are scanned more carefully by courts of appeal than cases where trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. Code Civ.Proc. § 473.

#### 4. Continuance ⇨51

##### Trial ⇨5

Plaintiff, who diligently prosecutes his suit, is entitled to have trial within reasonable time, and policy that there shall be a disposition of causes on their merits is not served when party, who is without fault, is denied determination of his cause through repeated continuances granted to opposing party.

#### 5. Judgment ⇨143(15)

Where trial was had without presence of hospitalized defendant or his counsel, but defendant, who supported request for relief from judgment with bare assertion that he was only witness who could testify to many material portions of his defense, had had, by continuances, three years to

prepare defense, marshal evidence and take depositions, and was granted last continuance on understanding that if he were ill on date of trial he would waive testimony or present deposition, judgment and order denying motion to vacate judgment on grounds that it was taken against defendant through his mistake, inadvertence, surprise and excusable neglect, were proper. Code Civ.Proc. § 473.

#### 6. Judgment ⇐159

Affidavit, which supported motion for relief from judgment on grounds that it was taken against petitioner because of his mistake, inadvertence, surprise and excusable neglect, but which did not state testimony petitioner would give in contradiction of opponent's evidence and only asserted that he was only witness who could testify to many of material portions of his defense, was not sufficient to support granting of the relief. Code Civ.Proc. § 473.

#### 7. Appeal and Error ⇐948

Appellant who complained of order denying his motion for vacation of judgment on grounds that it was taken against him through his mistake, inadvertence, surprise and excusable neglect, had burden of showing an abuse of discretion by the trial court. Code Civ.Proc. § 473.

---

Harry Brody, Los Angeles, for appellant.

Marshall & Farnham and J. F. Marshall, Long Beach, for respondent.

WHITE, Presiding Justice.

Defendant has appealed from a judgment entered against him for the recovery of money and also from an order denying his motion under section 473 of the Code of Civil Procedure to vacate the judgment on the grounds that it was taken against him through his mistake, inadvertence, surprise and excusable neglect.

The complaint herein, filed in September, 1947, was based upon a promissory note executed and delivered by defendant to one Sophie Lieberman in May, 1943, whereby defendant agreed to pay the sum of \$3,500 at the rate of \$200 per month commencing July 1, 1943. Plaintiff herein

is the assignee of Sophie Lieberman. It was alleged that no part of the money due had been paid except the sum of \$200. The defense set forth in the answer was that the obligation had been fully discharged, in that at the time of the execution of the note defendant also assigned to Mrs. Lieberman a mortgage covering certain real property in New York City pursuant to an oral agreement that the mortgage would be held as collateral security; that Mrs. Lieberman foreclosed the mortgage and took possession of the real property and thereby received "in cash or its equivalent" an amount greatly in excess of her claim. It was further pleaded that the action was barred by the four-year statute of limitations. Code Civ.Proc. § 337. By cross-complaint defendant sought to recover damages from Mrs. Lieberman for her failure to account for the value of the property so acquired by her or the rents, issues and profits thereof.

After many continuances at the request of defendant, the cause came on for trial on January 31, 1951, at which time defendant's then counsel moved for a continuance on the ground that defendant was in the hospital in preparation for an operation to remove a kneecap because of osteomyelitis resulting from an injury received in an automobile accident. The court denied the motion, but because of the condition of the calendar continued the case to February 2, 1951. On this date neither defendant nor his counsel appeared, and upon the evidence offered by plaintiff, the court entered judgment. Thereafter defendant's present counsel filed a notice of motion to set aside the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect, which motion was heard and denied on March 5, 1951.

[1-3] Appellant urges that it was an abuse of discretion to deny his motion, because he was placed in the situation of being unable to attend the trial without fault on his part by reason of a situation which ordinary prudence could not have guarded against. It is true that sound policy favors the determination of actions on the merits and any doubts which may exist should be resolved in favor of the application for re-



lief, *Friedrich v. Roland*, 95 Cal.App.2d 543, 552, 213 P.2d 423; *Brill v. Fox*, 211 Cal. 739, 743, 297 P. 25. The decision of the trial court when relief is sought under section 473, as was said in *Elms v. Elms*, 72 Cal.App.2d 508, 513, 514, 164 P.2d 936, 942, "must be rooted in a sound discretion, based upon a fair consideration of the total evidence and grounded upon principles of justice and fair dealing. It is not a mental discretion but an impartial discretion guided by fixed legal principles 'to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' \* \* \*." Further, it is true that while courts of appeal are reluctant to interfere with the discretion of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. *Brill v. Fox*, *supra*, 211 Cal. at page 743, 297 P. 25. We have examined the record in the light of these rules and are convinced that no abuse of discretion has been shown.

[4] Concededly, on January 31, 1951, the defendant was in the hospital undergoing a serious operation. His physician by affidavit deposed that it was a physical impossibility for the defendant to be present in court for a period of at least six weeks following the operation. But consideration for the misfortune of the defendant must be balanced by a proper consideration for the rights of the plaintiff. A plaintiff who diligently prosecutes his suit is entitled to have a trial within a reasonable time, and the policy that there shall be a disposition of causes on their merits is not served when a party who is without fault is denied a determination of his cause through repeated continuances granted to the opposing party. At some point it must be ruled that the case shall without fail be tried on a day certain. The present cause was at issue on December 9, 1947; it was on the trial calendar on February 9, 1950, March 31, 1950, June 16, 1950, September 26, 1950, and January 31, 1951, and, to quote from the affidavit of plaintiff's counsel,

"plaintiff was ready for trial on each of the above days, and on each occasion the defendant requested a continuance by reason of (a) he desired depositions taken, or (b) he was in ill health; that on each occasion the plaintiff objected to a continuance, upon the grounds (1) that the defendant had had ample opportunity to take the depositions desired; that he had an opportunity to take the deposition of the plaintiff's assignor \* \* \* at the time her deposition was taken on behalf of plaintiff; and (2) that if the defendant desired his own testimony into evidence, and it could not be presented because of illness, that the deposition of the said defendant could, with reasonable diligence, have been procured; that by continuous illnesses the plaintiff would be prevented from ever trying the case, if such was a sufficient ground for innumerable and infinite continuances."

[5, 6] It further appears that when the cause was called on September 26, 1950, the court continued it to January 31, 1951, with the understanding that there would be no further continuances provided the court was in a position to try the case, and that of the state of defendant's health was such that he could not be present at the trial, then he could either waive his testimony, or present his deposition.

The deposition of Sophie Lieberman, plaintiff's assignor, was taken by plaintiff in June, 1949, the defendant not appearing in person or by counsel. In April, 1950, defendant secured an order for the taking of the deposition of Sophie Lieberman and others. This deposition, it appears, was set for November 10, 1950, but it was not taken. Defendant's attorney on January 31, 1951, as part of his grounds for continuance, said he understood that the deposition was to have been taken *the day before*, January 30, 1951. Thus it appears that defendant had three years in which to prepare his defense, marshal his evidence and take depositions. Although warned on September 26, 1951, that the case would go to trial on January 31, 1951, the defendant delayed the taking of depositions on his behalf until the day before the trial date, and no explanation or excuse for the delay is found in the affidavits support-

ing defendant's motion for relief or anywhere in the record.

The showing of a necessity for defendant's presence at the trial was wholly inadequate. Plaintiff's evidence consisted solely of the depositions of Sophie Lieberman and Sim C. Binder, which we have examined, and from which it appears that the security given Mrs. Lieberman was valueless (it was a second mortgage, a fact not mentioned in defendant's pleadings), and in an effort to protect her investment she paid out, in taxes, foreclosure expenses, and on the first mortgage, a sum greater than the value of the property she acquired. All of the charges made by defendant against Mrs. Lieberman in his affirmative defense and cross-complaint were made upon his information and belief. His affidavit does not state what testimony he could give in contradiction of plaintiff's evidence, but only that he "is the only witness who can testify to many of the material portions of his defense." This is insufficient. It is plain from the record that even had defendant been able to attend in court on January 31 or February 2, he was no more prepared for trial at those times than he was at any other time during the previous years of dilatory tactics on his part.

In the case of *Hurley v. Kazantzis*, 82 Cal.App.2d 378, 186 P.2d 434, 435, the denial of a continuance on the ground of unavoidable absence of a party was held not to constitute an abuse of discretion. The language of the court in pointing out the insufficiency of the showing for a continuance is applicable to the situation presented in the instant cause. "The failure of the affidavits in support of the motion to show the testimony, if any, to be expected from defendant or to state any facts tending to support the naked conclusion found in his counsel's affidavit that 'it is impossible to try this matter without the attendance of the defendant', (*Ross v. Thirlwall*, 101 Cal.App. 411, 416, 281 P. 714; *Callegari v. Maurer*, 4 Cal.App.2d 178, 184, 40 P.2d 883; *Capital National Bank v. Smith*, 62 Cal.App.2d 328, 339, 144 P.2d 665), the failure to show any effort to take defendant's deposition or any excuse for not doing so (*Beckman v. Waters*,

161 Cal. 581, 588, 119 P. 922), the want of diligence in delaying the motion for continuance until the morning set for trial and the other facts above recited are sufficient to support the order denying a continuance."

[7] The burden was upon appellant to show an abuse of discretion by the trial court. *White v. Rurup*, 88 Cal.App.2d 692, 694, 199 P.2d 451; *Lynch v. Superior Court*, 150 Cal. 123, 88 P. 708, and this burden he has failed to sustain.

It should be pointed out that counsel who represented defendant on his motion for relief under section 473 of the Code of Civil Procedure and who represents him on appeal is not the counsel who represented defendant prior to and until January 31, 1951.

For the reasons stated, the judgment, and the order denying defendant's motion to set aside the judgment under section 473 of the Code of Civil Procedure are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.



110 Cal.App.2d 221

GRAVES et al. v. SMOLICZ.

Civ. 18663.

District Court of Appeal, Second District,  
Division 1, California.

April 2, 1952.

Rehearing Denied April 21, 1952.

Hearing Denied May 29, 1952.

Robert B. Graves and Clara M. Graves brought action against defendant to enjoin proposed trust deed sale and for cancellation of deed by defendant to plaintiffs, and for cancellation of trust deed and note executed by plaintiffs, on ground of fraud, because the transaction was allegedly a sham and was not intended to create any contractual obligations but was entered into merely to facilitate sale of realty by defendant. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered a judgment for plaintiffs, and defendant appealed. The Dis-

trict Court of Appeal, Doran, J., held that evidence sustained finding that transaction was a sham.

Judgment affirmed.

**1. Evidence** Ⓒ434(7)

In action to enjoin proposed trust deed sale, and for cancellation of deed of realty by defendant to plaintiffs, and for cancellation of trust deed and note executed by plaintiffs, on ground of fraud, because defendant had allegedly induced plaintiffs to enter into the transaction so that defendant could more advantageously sell the realty to third persons, parol evidence rule did not prevent plaintiffs from testifying that the transactions were sham and were never intended to and did not create any contractual obligations.

**2. Evidence** Ⓒ434(1)

The parol evidence rule was designed to prevent rather than to aid fraudulent transactions.

**3. Appeal and Error** Ⓒ1010(1)

Findings and judgment of the trial court must be affirmed on appeal, if there exists substantial evidence in support thereof.

**4. Mortgages** Ⓒ86(3)

In action to enjoin proposed trust deed sale, and for cancellation of deed of realty by defendant to plaintiffs, and for cancellation of trust deed and note executed by plaintiffs, on ground of fraud, because defendant had allegedly induced plaintiffs to enter into the transaction so that defendant could more advantageously sell the realty to third persons, evidence sustained finding that transaction was a mere sham, entitling plaintiffs to judgment.

---

Joseph Friedman, Los Angeles (Newton Kalman, Los Angeles, of counsel), for appellant.

Norman Newmark, Los Angeles, for respondents.

DORAN, Justice.

The present appeal is from a judgment canceling on the ground of fraud, a real estate transaction between the parties

whereby Robert B. Graves and wife, respondents herein, purportedly purchased from the appellant Smolicz certain real estate on Sunset Boulevard in Los Angeles referred to as Parcel II, and adjoining Parcel I owned by respondents.

On July 19, 1949 the parties opened an escrow for the purchase by respondents of Parcel II at a total purchase price of \$107,056.34. The sale was made without a down payment; respondents agreeing to assume a first trust deed in the sum of \$22,056.34 in favor of Harris E. Newton and wife, and executing a purchase money trust deed for \$85,000 to Smolicz, covering Parcel II. Appellant paid all expenses of the escrow.

Previous to the escrow transaction, in 1946, Smolicz had leased the Graves property, Parcel I, completed a building on the front part thereof which was subleased as a restaurant to one Schneider. Smolicz had purchased the adjoining Parcel II in 1945 for \$27,500, changed a residence thereon into an office building, and built a new office building at the front of Parcel II. The rear portion of the Smolicz property and the contiguous part of the Graves Parcel I, were used as parking space by the House of Westmore.

At the time the escrow was opened for respondents' purchase of the Smolicz Parcel II, the Newton trust deed thereon required payment of \$200 per month. The second trust deed to Smolicz required payment by the Graves of \$750 per month. In order to handle these monthly payments, and at Smolicz' suggestion, a bank account was opened at the Bank of America in Graves' name, the bank being instructed to pay from said account the monthly payments totaling \$950. The initial deposit therein of \$956 was made by Smolicz, purportedly representing rental collections made by Smolicz for Graves, in the amount of \$815 plus cash in the sum of \$141. All succeeding deposits were likewise made by appellant in a similar manner. Appellant continued to manage the property for Graves, channeling the rental payments through the account as hereinbefore described.



According to appellant's brief, "The respondents fell behind in their payments to the appellant herein during the months of March and April, 1950, and on April 26, 1950, the appellant caused to be recorded \* \* \* a document referred to herein as 'additional security agreement', dated and acknowledged on July 19, 1949, wherein and whereby respondents transferred to the Title Insurance and Trust Company as trustee, for the benefit of appellant, as beneficiary, respondents' own property, to-wit, Parcel I, as additional security for the above described \$85,000.00 note and trust deed". Respondents deny any knowledge of such "additional security agreement".

On June 14, 1950, appellant caused a Notice of Default to be recorded, seeking a sale of Parcel II, and on June 19, 1950 respondents filed the present action seeking an injunction against the proposed trust deed sale, and praying for cancellation of the deed covering Parcel II and of the \$85,000 trust deed and note on the ground of fraud. Neither the original complaint nor appellant's answer thereto mention the "additional security agreement" covering Graves' Parcel I, and respondents claim not to have had even "the slightest intimation that there was any such thing \* \* \* or that their own property was in any way involved".

The trial was set for October 23, and according to the respondents' brief, in September, 1950, during a conversation between Mr. Newmark and Mr. Friedman, attorneys for respondents and appellant respectively, Mr. Newmark pointed out that in any event, since the instrument in question was a purchase money trust deed, under Section 580b of the Code of Civil Procedure, no deficiency judgment could be obtained. At that time appellant's attorney advised Mr. Newmark of the existence of the "additional security agreement" or trust deed covering the Graves' Parcel I. A photostat of the document was exhibited to the Graves, and it is claimed, "marked the first time they had seen the document".

The "additional security agreement" bore a notarial acknowledgment of July

19, 1949, the notary being the escrow agent and that being the date of the escrow. This document was not, however, a part of the escrow, and was not recorded by appellant until April 26, 1950. There was evidence that the document was not acknowledged on July 19, 1950, but that the notary had later placed such date thereon to correspond with the escrow date. Upon learning of this document, the complaint and answer were duly amended, it being respondents' contention that the instrument was part and parcel of an entire fraudulent transaction. As hereinbefore indicated, the trial court found in favor of respondents.

It is contended in appellant's brief that the judgment should be reversed for the reason that "When the terms of an agreement have been reduced to writing, the parol evidence rule excludes, between the parties to the agreement, extrinsic evidence varying the terms of the writing", and that therefore in this case, "Parol evidence is inadmissible to prove that appellant promised to cancel and rescind all documents executed by respondents in connection with their purchase of Parcel II". Appellant further argues that "There is no substantial evidence, as a matter of law, to support the trial court's finding that the additional security agreement was a forgery"; also, that the trial court refused to grant a new trial upon the grounds of newly discovered evidence, and insufficiency of the evidence.

The appellant's contention regarding the parol evidence rule is predicated upon respondents' allegation that appellant had orally represented that the documents executed would be deemed "nullities and of no force or effect", and that the transaction was entered into with appellant's assurance "that he, the said Smolicz, would at any time 'straighten out' said transaction", although appellant then "intended to take the position, at some time in the future, whenever it would serve his purpose so to do, that said transaction was a *bona fide* transaction".

Cited in support of appellant's position is *Cobbs v. Cobbs*, 53 Cal.App.2d 780, 128 P.2d 373, 374, where, in order to induce

plaintiff to enter into certain contracts, it was alleged that the defendant wife promised "that she would not remarry, that in the event she did so she would cancel both of these agreements and would relieve the plaintiff from the payments called for". Refusing to cancel the agreements, the reviewing court held, in the language of the headnote, that "Parol evidence of fraud to establish the invalidity of a written instrument induced by a promise made without any intention of performing it is only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract, and not in the case of a promise directly at variance with the terms of the instrument".

Respondents' brief answers this argument by calling attention to the fact that the gravamen of respondents' claim and the basis of the findings and judgment "is that there has never been any agreement at all between appellant and respondents for the purchase of the Smolicz property, and that the escrow instructions and all documents executed in connection therewith were sham and were never intended to, and did not create any contractual obligations at all between them". Appellant's promise to "straighten out" the transaction was, say the respondents, "but part of the evidence relied upon to show its sham nature". And, as a part of the entire fraudulent transaction, the so-called "additional security agreement" was found to be a forgery.

[1] Appellant's argument in reference to the parol evidence rule is untenable so far as the present litigation is concerned. The instant case is governed by the rule as stated in *Cooper v. Cooper*, 3 Cal.App.2d 154, 158, 39 P.2d 820, 822, and elsewhere, namely, that "Oral evidence is competent to prove that a purported promissory note or written contract was executed as a mere artifice affecting the relationship or conduct of the parties thereto, and that it was not the intention of the parties that it should become binding upon them. Under such circumstances the reception of oral evidence does not have the effect of varying the terms of the written instrument,

but rather tends to prove the invalidity of the challenged document."

[2] Section 1856 of the Code of Civil Procedure, stating the parol evidence rule, specifically excludes from its operation cases "Where the validity of the agreement is the fact in dispute". Indeed, any other concept would effectively prevent a party from showing fraud, illegality or other facts rendering a written instrument of no legal force. The parol evidence rule would then become an effective aid in the perpetration of fraud; by procuring a victim's signature, the perpetrator would automatically foreclose the interposition of such valid defenses. Such is not the office of the parol evidence rule which, like the statute of frauds, was designed to prevent rather than to aid such nefarious transactions.

[3] The action herein was one for cancellation of all documents relating to the purported sale. The trial court found that the entire transaction was invalid and that the respondents had been fraudulently induced to become parties thereto. Under the well known and usual rule of appellate review, such findings and judgment must be affirmed if there exists substantial evidence in support thereof. Appellant avers that there is no such substantial evidence.

[4] The conflicting claims of the parties required a judicial determination of factual issues as to whether the alleged sale was what it purported to be or a mere sham transaction maneuvered for appellant's benefit, and whether the "additional security agreement" was a valid or spurious document. This situation manifestly required the trial court to pass upon the credibility of parties and witnesses, to resolve sharply conflicting evidence, and to consider and draw reasonable inferences from the surrounding circumstances. That the record discloses substantial evidence in support of the findings and judgment cannot well be doubted.

There was evidence, for example, that in May or June, 1949, Smolicz informed Graves, a retired man, aged about 72 years, that appellant had a prospect for the

sale or trade of the Smolicz lot and that it would be advantageous if the property could be put in Graves' name so that Smolicz could deal with the property as an agent.

The Graves were informed that there would be no expense or liability connected therewith and that Smolicz would continue to manage the property as in the past. Respondents had no previous knowledge of what the purported price would be, the amount of the trust deed, or the rental income. Smolicz made the escrow arrangements, had the papers prepared in advance, and paid all expenses. Appellant likewise fixed the amount of the trust deed at such a large amount as to cause Graves to say, "Well, you certainly made your mortgage large enough. Do you want it that large? What's the idea?" There was evidence that the purported sale price of \$107,056.34 was greatly in excess of the reasonable market value of the Smolicz property which was estimated at \$60,000.

Graves testified to having signed three different papers concerning Smolicz' collection of rentals, etc., of which two were unaccounted for. Respondents kept no copies of the documents but were certain that no "additional security agreement" was ever knowingly executed. This latter document was made up of three pages, and although bearing genuine signatures, was found to be a forgery in the sense that the signatures were procured by "fraud, trick and device".

The fact that the notarial acknowledgment thereon was knowingly false at least in respect to the date, has already been referred to. There was expert testimony that the signature page had been tampered with and bore evidence of alternation; the page had "been typed under two or possibly three typing operations"; erasures had been made and there had apparently been an attempt to make the document look as if it had been prepared in one typing operation.

It is claimed by appellant that the evidence of fraud was "shadowy", and that the expert testimony of Clark Sellers, hereinbefore referred to, "represents no more than shadow-boxing with the addi-

tional security agreement"; that consequently the findings of fraud are unsupported. This argument is untenable, and as hereinbefore indicated, the evidence before the trial court and legitimate inferences therefrom, substantially support the findings. That the record discloses contrary and conflicting evidence does not change the situation.

The judgment is affirmed, and the attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 249

ROTH et al. v. MARSTON.

Civ. 18632.

District Court of Appeal, Second District,  
Division 3, California.

April 4, 1952.

Hearing Denied May 29, 1952.

Action by plaintiffs against defendant. From an order of the Superior Court of Ventura County, Charles F. Blackstone, J., granting a new trial after judgment entered on a verdict for defendant, plaintiffs appealed. The District Court of Appeal, Vallée, J., held that where plaintiffs' motion for new trial was granted on ground that evidence was insufficient to sustain the verdict but clerk failed to so specify in entering the order in the minutes the error could only have been corrected by nunc pro tunc order made and entered within ten days after motion was granted and nunc pro tunc order entered after the expiration of ten days was a nullity and the order which did not specify insufficient evidence as a ground for granting a new trial stood as the order of the court.

Order reversed.

I. Appeal and Error 440

Courts 116(1)

In absence of a statutory limitation a court not only has inherent power, but it is its plain duty, to remedy clerical errors, and



ordinarily neither power nor duty is abrogated or suspended by pendency of an appeal, nor are they lost through lapse of time.

## 2. Appeal and Error ◊662(2)

Recital in nunc pro tunc order that court had granted motion for new trial on ground that evidence was insufficient to sustain verdict or decision for defendants and that court had directed entry of its order on that specific ground was controlling as to the facts. Code Civ.Proc. § 657.

## 3. New Trial ◊163(1)

Under statute providing that when a new trial is granted, on all or part of issues, on ground of insufficiency of evidence to sustain verdict or decision, orders shall so specify that in writing and shall be filed with clerk within ten days after motion is granted, otherwise, on appeal from such order it will be conclusively presumed that order was not based on that ground, order granting new trial on ground of insufficiency of evidence must be placed of record with clerk within ten-day period, and if it is not done, order may not be corrected nunc pro tunc after ten-day period has elapsed. Code Civ.Proc. § 657.

## 4. Appeal and Error ◊933(4)

### New Trial ◊163(1)

Where plaintiffs' motion for new trial was granted on ground that evidence was insufficient to sustain a verdict for defendant but clerk failed to so specify in entering order in the minutes, error could not be corrected by nunc pro tunc order made and entered more than ten days after motion was granted and nunc pro tunc order was therefore a nullity, and as original order which did not specify insufficiency of evidence stood as order of court it was conclusively presumed that grant of new trial was not based on that ground, and as it was not suggested that there was any other error which would justify new trial order would be reversed. Code Civ.Proc. § 657.

James C. Hollingsworth and Edward Henderson, Ventura, for respondents.

VALLÉE, Justice.

Appeal from an order granting a new trial after judgment entered on a verdict for defendant.

The notice of intention to move for a new trial named as grounds of the motion all of the causes specified in section 657 of the Code of Civil Procedure except excessive damages. There is no contention here, however, that any cause was well taken except the insufficiency of the evidence to sustain the verdict.

On January 19, 1951, plaintiff's motion for a new trial was granted. In granting the motion the court orally stated it was granted "upon the ground of the insufficiency of the evidence to sustain the verdict," and directed the clerk to enter the order as made in the minutes of the court. Instead of entering the order as directed, the clerk, on the same day, entered the following order in the minutes: "Orders that said motion be, and the same is hereby granted." On March 5, 1951, defendant filed a notice of appeal from the order.

On March 15, 1951, the court made a "nunc pro tunc order granting motion for new trial and correcting order heretofore made granting new trial," in which it recited: "the said Court did, on the 19th day of January, 1951, make its order granting plaintiffs' motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict of the jury and the judgment entered thereon, and the Court did thereupon further direct that the Clerk of said Court enter said order so made by the Court upon the minutes of the above entitled Court. \* \* \* through clerical error, inadvertence, oversight, and neglect on the part of said Clerk the said Clerk failed to specify and include in said order granting plaintiffs' motion for a new trial, that the same was made upon the ground of the insufficiency of the evidence to sustain the verdict of the jury and the judgment entered thereon"; and ordered that the order as entered by the clerk on January 19, 1951, "be corrected to conform to

---

Parker, Stanbury, Reese & McGee and White McGee, Jr., Los Angeles, for appellant.

the order of the Court actually made and announced in open Court on the 19th day of January, 1951, granting plaintiffs' motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict of the jury and the judgment entered thereon, and the Clerk of said Court is ordered and directed to enter upon the minutes of said Court so as to conform to the order actually made by said Court on the 19th day of January, 1951, the following order \* \* \* 'Orders that said motion be and the same is hereby granted upon the ground of the insufficiency of the evidence to sustain the verdict of the jury and the judgment entered thereon.' And It Is Further Ordered that said corrected order be entered *nunc pro tunc* upon the minutes of said Court as of the 19th day of January, 1951." Whereupon the clerk entered the corrected order in the minutes *nunc pro tunc* as of January 19, 1951.

Code of Civil Procedure, section 657, provides: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground." A written minute entry is compliance with the requirement that an order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict "shall so specify this in writing" and be filed with the clerk. *Dempsey v. Market Street Ry. Co.*, 23 Cal.2d 110, 114-116, 142 P.2d 929, 930.

The only assignment of error is that because the original order as entered in the minutes did not specify the insufficiency of the evidence, and the *nunc pro tunc* order was made more than ten days after the motion was granted, the latter order is a nullity; that it must be conclusively presumed the original order was not based on the ground of the insufficiency of the evidence; and as it is not sustainable on any other ground it must be reversed.

[1] This is a case where the order, as entered by the clerk, is not the order made by the court—clearly a clerical error. *Lauchere v. Lambert*, 210 Cal. 274, 277, 291 P. 412; 14 Cal.Jur. 995, § 72. In the absence of statutory limitation a court not only has the inherent power, but it is its plain duty, to remedy clerical errors. Ordinarily neither the power nor the duty is abrogated or suspended by the pendency of an appeal, nor are they lost through lapse of time. *Boylan v. Marine*, 104 Cal. App.2d 321-322, 231 P.2d 92.

[2] The provision of section 657 that an order granting a new trial on the ground of the insufficiency of the evidence "shall be filed with the clerk within ten days after the motion is granted", was added in 1939. Stat. 1939, p. 2234. Prior to that time, a court had undoubted power to make a *nunc pro tunc* order correcting its minutes with respect to a former order granting a new trial, even though an appeal had been taken therefrom, by showing the motion was granted on the ground of the insufficiency of the evidence and the order had in fact been made on that ground but the clerk had inadvertently omitted from the former order the specification that the motion was granted for that cause. The recital in the *nunc pro tunc* order that the court had granted the motion on the ground the evidence was insufficient to sustain the verdict or decision and had directed the entry of its order on that specific ground, was controlling as to the facts. *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412; *In re Estate of Hultin*, 29 Cal.2d 825, 829-830, 178 P.2d 756.

Defendant-appellant argues that the power of the court to correct clerical errors by a *nunc pro tunc* order is limited by the provision of section 657 that an order granting a new trial on the ground of the insufficiency of the evidence "shall be filed with the clerk within ten days after the motion is granted". He relies on *Thomas v. Driscoll*, 42 Cal.App.2d 23, 108 P.2d 43; *Cox v. Tyrone Power Enterprises*, 49 Cal. App.2d 383, 121 P.2d 829; *Whitley v. Superior Court*, 18 Cal.2d 75, 113 P.2d 449; *Dempsey v. Market Street Ry. Co.*, 23 Cal. 2d 110, 142 P.2d 929, and *Gursey v. Camp-*

us Camera Shop, Inc., 98 Cal.App.2d 257, 219 P.2d 884, in support of his contention.

In *Thomas v. Driscoll*, 42 Cal.App.2d 23, 108 P.2d 43, the order granting a new trial was entered in the minutes within ten days after the order was made, but it did not specify the insufficiency of the evidence. More than ten days after the new trial was granted the court entered an order *nunc pro tunc* in which it stated that the former order was inadvertently entered by the clerk, and ordered it corrected to show it was granted on the ground of the insufficiency of the evidence. The reviewing court held that section 657, as amended in 1939, requires an order in writing other than a minute entry by the clerk. (The holding in this respect was overruled in *Dempsey v. Market Street Ry. Co.*, 23 Cal. 2d 110, 142 P.2d 929.) It was also held that the order must be "filed" within ten days and that, 42 Cal.App.2d at page 27, 108 P.2d at page 45: "[t]he contention that the court did not abuse its discretion by making the second order is beside the point. The amendment operates to deprive the court of discretion after the ten days have expired. If the court could make a *nunc pro tunc* order in cases where the grounds are the insufficiency of the evidence five months after the granting of the motion for a new trial, it would thereby effectively abrogate the statute which emphatically proscribes such an order after the lapse of the time designated. \* \* \* In making the second order, the court did more than abuse its discretion; it exceeded its jurisdiction. To hold otherwise were to override legislative authority exercised within its constitutional province." The holding of the *Thomas* case that the order specifying the insufficiency of the evidence must be placed of record with the clerk within the ten-day period has not been questioned in any later decision.

In *Cox v. Tyrone Power Enterprises*, 49 Cal.App.2d 383, 121 P.2d 829, 833, the only cause stated in the notice of intention to move for a new trial was the insufficiency of the evidence. The order granting the motion was entered by the clerk in the minutes on the day the ruling was pronounced. It said the order was granted

upon "the grounds of inadequate damages". This court held that the statement in the order, construed with the motion, constituted a specification that the legal ground was the insufficiency of the evidence. After reviewing the history of section 657, it was said, 49 Cal.App.2d at page 393, 121 P.2d at page 835: "No court or seasoned member of the legal profession will doubt that the purpose of the legislature in enacting the above quoted amendments of 1939 \* \* \* was to set up, in effect, a *statute of limitation* on the time within which a trial court can, either by original action or by *nunc pro tunc* order, specify *insufficiency of the evidence* as a ground for an order granting a new trial. The time within which a notice of intention to move for new trial may be filed is limited (Code Civ.Proc., sec. 659) as is the time within which the motion must be passed upon by the court (Code Civ.Proc., sec. 660), and it seems entirely logical, particularly in view of the broad discretion vested in the trial judge in passing on motions based upon insufficiency of the evidence, that there be a limitation on the time, after actual granting of the motion, within which the fact that this particular ground is a basis for the order, if such be the truth, actually shall be made a matter of record 'in writing \* \* \* filed with the clerk.'"

"It may be inferred with confidence that the legislature, in order to accomplish its purpose, deemed it necessary to require both that the ground be specified in writing and placed of record with the clerk within the limited period because it could be contemplated that records inevitably would appear before courts of appeal, declaring, by virtue of *nunc pro tunc* action subsequent to the ten-day period, that the trial court's records as originally inscribed failed to specify the mooted ground only through inadvertence, it having been truly a basis of the order (sustainable on no other ground)—and without the dual requirement, certainly such *nunc pro tunc* order, under a long line of cases, would prevail."

In *Whitley v. Superior Court*, 18 Cal.2d 75, 78, 113 P.2d 449, 452, it was said: "The



fact that the legislature in 1939 amended section 657, subdivision 7, so as to impose a ten-day limitation for filing such order for new trial, where no time restriction existed at all prior to this recent enactment, demonstrates the legislature's intent to change the pre-existing law, and it must be presumed that it was intended to change the statute in all the particulars where there is a material change in the language of the amended provision. \* \* \* Manifestly, if this new requirement is not construed as mandatory, the rule regarding the filing of such order will remain the same as it was before the enactment of the amendment, which interpretation would render the amendment nugatory.

"Another circumstance to be noted in our consideration of the intended character of this statutory language is the fact that a penalty is attached to a failure to act in time. \* \* \* When the time within which the judicial act must be done is jurisdictional, the court cannot circumvent the clear mandate of the statute by filing an order *nunc pro tunc*. In such a circumstance, it is immaterial whether the default be that of the court or of the litigant. Analogous to the instant case is the situation discussed in *Kraft v. Lamp-ton*, 13 Cal.App.2d 596, 57 P.2d 171, where in the trial court failed to make its order granting a new trial within the sixty days allowed by the statute (Code Civ.Proc., sec. 660), and it was held that the court, chargeable with such jurisdictional default, cannot accomplish by an order *nunc pro tunc* what it is prohibited from doing otherwise.

"We are not here concerned with a mere error of record, but with a failure to comply with a jurisdictional requirement. \* \* \* The above considerations impel the conclusion that the legislature by its amendment to section 657, Code of Civil Procedure, subdivision 7, intended to make it mandatory that a written order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict or decision be filed within ten days after the motion is granted or not at all, and that this time limitation applies to *nunc pro tunc* orders as well as to or-

iginal orders made pursuant to this statutory provision."

The *Whitley* case also held that a minute order made within the ten-day period specifying the insufficiency of the evidence is not the "writing" required by section 657. The holding, in that respect, was overruled in *Dempsey v. Market Street Ry. Co.*, 23 Cal.2d 110, 142 P.2d 929. However, what was said with respect to the requirement that the order must be made a matter of record with the clerk within the ten-day period has not been affected by anything said in any later case.

In *Dempsey v. Market Street Ry. Co.*, supra, the order was entered in the minutes within the time prescribed by law and specified the cause insufficiency of the evidence to sustain the verdict. The precise question before the court was whether "there must be a formal order written, signed and filed, as distinguished from a mere written entry in the minutes, when the motion is granted on the ground of insufficiency of the evidence". It was held that a written entry in the minutes specifying the insufficiency of the evidence constitutes compliance with the statute. In so construing section 657 the court declared, 23 Cal.2d at page 115, 142 P.2d at page 931: "The provision of section 657 that the order shall specify the ground of insufficiency of the evidence 'in writing and shall be filed with the clerk within ten days,' indicates an intent that the ground shall be specified in some unmistakable way and placed of record in writing within the ten-day period. The only essential change in procedure is the requirement that the ground be stated and recorded within the prescribed time limit. \* \* \* The amendments were undoubtedly adopted first, to stop the prior practice by appellate courts of assuming that insufficiency of the evidence was the ground for the order, except where that ground was not stated in the motion or was excluded by the order, and second, to place a limit on the time within which the record may be corrected by a *nunc pro tunc* order." (Italics added.)

[3] While it may be true, as argued by plaintiffs, that what was said in *Thomas v.*

Driscoll, 42 Cal.App.2d 23, 108 P.2d 43; Cox v. Tyrone Power Enterprises, 49 Cal. App.2d 383, 121 P.2d 829; Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, and Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 142 P.2d 929, to the effect that (1) an order specifying the insufficiency of the evidence must be placed of record with the clerk within the ten-day period, and (2) an order which does not so specify may not be corrected after the ten days have elapsed, was not strictly necessary to the decisions in those cases, we think they correctly state the consequences of the amendment of 1939. The *dictum* of a court is not always and at all times to be discarded. A correct principle of law may be announced in a given case, although it may not be necessary to there apply it, because of other principles on which the case may be decided. The courts, in the cited cases, recognized that the correct construction of section 657, as amended in 1939, is that an order granting a new trial on the ground of the insufficiency of the evidence must be placed of record with the clerk within the ten-day period, and if it is not done the order made may not be corrected *nunc pro tunc* after the ten-day period has elapsed. This construction loses none of its force as such because it was not applied in those cases.

Furthermore, what was said on the point in Gurse v. Campus Camera Shop, Inc., 98 Cal.App.2d 257, 219 P.2d 884, 886, was not *obiter dicta*. In that case a minute order reading, "Motion for a new trial is granted", was made and entered on September 15, 1949. Seven days later a notice of appeal from the order was filed. "On November 29 an order was filed by the trial court granting *nunc pro tunc* the motion for a 'new trial on all issues, and upon the ground of the insufficiency of the evidence to justify the decision and that it is against law.' In making such order the court stated that a clerical error had been made in the prior minute order when the grounds had been inadvertently omitted." Examination of the record shows that the court at the time it granted the motion "announced" it was granted on "the ground of the insufficiency of the evidence

to justify the decision". The court held, 98 Cal.App.2d at page 261, 219 P.2d at page 886: "While much of the Whitley decision [Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449] has been overruled, still it involved an order which was not made in pursuance of any of the prescribed methods defined by the Code of Civil Procedure, Howard v. Superior Court, 25 Cal.2d 784, 789, 154 P.2d 849, and its pronouncement has not been modified wherein it held that 'the legislature \* \* \* intended to make it mandatory that a written order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict or decision be filed within ten days \* \* \* or not at all, and that this \* \* \* limitation applies to *nunc pro tunc* orders as well as to original orders.' As to the Thomas case [Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43], without regard to the manner in which the motion to correct the order, *nunc pro tunc*, reached the court, the holding of that decision has not been altered by the shifting scenes on the judicial stage. It was there definitely determined that a court cannot make a *nunc pro tunc* order, in cases where the grounds are the insufficiency of the evidence, after the lapse of 10 days following the granting of the motion for a new trial. That holding was emphasized by Cox v. Tyrone Power Enterprises [49 Cal.App.2d 383, 121 P.2d 829] in a sweeping decision."

[4] There can be no doubt that the 1939 amendment of section 657, as construed in the foregoing cases, curtails the inherent power of the court to correct a clerical error in a minute entry granting a motion for a new trial. If the court, in fact, grants the motion on the ground of the insufficiency of the evidence, and that ground is not specified in a minute order, or in a formal written order, the error can only be corrected by a *nunc pro tunc* order made and entered within ten days after the motion is granted. The *nunc pro tunc* order of March 15, 1951, was, therefore, a nullity, of no force or effect; and the order of January 19, 1951, which did not specify the insufficiency of the evidence, stands as the order of the court.

The contention of plaintiffs-respondents that if section 657 is construed to require that an order specifying insufficiency of the evidence be placed of record within the ten-day period, it is unconstitutional, is answered by *Whitley v. Superior Court*, 18 Cal.2d 75, 81-82, 113 P.2d 449.

Since the order of January 19, 1951, did not specify that the motion was granted on the ground of the insufficiency of the evidence to sustain the verdict, it is conclusively presumed it was not based on that ground. In the present case it is not suggested that there is any error which would justify a new trial, with the exception of the insufficiency of the evidence. The order must, therefore, be reversed.

The order of January 19, 1951, is reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



110 Cal.App.2d 210

**CORRIE v. CONTRA COSTA COUNTY et al.**

Civ. 14913.

District Court of Appeal, First District,  
Division 2, California.

April 2, 1952.

J. B. Corrie, a taxpayer, sued the County of Contra Costa and others to have the statute providing for an alternative method of distribution of property tax levies and collections and tax sale proceeds declared void as unconstitutional. From a judgment of the Superior Court in and for the County of Contra Costa, Hugh H. Donovan, J., for defendants, plaintiff appealed. The District Court of Appeal, Goodell, J., held that the statute does not violate the constitutional provisions against lending a county's credit to other political subdivisions or incurring indebtedness or liability exceeding county's annual revenue without assent of two-thirds of its qualified electors.

Judgment affirmed.

### 1. Counties ⇨195

The Constitution does not prohibit apportionment of amount of taxes extended on county tax roll to credit of funds for which tax levies are included on county auditor's and treasurer's account before tax collections start. Revenue and Taxation Code, § 4705.

### 2. Counties ⇨153½

The statute, providing that moneys designated by County Board of Supervisors as available to be drawn from county treasury to extent of amount of uncollected taxes credited to each fund for which tax levy is included on tax roll may be drawn against in amount not exceeding amount of such taxes credited to each fund in same manner as if such amount had been collected, does not violate constitutional provision against lending county's credit to other political subdivisions, as such plan does not contemplate loans, but partial payments or advances on account of shares of tax money already allocated to such subdivisions. Revenue and Taxation Code, § 4705; Const. art. 4, § 31.

### 3. Counties ⇨150(1)

The statute, providing that moneys designated by County Board of Supervisors as available to be drawn from county treasury to extent of amount of uncollected taxes credited to each fund for which tax levy is included in tax roll may be drawn against in amount not exceeding amount of such taxes credited to each fund in same manner as if such amount had been collected, does not violate constitutional provision that no county shall incur indebtedness or liability exceeding its annual revenue without assent of two-thirds of qualified electors thereof. Revenue and Taxation Code, § 4705; Const. art. 11, § 18.

### 4. Counties ⇨195

A resolution, adopted by County Board of Supervisors almost six months before first day of county's next fiscal year, to place in effect statutory alternative method of distributing amounts of tax levies, collections and sale proceeds, was not void as premature because statute provides for adoption of such resolution not later than July 15th of fiscal year, in absence of pro-



vision therein as to how much earlier than such date resolution may be adopted. Revenue and Taxation Code, § 4702.

A. F. Bray, Jr., Martinez, for appellant.

Francis W. Collins, Dist. Atty., Charles L. Hemmings, Deputy Dist. Atty., Martinez, for respondents.

GOODELL, Justice.

The 1949 legislature enacted the "Alternative Method of Distribution of Tax Levies and Collections and of Tax Sale Proceeds." Stats.1949, ch. 1370, p. 2386; §§ 4701-4716, Revenue and Taxation Code. Its purpose as § 4701 declares is "to provide an alternative procedure for the distribution of property tax levies on the secured roll made by counties on their own behalf or as the tax-levying and tax-collecting agency for other political subdivisions" and "to accomplish a simplification of the tax-levying and tax-apportioning process and an increased flexibility in the use of available cash resources."

The Board of Supervisors of Contra Costa County by resolution declared its intention to adopt the new system whereupon appellant commenced this taxpayer's suit, contending that the new law is in conflict with § 31 of article IV and § 18 of article XI of the constitution, and therefore void. The court held otherwise and this appeal was taken.

Section 31 of article IV provides: "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county \* \* \* or other political corporation or subdivision of the State \* \* \* in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; \* \* \*."

Appellant contends that the new system conflicts with § 31 since it "allows a credit to a political subdivision of the full amount of its tax assessments" and permits such

subdivision "to expend the amount of the assessments before any such taxes are collected." Appellant says by way of illustration: "Thus a political body, such as a school district, is given full credit before any tax is actually collected, and such body will draw on and receive county moneys before they are actually collected from taxes."

The principal legal question is whether such action runs counter to the constitution, and the principal practical question is whether there is any more danger of loss to the county and its taxpayers under the new system than under the old.

"All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied", § 2192, Rev. & Tax. Code, and "Every lien \* \* \* has the effect of an execution duly levied against the property subject to the lien". § 2193, Id.

After the Board of Supervisors fixes the tax rate, § 2151, Id., it becomes the duty of the Auditor to compute "in dollars and cents", and to otherwise make up, the tax roll, § 2152, Id. This completion of the tax roll occurs about the end of August. Thus there comes into existence a complete showing of all taxes collectible for the current year, which are then a lien against all the property in the county subject to taxation.

[1] Section 4705, Rev. & Tax. Code, one of the new sections, reads in part as follows: "Upon completion of the tax roll as prescribed by Section 2152 of this code the county auditor shall determine the total amount of taxes actually extended thereon for each fund for which a tax levy has been included. The amount so determined for each fund shall forthwith be apportioned to the credit of such funds on the accounts of the county auditor and county treasurer and the total thereof shall be entered on the accounts of both officers as a charge to the tax resources account 'tax collector—un-collected current taxes.'"

Under the old system there is no such apportionment until the taxes are actually collected, but there is nothing in the constitution prohibiting such action (which after all is simply a matter of bookkeeping

entries) even though it occurs several months before collections start in November. However, § 4705 goes on to say that "The board of supervisors shall provide which moneys in the county treasury \* \* \* shall be available to be drawn on to the extent of the amount of uncollected taxes credited to each fund for which a tax levy has been included, and *such moneys may thereafter be drawn against* in an amount not to exceed the amount of uncollected taxes credited to each fund for which a tax levy has been included *in the same manner as if the amount credited had been collected.*" (Emphasis added.)

This means that such advances may be made to the districts and political subdivisions in September, some weeks before the tax money starts to come in.

The immediate and pressing financial needs and requirements of many of the political subdivisions or revenue districts cannot wait upon the actual collection of taxes starting in November and running into April. School districts, where the monthly payrolls of teachers must be met, are a good example.

There is nothing new about this problem. The constitution itself recognizes it, § 31, art. IV, *supra*, and § 3719, Political Code, provides one method of meeting it. However, respondents do not claim that the new sections derive their authority from § 31 of article IV. They stand on the proposition that under the new system "There is no lending of credit as the County has given nothing to the political subdivisions which is not rightly theirs. The uncollected taxes are assets of the County as well as of its political subdivisions \* \* \*" and respondents cite *County of Los Angeles v. Payne*, 8 Cal.2d 563, 577, 66 P.2d 658, where the court quotes approvingly from *State ex rel. Barton v. Hopkins*, 14 Wash. 59, 44 P. 134, 135, as follows: "Those [taxes] of the current year have been by the courts treated as a part of the cash assets of the county, for the reason that, in legal contemplation, their collection is certain \* \* \*. The legal certainty grows out of the fact that the law presumes that the tax assessed upon property will be paid, for the reason that the property is

liable for the tax, and can be sold if the tax is not paid. If this legal presumption is warranted as to taxes when they are assessed, there is no reason why such presumption should not continue until the property has been sold for the purpose of realizing the amount of the taxes assessed against it."

[2] The constitution, § 31, art. IV, says that "The Legislature shall have no power to \* \* \* authorize the giving or lending, of the credit of \* \* \* any county \* \* \*" and appellant argues that under the new system "the county lends money to the political subdivision and may or may not thereafter receive that amount back in taxes actually collected."

In our opinion the new system does not violate this provision against "lending" the credit of the county. A "loan" connotes an obligation to repay, but such is not the plan under this new system. It is rather a partial payment or advance on account of the share of tax money already allocated to the political subdivision which ultimately will go to such subdivision to meet its annual budget requirements. The deputy Auditor characterized the transaction as an advance, whereupon the court said "But they have the assets to back up that advance, don't they? \* \* \* They have it assured; its prime security \* \* \*." The deputy testified also that in accounting practice uncollected taxes are treated as cash assets.

With respect to appellant's apprehension that the county might not get back the amount so advanced, the deputy Auditor testified that the rate of tax delinquency in Contra Costa County is less than 2%—approximately 1.6%, and the Auditor testified that since 1942-3 the delinquencies have run under 2% annually; that in 1948-9 they were around 1.8% and in 1949-50 around 1.7%; that in 1932-3, the worst year of the depression, they ran 6½ or 7%; and that immediately after the close of any year there are a lot of collections of delinquencies and by the end of the succeeding fiscal year the delinquencies became reduced by about 50%. But as pointed out in the *Payne* case, the provisions for the sale and redemption of the taxpayer's property supply ample

assurance that however long-drawn-out the process may be, the county will ultimately recover every cent of taxes advanced to political subdivisions under the new system.

We have already referred to that part of § 31 of article IV which deals with interim or emergency financing. It declares it to be the duty of the county treasurer "to make such temporary transfers from the funds in his custody as may be necessary to provide funds for meeting the obligations incurred for maintenance purposes by any city, county, city and county, district, or other political subdivision whose funds are in his custody and are paid out solely through his office."

Under the old system these temporary transfers are taken care of, as respondents point out, (a) by drafts (known in municipal accounting parlance as warrants) which are registered by the county treasurer and bear interest at 5% until the fund has resources wherewith to meet them, (b) by tax anticipation warrants, and (c) by borrowing, through the Board of Supervisors, from surplus county funds, if any happen to be on hand.

Respondent Teeter is the author of the plan on which the new legislation was based, and it appears that his printed explanation of the plan, which was introduced as an exhibit, was before the legislature when the bill was under consideration. He testified respecting the operation of the new system and explained how it will save much complicated and detailed accounting which has not kept abreast of the practices of private business.

From the record in this case we fail to see how there is any more danger of loss to a county under the new method than under the old.

[3] While the appellant alleges in his complaint that the alternative method violates § 18 of article XI he makes no argument in his brief on that subject, the discussion therein being addressed only to § 31 of article IV. Section 18 provides that "No county \* \* \* shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year,

without the assent of two-thirds of the qualified electors thereof \* \* \*." It does not appear how the alternative method violates this part of the constitution, and the court properly concluded that it does not conflict with either § 31 of article IV or § 18 of Article XI.

[4] Section 4702, Rev. & Tax. Code, provides that the alternative method may be placed in effect in any county by resolution of the Supervisors "adopted not later than July 15th of the fiscal year for which it is to first apply". The resolution in this case was adopted on January 3, 1950. Appellant argues that such resolution, adopted almost six months before the first day of the fiscal year 1950-51, was premature and therefore void. The statute names the date *after* which the action cannot be taken but it is silent as to how much earlier it may be done. We fail to find any irregularity in the action taken.

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem.,  
concur.



110 Cal.App.2d 291

**RICKEY v. KARDASSAKIS et al.**

Civ. 14895.

District Court of Appeal, First District,  
Division 1, California.

April 8, 1952.

Action by Thomas B. Rickey, II, by and through his guardian ad litem, Stanton J. Rickey, against Marion Marguerite Kardassakis and Gus Kardassakis for injuries sustained by plaintiff when struck by an automobile. The Superior Court, Marin County, Edward I. Butler, J., entered a judgment for defendants and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the conflicting evidence as to the point of impact, which was important in determining



whether defendant was negligent in failing to see the plaintiff, was for jury.

Affirmed.

**1. Automobiles ⇨245(8)**

In action against motorist for injuries sustained by three year old child when child was struck by motorist's automobile at time automobile was travelling from 10 to 15 miles per hour as motorist was preparing to park automobile after having passed a parked automobile, conflicting evidence as to point of impact, which was important in determining whether motorist was negligent in failing to see child, was for jury.

**2. Trial ⇨260(8)**

In action against motorist for injuries sustained by three year old child when he was struck by automobile driven by motorist, wherein motorist testified that she did not see child until she heard the impact, refusal to give "looking and not seeing" instruction was not error, in view of instruction given relating to motorist's duty as to lookout.

Myers & Carter, San Anselmo, for appellant.

Richard Belcher and Clark & Heafey, all of Oakland, Gerald P. Martin, San Francisco, of counsel, for respondents Marion Marguerite Kardassakis and Gus Kardassakis.

PETERS, Presiding Justice.

Through his father as guardian *ad litem*, plaintiff Thomas B. Rickey, II, brought this action against Mr. and Mrs. Kardassakis for injuries received by him when struck by an automobile driven by Mrs. Kardassakis. The defendants denied the allegations of the complaint and pleaded, as a special defense, that the accident was unavoidable. The jury specifically found that the defendants were "not negligent," and brought in its verdict in their favor. Plaintiff appeals, contending that the judgment is unsupported by the evidence, that the evidence shows that Mrs. Kardassakis was guilty of negligence as a matter of

law, and that prejudicial error was committed in refusing to give a proffered instruction.

This is a typical fact case. The evidence is conflicting, and that most favorable to respondents supports the judgment. There was no prejudicial error in refusing to give the instruction. For these reasons there is no merit to this appeal.

The accident happened in San Rafael, on June 10, 1949, at about noon. Tommy was then about three years of age. He resided with his parents at No. 27 Billou Street. Defendant Marion Kardassakis, mother of two children, and the wife of the other defendant, resided about five houses away on the same street. The street is uphill from the Kardassakis home to the Rickey home. Mrs. Kardassakis was thoroughly familiar with the area, and knew that several young children customarily played on the sidewalks.

Billou Street is about twenty-five feet wide and has rolled curbs, so that automobiles customarily park with their right wheels over the curb. At the time of the accident there was a Ford parked in front of No. 31 Billou Street, which house is adjacent to the Rickey house. This Ford was parked with its right wheels over the curb. Some eighteen feet in front of the parked Ford, and inside the curb line, there was a telephone pole.

On the day in question Mrs. Kardassakis was driving her automobile, a 1941 Oldsmobile just purchased that day, from her home on Billou Street intending to stop at the Rickey house to deliver a message. She was accompanied by her two young children. In driving from her home to the Rickey home, Mrs. Kardassakis was required to pass the parked car and then the telephone pole in order to park in front of the Rickey home. It was a dry, sunny day. Mrs. Kardassakis had had four years' experience in driving an automobile. She was traveling upgrade. Somewhere between the parked Ford and the telephone pole, or just beyond it, she ran into Tommy. There is a major and substantial conflict over the exact point of impact.

Mrs. Rickey testified that just prior to the accident she had given her children, including Tommy, their lunch and had gone across the street to visit a Mrs. Birdsall who lived at No. 30 Billou Street. Mrs. Birdsall was working in her front garden, and the two women started to chat while standing there. Mrs. Rickey testified that Mrs. Kardassakis, as she passed by, waved and called out asking how they liked her new car. Mrs. Birdsall testified that she did not see Mrs. Kardassakis wave, but did hear her call out, but did not hear what she said. Mrs. Kardassakis testified that she did not wave or call out.

The last time Mrs. Rickey saw Tommy, prior to the accident, he was sitting on the front porch of the Rickey house eating his lunch. She did not see the accident. She testified that when she last saw the Kardassakis' car it was going fifteen miles per hour. Mrs. Birdsall corroborated this testimony. Mrs. Kardassakis testified that she was going about ten miles per hour just prior to the accident.

Mrs. Kardassakis testified that she intended to park in front of the parked Ford; that she saw no one in the area of the parked car; that she started to pass the parked car, and, when about three feet beyond it, heard a thud; that she brought her car to a stop within five or six feet; that then her car was at a slight angle towards the curb, that is, she had started to turn in to park. Tommy was then under her car between the front and rear wheels, one of the front wheels having apparently passed over him. The child incurred a broken leg, gravel burns and bruises.

All of the key witnesses fixed on a diagram the spot where they remembered the Kardassakis' car to have been after the accident. This presents the only important conflict in the testimony. Mrs. Kardassakis placed her car about half way past the parked Ford at a slight angle towards the curb. Mrs. Rickey placed the Kardassakis' car halfway past the telephone pole and much closer to the curb. This would place the Kardassakis' car some eighteen to twenty feet from the point testified to

by Mrs. Kardassakis. Mrs. Birdsall corroborated Mrs. Rickey on this point. The owner of the parked Ford, her mother, and another neighbor, all placed the Kardassakis' car near or beyond the telephone pole. Mrs. Rickey and Mrs. Birdsall testified as to observing some bread (Tommy was eating a sandwich before he was hit) in the vicinity of the telephone pole after the accident. Mrs. Kardassakis testified that she did not observe any bread in that area. She testified that as she approached the spot where she intended to park, she could see the area around the telephone pole but did not see Tommy in that area. Mrs. Birdsall testified that just before the accident she saw Tommy near the pole.

[1] Appellant argues that the evidence conclusively places the point of impact three or four feet out from the curb at or near the telephone pole. It is argued that, because Mrs. Kardassakis testified she could see everything around the pole, and because Mrs. Birdsall places Tommy near the pole just prior to the accident, the finding of "not negligent" is unsupported. It is also argued that such evidence establishes negligence on the part of Mrs. Kardassakis as a matter of law. There is no merit to these contentions. The arguments might be valid if the major premise as to the point of impact were correct. While there is substantial evidence by at least five witnesses fixing the point of impact at or near the pole,<sup>1</sup> that testimony is contradicted by Mrs. Kardassakis. She fixes the point of impact as just in front of the parked Ford. There being nothing inherently improbable in this testimony, this conflict, under elementary principles, was for the jury.

The importance of this conflict is this: if the accident happened near the pole, there was nothing to obstruct the view of Mrs. Kardassakis, who admitted that she was looking towards the pole just prior to the accident, and she should have seen Tommy as he ran into the street. On the other hand, if the accident happened just in front of the parked Ford, then Tommy must have run in front of the parked

1. There are some inconsistencies on this point in the testimony of Mrs. Birdsall and in that of the owner of the Ford car.

Ford into the path of the Kardassakis' car. In such event, the jury was justified in finding, as it did, that Mrs. Kardassakis was not negligent. As was said in *Burton v. Los Angeles Ry. Corp.*, 79 Cal.App.2d 605, 610, 180 P.2d 367, 369: "But if a child suddenly runs from the cover of an automobile standing at the curb of a narrow street toward the front of an approaching bus traveling at a speed of 15 miles an hour, in either the artificial light of a street or in the brilliance of a noonday sun, it would require more than reasonable care to avoid a collision." See, also, *Bennett v. Stein*, 42 Cal.App.2d 237, 108 P.2d 694; *Wilcox v. Epstein*, 65 Cal.App.2d 581, 151 P.2d 156.

[2] Appellant offered, and the trial court refused to give, the following instruction: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive."

This is the so-called "looking and not seeing" instruction.<sup>2</sup> While, under appellant's version of the evidence as to the point of impact, it would have been proper to have given such an instruction, failure to give it was not necessarily error, and certainly was not prejudicial error. In *Cooper v. Smith*, 209 Cal. 562, at page 566, 289 P. 614 at page 616, the Supreme Court, in a case where a pedestrian looked down a highway but did not see defendant's approaching car, and where the trial court refused to give such instruction, stated: "Complaint is made of the court's refusal to instruct the jury that, 'when to look is to see and a party or witness states that he looked and did not see, his testimony in this respect to-wit, that he looked, must be

disregarded.' The proposed instruction is a mere commonplace, within the knowledge of all the jurors, and is argumentative, rather than a statement of law. The court fully, and in terms favorable to the defendant, instructed the jury as to the plaintiff's duty to look before and while crossing the payment."

In *Schwenger v. Gaither*, 87 Cal.App.2d 913, at page 914, 198 P.2d 108, at page 109, the court, citing the case of *Cooper v. Smith*, supra, stated: "The failure to give a tendered instruction on 'to look is to see' was not error."

On the other hand, the questioned instruction, or one like it, has been given in several cases, and the courts have held that it was not error to give it. See *Bischell v. State of California*, 68 Cal.App.2d 557, 157 P.2d 41; *Lasater v. Oakland Scavenger Co.*, 71 Cal.App.2d 217, 162 P.2d 486; *Bosserman v. Olmstead*, 77 Cal.App.2d 236, 175 P.2d 49; *LaBranch v. Scott*, 82 Cal.App.2d 1, 185 P.2d 823.

The jury, in the instant case, was not without a general guide on the subject matter of the proffered instruction. The court instructed that: "You are hereby instructed that the right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian, and in exercise of a common right to the use of the public highways all persons using the same must exert constant care and caution for the conservation of their correlative rights commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways; that the driver of an automobile has no right to assume that the road is clear but under all circumstances and at all times she must anticipate the presence of others; and the fact that she did not know that anyone was on the highway is no excuse for the conduct which would have amounted to recklessness if she had known that another vehicle or person was on the highway; even though the operator of an automobile may be rigidly within the law, she still remains bound to anticipate that she may meet persons at any point of the street, and

2. (This instruction was taken from B.A. J.I., Instruction No. 140. The authors

have revised it in several respects in their 1950 revision.)



she must, in order to avoid the charge of negligence, keep a proper lookout for them and keep her automobile under such control as will enable her to avoid a collision with another person using proper care and caution and if the situation requires, he must slow up and stop."

Under the circumstances, it was not error to refuse the proffered instruction.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



110 Cal.App.2d 297

**ROY v. ROY.**

No. 14900.

District Court of Appeal, First District,  
Division 1, California.

April 8, 1952.

Action by wife for divorce and custody of minor child. The Superior Court, County of Marin, Edward I. Butler, J., entered final decree of divorce awarding wife custody of child and ordering husband to pay wife \$50 a month for support of child and thereafter court modified the decree by requiring husband to pay \$100 a month and the husband appealed. The Court of Appeal, Fred B. Wood, J., held that the evidence supported the implied finding that the husband was financially able to pay the increased amount.

Order affirmed.

**1. Divorce**  $\S$  312.6

In proceeding for increase in support of minor child, the evidence supported the implied finding of trial court that father was financially able to pay the increased amount. Civ.Code,  $\S$  196.

**2. Divorce**  $\S$  312.6

In proceeding for increase in support of minor child, evidence supported the implied finding of trial court that a change of conditions required a substantial increase. Civ.Code,  $\S$  196.

**3. Divorce**  $\S$  312.6(9)

In proceeding for increase of support for minor child, trial court's permitting a certain exhibit, consisting of a book in which plaintiff had kept account of expenditures made for support of the child, to be withdrawn and later returned to the court and included in the record upon appeal was not prejudicial error.

Natalie J. Holly, San Rafael, for appellant.

Frederick W. Kant, Allan H. Fish, San Francisco, for respondent.

FRED B. WOOD, Justice.

December 30, 1941, a final decree of divorce was rendered awarding plaintiff Dorraine Roy the custody of the minor daughter of the parties and ordering defendant Ralph S. Roy to pay plaintiff \$50 a month for the support of the daughter. Defendant voluntarily increased the amount to \$60 a month, commencing June 1, 1948.

October 13, 1950, the trial court entered a minute order directing the defendant to pay \$100 a month for the support of the daughter. October 19, 1950, the court made a written order modifying the final decree, as of October 13, to require defendant to pay \$100 a month. Defendant has appealed, claiming (1) he is without financial ability to pay the increased amount, (2) an insufficient showing of need for the increased amount, and (3) the trial court committed reversible error in permitting to be withdrawn a certain exhibit which was later returned to the court and included in the record upon this appeal.

[1] (1) *The evidence supports the implied finding that appellant is financially able to pay the increased amount.* Appellant is a dairy farmer. He owns 175 head of dairy cattle valued at \$200 per head, and machinery and equipment valued at \$22,500. He has the use of his father's ranch rent free, save that he pays the taxes thereon, averaging approximately \$1,400 a year. At the time of the hearing he had a total indebtedness of \$22,000, consisting of a bank loan of \$13,000 secured by a chattel mortgage upon the cattle, and a personal loan of

\$9,000. From a stipulation of the parties filed in this court June 25, 1951, it appears that his personal indebtedness now amounts to \$29,100, the bank loan having increased to \$14,100 and appellant having incurred an additional personal loan of \$6,000 incident to effecting a property settlement with his second wife, from whom he is now divorced. There is no evidence in the record concerning the terms of these loans, such as the number of years within which they must respectively be paid or the amount, if any, which must be paid annually or by the month. Nor is there any evidence concerning the facility with which appellant might refinance any of these loans should the creditor effectively insist upon immediate liquidation. It is inferable that with the assets of the kind and value which he has, and a going business, appellant has the ability to pay these loans, or refinance them, as they fall due.

Appellant testified that he embarked upon this business in 1940 or 1941, and that he made money in 1946 and 1947 ("they were good years") but sustained heavy losses in 1948, 1949 and 1950. His seeming loss in 1948 resulted from including in his expenses for that year an item of \$29,651 for livestock purchased, really a capital outlay. Adjustment as to that item indicates that he gained \$15,151 instead of losing \$14,500 in 1948.

Some of the cows purchased in 1948 were infected with brucellosis. These he isolated and immediately replaced with other cows to keep up production. A portion (\$2,000) of his loss on the infected cows appears in his accounts for the year 1949. However, in this year, he listed in his expenses an item of \$3,570 for cows purchased in 1949. Adjustment as to the latter item indicates a gain of \$1,400 instead of a loss of \$2,170 in 1949. In addition, both in 1948 and 1949, when striking a balance between receipts and expenditures, he included a substantial item for depreciation of machinery and equipment. He did not actually set that amount aside in an account or at the bank. He said "I suppose I used the money," apparently not in the conduct of the dairy business. Although he testified that the money he received during the year

was paid out in connection with the various expenses of the ranch, this depreciation item (\$4,596.65 in 1949) was a mere book entry, not an actual business expenditure. In addition, his 1949 expenditures included an item of \$27,021 for feed, as against \$16,257 in 1948 and \$10,945 during the first nine months of 1950. He offered no explanation of this large purchase in 1949. The trial court may reasonably have inferred that he had a carry over of feed in a substantial quantity from 1949 to 1950. It appears that he gained instead of losing in 1949.

Appellant's accounts for the first nine months of 1950 show expenditures of \$40,450.48 and receipts of \$36,381.73. However, it appears that this loss was due to a temporary set-back which has been overcome. He lost his grade A milk contract in January 1950 and was delayed in restoring it because his barn burned down in March of that year. He recouped \$8,543.80 of the fire loss from insurance which he carried. Effective October 1, 1950, he secured a new grade A milk contract. Such a contract pays about twice as much as did the grade B contract which he had from January to October 1950. He testified that the reason for his 1950 loss was the loss or suspension of the grade A contract. This and other evidence supports an implied finding by the trial court that from and after the date of the hearing (October 13, 1950) appellant would again operate his dairy business at a substantial profit, sufficient to enable him to pay the increased amount for the support of his daughter.

[2] (2) *The evidence supports the implied finding of need.* The increase in the age of the child from 4 to 13 years and the decreased purchasing power of the dollar from 1941 to 1950, in themselves indicate a change of conditions from which a substantial increase in the cost of support might be inferred.

Respondent kept an account of expenditures for the support of the child, commencing in January of 1942. She entered but ten dollars a month for food for the child until July 1947, when that item was increased to twenty-five dollars. In that year the total per month began to increase. In 1949 we

note \$85 expended in August, \$103 in September, \$74 in November; in 1950, \$98 spent in February, \$99 in March, \$94 in April, \$113 in June, and \$80 in September. There are no items of expenditure which appellant considers extravagant. There are some which he deems luxuries, not necessities, such as private instruction in music, dancing, tennis and horseback riding, and occasional attendance at the light opera. He testified that he voiced no objection to these expenditures. He realizes that his daughter is getting out of the baby class and into the young lady class and realizes it costs more money to live than several years ago, also that respondent is taking proper care of their daughter, is doing the best she can to raise the girl properly. His objection is that he is financially unable to pay for more than "basic support"; that respondent earns \$107 a month take-home pay (at part-time employment) and should defray the cost of these desirable "luxuries" which he claims he has not the money to meet. This argument depends upon his asserted financial incapacity to pay the additional forty dollars a month. The trial court has impliedly found, upon sufficient evidence, that he is financially able to meet this obligation, which is primarily his, not respondent's. See Civ.Code, § 196. In this connection, we observe that respondent testified she would prefer to give up her employment, remain in the home, and devote more of her time and attention to the care and training of the child.

(3) *The exhibit which respondent withdrew by permission of the court given October 24 and returned on or before December 9, 1950*, was the book in which respondent had kept account of expenditures made for the support of the child. On the latter date, the court made and filed an order reading in part as follows: "It Appearing To The Court that an order for the withdrawal of plaintiff's exhibit numbered one from the Clerks Office was inadvertently made and that said exhibit numbered one has been at the request of the Court returned to the files in the Clerks Office (there having been added certain items of expenditures not in evidence).

"It Is Therefore Ordered that the same be included in the Clerk's transcript on appeal."

Appellant argues that because of the possibility of the alteration of this document during the period of its withdrawal, the trial court committed prejudicial, reversible error in permitting its withdrawal and in later ordering its inclusion in the record on this appeal. This point is without merit.

Appellant directs our attention to no entry which he claims has been altered. The court's order of December 9, 1950, did not speak of any "alteration." It said there had been "added certain items of expenditures not in evidence." Examination of the book indicates no alteration, merely a continuation after the day of the hearing (October 13, 1950) of entries of expenditure during the remainder of October, through November and into December, 1950. Those entries, of course, are excluded from consideration upon this appeal. The earlier items were in evidence and are in the record. Even without the consideration of this exhibit, the evidence would amply support the implied finding of need. Upon the cross-examination of respondent, appellant brought out significant items of expenditure. They appear in the reporter's transcript.

[3] As found by the trial court, the withdrawal was inadvertently made. The court and respondent acted in entire good faith. No harm has been done. Appellant's rights have in no way been prejudiced.

Incidentally, we observe that on December 11, 1950, respondent served upon appellant, and on December 13, 1950, filed with the trial court, her designation of documents to be included in the clerk's transcript. Therein she specifically mentioned plaintiff's exhibit No. 1, the account book under discussion and "Any order of the above court directing the return of plaintiff's Exhibit No. 1 to the court or its clerk, or in any way pertaining to said Exhibit." Then was the time for appellant to present to the trial court, not to this court, any objection, he may have had to the inclusion of that exhibit. He had ample



time therefor (the clerk's transcript was not certified until February 16, 1951), but did not do so.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



110 Cal.App.2d 177

**CARLTON v. PACIFIC COAST GASOLINE CO.**  
et al.  
Civ. 18655.

District Court of Appeal, Second District,  
Division 3, California,  
March 31, 1952.

Action by Velma L. Carlton against Pacific Coast Gasoline Company, a corporation, Wm. A. Kirk, Jr., Ernest H. Gisler, and others, for alleged wrongful death of plaintiff's husband when truck he was driving came to sudden stop after leaving highway while passing defendant Kirk's automobile, which was parked on highway, and upon striking defendant Gisler's plowing which was within 3 feet of pavement and on highway easement. The Superior Court of Los Angeles County, Irvin Taplin, J., entered judgment of nonsuit in favor of defendants Kirk and Gisler, and plaintiff appealed. The District Court of Appeal, Vickers, J., held that evidence as to negligence of defendants Kirk and Gisler and as to proximate cause was sufficient for jury.

Reversed.

# 1. Trial ⇐165

Motion for nonsuit admits truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and evidence should be interpreted most strongly against defendant.

## 2. Appeal and Error ⇐989

On appeal from judgment of nonsuit in negligence action arising from truck accident, the District Court of Appeal was required to differentiate between evidence received from plaintiff's witnesses and that

elicited from defendants who were called by plaintiff for cross-examination under statute, and that part of evidence of these defendants which was unfavorable to plaintiff would be disregarded. Code Civ.Proc. § 2055.

## 3. Automobiles ⇐173(4), 242(7)

Where defendant parked his automobile partly on main travelled portion of highway when it was practicable to have parked it entirely off highway, such action constituted negligence, but burden was on plaintiff to show that such negligence was proximate cause of another vehicle leaving roadway and causing death of her husband. Vehicle Code, § 582.

## 4. Death ⇐58(1)

In action for decedent's death occurring when vehicle decedent was driving left roadway while passing defendant's automobile which was illegally parked on roadway, presumption existed that decedent exercised due care for his safety, and evidence did not rebut presumption. Vehicle Code, § 582.

## 5. Automobiles ⇐245(17, 62)

In action by widow for alleged wrongful death of husband when truck he was driving came to sudden stop after it left highway while passing defendant's parked automobile, evidence as to defendant's negligence in parking on highway and proximate cause was sufficient for jury. Code Civ.Proc. § 2055; Vehicle Code, § 582.

## 6. Automobiles ⇐245(4)

Whether condition created by possessor of land constitutes trap or pitfall and whether condition is artificial and of such nature and so near existing highway that possessor should have realized that it involved unreasonable risk to users of highway, are generally questions of fact for jury.

## 7. Highways ⇐89

Adjoining landowner's right to use land next to highway pavement was subject to easement for highway purposes, and such use could have been abated if inconsistent with full enjoyment of right of way by public. Streets and Highways Code, § 660(a).

**8. Automobiles** ⇨308(8, 10)

In action by widow against possessor of adjoining land for death of husband when his truck left pavement and came to sudden stop upon hitting possessor's plowing which was within 3 feet of pavement and on part of highway easement, evidence as to possessor's negligence and proximate cause was sufficient for jury. Streets and Highways Code, § 660(a).

---

C. Ransom Samuelson, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent Wm. A. Kirk, Jr.

R. M. Crookshank, Santa Ana, for respondent Ernest H. Gisler.

VICKERS, Justice pro tem.

Appeal by plaintiff from a judgment of nonsuit.

Plaintiff filed this action to recover damages for the wrongful death of her husband. On October 27, 1948, about 11 a. m., he was driving a truck and trailer loaded with oil well pipe. The vehicle left the road opposite a point where the defendant Kirk had parked his car, entered a plowed field and came to a sudden stop, with the result that the pipe shifted forward into the cab of the truck and killed the decedent. Originally there were five defendants in the action but the only ones with which we are concerned in this appeal are the defendant Kirk, the driver of an automobile that was parked so as to occupy a portion of the road, and the defendant Gisler, the lessee of the plowed field.

[1] This being an appeal from a judgment of nonsuit we must apply the following legal principles: "The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and \* \* the evidence should be interpreted most strongly against the defendant." *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 599, 112 P. 53, 54. "The trial and appellate courts must indulge in every inference or presumption fairly arising from the evidence in favor of plaintiff." *Slater v. Shell Oil Company*, 39 Cal.App.2d 535, 539, 103 P.2d 1043, 1046.

[2] It will therefore be necessary for us to examine the evidence in considerable detail. It will also be necessary to differentiate between the evidence received from the plaintiff's witnesses and that elicited from certain of the defendants when called by plaintiff in pursuance to Code of Civil Procedure, section 2055. Insofar as the latter evidence is concerned the plaintiff may rely on so much of it as is favorable to her and disregard the unfavorable portions, see *Green v. Uarte*, 87 Cal.App.2d 75, 77, 196 P.2d 63.

The scene of the accident was Atlanta Street between Cannery and Buchard Streets in Orange County. Atlanta Street is a country road which had an oil pavement 16 feet in width and dirt shoulders on each side of varying widths. The county had a 60 foot easement for road purposes but had only made use of a portion thereof. Atlanta Street runs east and west and for a mile or more in each direction was level, and from the photographic exhibits offered by plaintiff appears to have been fairly smooth. The land on each side of Atlanta Street was flat and open and for many years had been used for agricultural purposes by the defendant Gisler, under a long term lease. He testified, when called by plaintiff as a witness under Code of Civil Procedure, section 2055, that he had plowed it to within 3 feet of the paved portion of the road. The weather was clear and dry.

Decedent approached from the west, alone, driving the truck and trailer in question. This vehicle was 8 feet wide and approximately 54 feet long. It weighed approximately 13 tons and was loaded with approximately 21 tons of oil pipe secured to it by chains. Under the physical conditions present the maximum speed of the vehicle was 40 miles per hour. Decedent was bringing the pipe from a point several miles distant. The pipe was to be delivered by decedent to an oil well located about one-quarter of a mile southeasterly from the point where the defendant Kirk and another defendant, Cox, were parked. The approach to this well was from Atlanta Street and by means of a dirt road. Plaintiff's expert witness Jagger testified that normally it would require 350 feet to 400 feet to slow down the vehicle so loaded

from 40 miles per hour in order to make a right-hand turn and that it would have to practically come to a stop in order to make the turn in question into the well. Plaintiff's witness Hughes was working on the derrick floor of the well in question and was looking for the decedent. He testified that he could not tell whether the cars of defendants Kirk and Cox were parked on or off the roadway or what the speed of the truck and trailer was as it passed those cars; that the truck appeared to go off the north side of the road opposite to or a little east of the defendants' cars; that he had been watching the truck for a half minute before the crash. He further testified the sandy dirt came "right up to the edge" of the pavement.

Plaintiff called as one of her witnesses Norman Heffner, a state highway patrolman. He identified the photographic exhibits offered by plaintiff as truly depicting the scene as it appeared upon his arrival shortly after the accident. From these exhibits it appears that the rear of the truck was supported by four wheels having two tires on each, which extended almost to the edges of the bed of the truck and that the front of the truck was supported by two single wheels which had a somewhat narrower tread. It also appears from these exhibits that the trailer was supported by six wheels of two tires each, which extended almost to the edges of the trailer. Two of these wheels were under the front and four of them under the rear of the trailer. As shown by these photographs the vehicle came to rest in the following position: The trailer was inclined slightly to the north with its right wheels on the pavement and its left wheels just off the dirt shoulder with the tires partly buried in loose earth; the truck was inclined further to the north with one of its right rear wheels on the shoulder and the other in the soft ground; the left wheels of the truck were in the plowed field; the front wheels of the truck were almost completely buried in the plowed field, the dirt of which had been piled up by the front of the truck so that it extended partly over the bumper; the right front wheel was approximately 10 feet from the pavement.

Officer Heffner testified as follows: That the paved portion of the road was 16 feet wide and the northerly shoulder was of packed dirt and was 3 feet wide; that the southerly shoulder was in better condition and was 6 feet wide; that the field was plowed up to these shoulders; that the front end of the truck was 10 feet from the pavement; that the left rear tires were just off the pavement on the shoulder and that the marks of the tread of these tires could be seen just off the pavement and on the dirt shoulder, running from a point 66 feet to the west to the left rear tires; the witness then identified these tread marks on plaintiff's photographic exhibit 1 and indicated them by drawing a red line thereon. The officer also testified he looked for but found no skid marks and was unable to find any eye witnesses.

The defendants Kirk and Cox were called by the plaintiff to testify under Code of Civil Procedure, section 2055. They testified that Kirk parked his passenger automobile on the south side of Atlanta facing west, with the left wheels resting on the shoulder and the right side of the car extending from 3 feet to 5 feet onto the pavement; that Kirk then engaged in conversation with Cox who had parked his car further to the south of and along the side of Kirk's car; that Cox's car was close to that of the defendant Kirk and was facing east; that from that time until the accident there was no other traffic on the road except a Dodge car that passed in a westerly direction shortly after the defendants' cars came to rest; that decedent's vehicle only moved over about 2 feet to the north to pass Kirk's car and was 2 or 3 feet away from it while passing; that it was travelling 45 miles per hour and came to rest 80 feet (per Cox) and 200 feet (per Kirk) from defendants' cars. From the photographic exhibits it is impossible to tell with certainty how wide the north shoulder of the road was for the last 15 feet before the truck turned into the plowed field. It is also impossible to tell how hard that part of the shoulder was or whether its surface was smooth or rough. If the case had been submitted to the jury a conclusion by it that that portion of the shoulder was less than 2 feet wide, was



soft and could not support the vehicle in question with its load of pipe, could not be said to be unsupported by the evidence.

[3-5] Insofar as the respondent Kirk is concerned it is admitted that he violated Vehicle Code, section 582, by parking his car partly on the main traveled portion of the highway when it was practicable to have parked it entirely off of it. Such action by him constituted negligence, see *Thomson v. Bayless*, 24 Cal.2d 543, 546, 150 P.2d 413. However the burden was on the plaintiff to establish a *prima facie* case that such negligence was a proximate cause of the vehicle leaving the roadway and the death of decedent. When we apply the legal principles, above set forth in this opinion, to the evidence and give effect to the presumption that decedent exercised due care for his safety, we are forced to conclude that plaintiff did establish such a *prima facie* case. Respondent Kirk earnestly urges that the presumption of due care is dispelled by uncontroverted physical facts and the evidence produced by plaintiff. With this we cannot agree. Disregarding the unfavorable testimony given by defendants under section 2055 as we must, see *Green v. Uarte*, supra, 87 Cal. App.2d 75, 196 P.2d 63, and accepting only the favorable evidence given by them, it is established that the Kirk car was on the pavement but it is not established that it was obstructing only 3 or 5 feet of the pavement. The only witness who testified on this point for plaintiff was Hughes. He stated he could not tell whether the parked cars were on or off the pavement. We must likewise disregard the defendants' testimony as to the speed of the vehicle. We must assume in accordance with Hughes' testimony that the point where the vehicle left the roadway was opposite to or just to the east of the parked cars. We therefore have no evidence, binding on the plaintiff, as to the acts and conduct of decedent which resulted in the happening of the accident that is inconsistent as a matter of law with the presumption that decedent exercised due care. Nor do we have such evidence from which it must be inferred that the conduct of the defendant

Kirk was not a proximate cause of the accident or that decedent's conduct contributed thereto. The presumption therefore was not dispelled.

The case of *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, exhaustively considers the presumption of due care and its application. At page 549 of 212 Cal., at page 532 of 299 P. that court said that the presumption was evidence and may in certain cases outweigh positive evidence addressed against it. At page 555 of 212 Cal., at page 535 of 299 P., that court said that when the party's evidence is not inconsistent with the presumption he invokes, the evidence sufficiently establishes a sphere or field within which the presumption can operate and that whether it does must be decided by the trial court as a question of law. Again at page 560 of 212 Cal., at page 536 of 299 P., that court said that the testimony of an adverse party was not sufficient as a matter of law to dispel the presumption of due care, but merely tended to create a conflict therewith, and that it was the right of the party relying on the presumption to have the conflict passed upon by the jury in its final deliberations, and not by the court.

Under the present state of the evidence we must therefore assume that decedent drove as close to the Kirk car as it appeared reasonably safe to do, that the position of that car on the highway was such as to force him to drive his vehicle off the pavement, that the dirt shoulder gave way and caused the vehicle to enter the plowed field; and that the resulting sudden stopping of the vehicle caused the pipe to shift forward and kill decedent. The question of proximate cause was therefore for the jury's determination and that portion of the judgment in favor of the defendant Kirk must be reversed.

The appeal from the portion of the judgment in favor of the defendant Gisler, presents the reverse of the problem involved in the Kirk case. There the negligence of the defendant Kirk was admitted but it was denied that such negligence could be found to be a proximate cause of the death of decedent. Here the negligence of the defendant Gisler is denied but there

is no contention that as a matter of law it can be said that the maintenance of the plowed field by defendant Gisler was not a contributing proximate cause to decedent's death.

The defendant Gisler concedes, as he must, that if he had excavated a deep pit close to the roadway, so as to constitute a trap or pitfall, and some user of the roadway fell into it, the questions of negligence and proximate cause would be for the jury's determination, see *Gerberich v. Southern Calif. Edison Co.*, 5 Cal.2d 46, 53 P.2d 948, *City of Fort Worth v. Lee*, 143 Tex. 551, 186 S.W.2d 954, 159 A.L.R. page 136, and cases cited. In considering the liability of the possessor of land adjacent to a highway for injuries suffered on the land by a user of the highway the American Law Institute, *Torts*, Vol. 2, in the opening paragraph of section 368 makes the following statement: "A possessor of land who creates or maintains thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact therewith while traveling with reasonable care upon the highway, is subject to liability for bodily harm thereby caused to them." Sub-paragraph d of section 368 reads as follows: "In determining whether the condition is one which creates an unreasonable risk of bodily harm to persons lawfully traveling the highway, the determining factor is whether it is so placed that travelers may come in contact with it while carefully traveling the highway, as by being forced off the road by other traffic, by skidding upon a slippery surface or by a mis-step while walking upon a highway. It is, therefore, impossible to state any precise distance at which a condition ceases to involve unreasonable risk."

[6-8] Whether or not the condition created by a possessor of land constitutes a trap or pitfall and whether it is an artificial condition, of such a nature and so near an existing highway that such possessor should have realized that it involved an unreasonable risk to users of the highway, are generally questions of fact to be

determined by the jury. Unless it can be said from the evidence in our case that such questions and the alleged negligence of defendant Gisler became questions of law we must reverse the judgment as to defendant Gisler. The evidence and the inferences to be reasonably drawn therefrom relating to this subject, are as follows: Atlanta Street had 16 feet of pavement; the northerly dirt shoulder was of uncertain width and firmness at the scene of the accident; Atlanta Street ran through an oil district (8 oil derricks are visible in plaintiff's exhibits and all of the parties and most of the witnesses were in the oil business); Atlanta Street was traversed by large vehicles 8 feet in width carrying heavy loads; defendant Gisler had plowed to within 3 feet of the pavement and to a depth of not less than 1 foot; such plowing had been done on a portion of the "highway", *Streets and Highways Code*, section 660(a) defines "Highway" as follows: "The term 'highway' includes all or any part of the entire width of right of way of a State highway, whether or not such entire area is actually used for highway purposes"; defendant Gisler's right to the use of the land in question was subject to an easement for highway purposes. This use could have been abated if inconsistent with the full enjoyment of the right of way by the public. The case of *People v. Henderson*, 85 Cal.App.2d 653, 194 P.2d 91 differs factually to some extent from our case but some of the principles of law declared therein are applicable and supports this right of abatement. The defendant landowner in that case had erected a shed upon the unused portion of the highway easement without having obtained a permit therefor from the Department of Public Works. The People secured an injunction. At page 656 of 85 Cal.App.2d, at page 93, of 194 P.2d, the court said: "It is a well-settled principle of common law, which has frequently been embodied in statutory form, that a structure maintained upon a public roadway is unlawful (citing cases), and is a nuisance *per se* subject to abatement at the instance of proper authority. (Citing cases.) It is no defense to an action based thereon that the structure is off the traveled part of the highway

or that sufficient areas remain to allow public use of the right of way in the accustomed manner. (Citing cases.) Where the sole question is whether the maintenance of the structure or obstruction is inconsistent with the full enjoyment of the right of way by the public, the owner of the fee is deemed to possess no greater rights than those who are strangers to the title." It cannot be said as a matter of law that the manner in which the defendant Gisler, plowed and maintained the portion of the "highway" adjacent to the roadway, was not an obstruction and inconsistent with the full enjoyment of the right of way by the public.

Giving due effect to the controlling principles of law as applied to the evidence we cannot say as a matter of law that the defendant Gisler, in plowing up the portion of the "highway" in question and maintaining the same, in the manner described above was not guilty of negligence which was a proximate cause of decedent's death. The plaintiff having thus established a *prima facie* case as to the defendant Gisler, the latter's motion for nonsuit should have been denied.

The judgment, and the order granting the motions for nonsuit, are reversed as to each respondent.

WOOD, Acting P. J., and VALLÉE, J., concur.



110 Cal.App.2d 187

**MILLER v. REPUBLIC GROCERY, Inc.**  
Civ. 8085.

District Court of Appeal, Third District,  
California.

March 31, 1952.

Rehearing Denied April 24, 1952.

Hearing Denied May 26, 1952.

Action by Jacqueline L. Miller against Republic Grocery, Inc., on a note executed by defendant and assigned to plaintiff by payee. The Superior Court, San Joaquin County,

Thomas B. Quinn, J., entered a non-suit and from an order denying plaintiff's motion to set aside nonsuit and to reopen cause and for consent to file amendment to pleading, plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem., held that under the peculiar circumstances of the case, trial judge's denial of plaintiff's motion to set aside non-suit and permit filing of the amendment showing the assignment was an abuse of discretion.

Order reversed with directions.

### 1. Appeal and Error ⇨946

In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all the circumstances before it being considered.

### 2. Appeal and Error ⇨948, 949

The burden is on the party complaining of an order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice, an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power.

### 3. Trial ⇨29(1, 2)

A trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but it is his duty to see that as nearly as possible the issues shall be disposed of on their merits and he may call attention to omissions in the evidence or defects in the pleadings which are likely to result in a mistrial.

### 4. Pleading ⇨232

Where through oversight original complaint did not contain allegations that note sued upon had been assigned to plaintiff, and objection to introduction of assignment in evidence was sustained, and counsel for plaintiff due to inexperience and surprise did not ask leave to amend the complaint, trial judge should have suggested to counsel for plaintiff that complaint be amended.

### 5. Dismissal and Nonsuit ⇨81(5)

Where through oversight original complaint did not contain allegation that note sued upon had been assigned to plaintiff, and at the trial defendant's counsel's objection to introduction of assignment in



evidence was sustained, and thereafter trial judge granted a non-suit, denial of plaintiff's motion to set aside the non-suit to permit filing of amendment showing the assignment, under the peculiar circumstances of the case, was an abuse of discretion. Code Civ.Proc. § 473.

#### 6. Action ⇨66

It is the policy of the law that every case should be tried on its merits.

#### 7. Judgment ⇨363

##### Pleadings ⇨230

Statute authorizing a court in furtherance of justice to allow a party to amend any pleading and to relieve a party from any judgment or order taken against him through mistake inadvertence, surprise or excusable neglect is to be liberally construed so it disposes of cases upon their substantial merits. Code Civ.Proc. § 473.

---

Blewett, Blewett & Macey, Stockton, by Rolla L. Garretson, Stockton, for appellant.

Parkinson, Nichols & May, Stockton, for respondent.

#### SCHOTTKY, Justice pro tem.

This is an appeal by plaintiff from an order denying plaintiff's motion to set aside non-suit and to re-open cause and for consent to file amendment to pleadings.

The factual situation as disclosed by the record is as follows:

Plaintiff commenced an action against defendant upon a promissory note executed by defendant to one Catalina S. Cruz for the sum of \$5,400. The complaint alleged the corporate existence of defendant, the execution of the note, which was set out in full, and further that nothing had been paid on the note. There was no allegation that the note had been assigned by the payee to plaintiff. A general demurrer was interposed by defendant, and no appearance being made at the time it came on for argument the demurrer was overruled by the court. Defendant thereafter filed an answer, admitting the execution of the note but denying that it was made for a valuable consideration, or that anything was

due to plaintiff upon it; and also setting up four separate defenses.

The case came on for trial on December 8, 1950. Plaintiff called as a witness Catalina Cruz, the payee of the note, who testified as to the execution of the note and that nothing had been paid upon it. Plaintiff's counsel then sought to introduce in evidence the assignment from the payee to plaintiff and the following appears in the reporter's transcript:

"Mr. Garretson: I will show you Plaintiff's Exhibit 2 for identification and entitled 'Assignment of Note for Collection', dated September 12th, 1948, and ask you whether that is your signature? A. Yes, that is my signature.

"Q. And what is that Mrs. Cruz?

"Mr. Parkinson: Well the document is the best evidence if the Court please.

"A. Yes, I had Mrs. Miller—

"Mr. Parkinson: Just a moment, a document is the best evidence, we object to her conclusion as to what it is.

"Mr. Garretson: Mrs. Cruz, you by this instrument, assigned all your interest in the promissory note to a Jacqueline L. Miller? A. Yes sir.

"Mr. Parkinson: Object to that and ask the answer be stricken out, the document is the best evidence.

"The Court: The objection is sustained.

"Mr. Garretson: We offer Plaintiff's Exhibit 2 for Identification in evidence.

"Mr. Parkinson: Object to that as not within the issues of the pleadings.

"Mr. Garretson: If Your Honor please, Jacqueline L. Miller is the plaintiff in this action and on the basis of that we certainly have a right to show that Mrs. Cruz' interest in the original promissory note has been assigned to the plaintiff, Jacqueline L. Miller.

"Mr. Parkinson: The fact that Jacqueline L. Miller, is the plaintiff in the action has no bearing on it at all if it is not within the issues of the pleadings. The caption of the name of the plaintiff does not take the place of the pleadings.

"The Court: Well, there is no issue in the pleadings concerning it.

"Mr. Garretson: That is correct, Your Honor, I note that in the pleadings.

"The Court: The objection will have to be sustained. As far as these pleadings are concerned, Jacqueline L. Miller is a perfect stranger."

Then followed some cross-examination by counsel for defendant, some redirect examination by counsel for plaintiff, and the record shows:

"Mr. Garretson: Plaintiff rests.

"Mr. Parkinson: At this time we move for a judgment of non-suit, no cause of action shown in favor of plaintiff in this case.

"The Court: The motion will be granted."

On December 13, 1950, plaintiff filed a notice of motion to set aside non-suit and to re-open the cause and for consent to file an amendment to the pleadings. Accompanying said notice of motion was an amended complaint setting forth an assignment of the promissory note from Catalina S. Cruz, the payee therein named, to plaintiff, and the affidavits of Robert N. Blewett and of Rolla L. Garretson, Jr., in support of the motion. Said affidavits alleged the following: Robert N. Blewett, as one of the attorneys for plaintiff prepared the original complaint in the action, and that through inadvertence and mistake the original complaint did not contain the allegation that the note sued upon had been assigned to plaintiff. That on the day before the trial Robert N. Blewett, because of his illness, asked one of his associates, Rolla L. Garretson, Jr. to handle the matter, and that Rolla L. Garretson, Jr. had a short time to prepare the case, and through inadvertence was not aware of the fact that the assignment had not been alleged in the original complaint, and that when the point was first raised at the trial, a general demurrer having been previously overruled, Rolla L. Garretson, Jr. through inadvertence failed to move the court for an amendment to the complaint to allege the assignment, and that an amendment to the pleadings would simply allege the assign-

ment of the note sued on, and that this would in no manner change the cause of action or cause any prejudice to the defendant who was prepared to proceed with the trial of the action on its merits, having all of his witnesses present in court, and that it would defeat the ends of justice and be an abuse of judicial discretion to permit the judgment of non-suit to remain. No counter-affidavits were filed.

On February 5, 1951, the court made the order from which the appeal is taken, said order reading: "It is ordered that the motion to set aside is denied, provided, however, that the order for a non-suit heretofore entered be amended by adding the words: 'Without prejudice.'"

Appellant contends that Section 473 of the Code of Civil Procedure authorizes a court in furtherance of justice to allow a party to amend any pleading and to relieve a party from any judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect, and that under the facts of the instant case the order appealed from was an abuse of the court's discretion and should be reversed.

[1,2] Respondent concedes that, as stated in the case of *Hughes v. Chung Sun Tung Co.*, 28 Cal.App. 371, 154 P. 299, 301, a trial court has power, after a non-suit has been granted, to set it aside and prevent the filing of an amended complaint. But respondent contends that there has been no showing of any abuse of discretion in the instant case because, argues respondent, appellant has had her day in court, the defects in pleading and evidence necessitating the non-suit were called to the attention of appellant's counsel in the course of the trial and he did nothing to remedy them but rested his case prior to the granting of the non-suit.

As was said in *Berry v. Chaplin*, 74 Cal. App.2d 669, at page 672, 169 P.2d 453, at page 456: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. *Makzoume v. Makzoume*, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed

but must be affirmatively established by the party complaining of the provisions of the order. [Citing cases.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Citing cases.]”

And in the early case of *Lybecker v. Murray*, 58 Cal. 186, at page 189, the court said: “\* \* \* Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion, governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be. \* \* \* It must be exercised within the limitations above stated to promote substantial justice in the case.”

In *Fine v. Fine*, 76 Cal.App.2d 490, at page 495, 173 P.2d 355, at page 358, the court said: “In determining the question as to whether an abuse of discretion occurred in this case, we have in mind the language employed in *Clavey v. Lord*, 1891, 87 Cal. 413, 25 P. 493, where the court said (87 Cal. at page 419, 25 P. at page 495): ‘The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice.’ See, also, *Hale v. Hale*, 1935, 6 Cal.App.2d 661, 663, 45 P.2d 246.”

It is apparent that the instant action was one brought on a promissory note by the person to whom it had been assigned for collection. The allegation as to the assignment of the note to plaintiff was omitted, due undoubtedly to an oversight, as there is no intricacy in such a pleading. A general demurrer was interposed by defendant and this was overruled by the court without being argued. Defendant filed an answer, not denying the execution of the note, but denying consideration and denying that anything was due to plaintiff

thereon. Defendant also set up a number of special defenses, in one of which it was alleged that plaintiff had no beneficial interest in the note. It is apparent also that the counsel who appeared at the trial for plaintiff had not drawn the complaint but knew that a general demurrer to it had been overruled. When counsel for appellant sought to introduce the assignment in evidence objection was made by respondent’s counsel that it was not within the issues, and counsel for appellant, due no doubt to inexperience and surprise, did not ask leave to amend the complaint (which amendment would, of course, have been allowed by the court), and the objection was sustained, and the granting of the non-suit followed as shown by the record.

[3, 4] We believe that when the assignment was offered in evidence, and objection to its introduction was made, and it appeared that the allegation as to the assignment had been omitted from the complaint, the trial judge should have suggested to counsel for appellant that the complaint be amended in this respect. For as said in the case of *Farrar v. Farrar*, 41 Cal.App. 452, at page 457, 182 P. 989, at page 991: “It is time it was understood that a trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits; and it is not out of place for him to call attention to omissions in the evidence or defects in the pleadings which are likely to result in a mistrial.”

In *Hellings v. Wright*, 29 Cal.App. 649, at page 656, 156 P. 365, at page 368, this Court said: “Appellant complains because the court reopened the case and allowed plaintiff to offer additional evidence after a motion had been made for a nonsuit. The purpose was to clear up any uncertainty as to whether plaintiff had obtained the required contracts from the purchasers to whom he had sold the lots on the monthly installment plan. Such action was not only within the discretion of the trial judge, but it was plainly his duty to see that the cause should not be defeated by



the mere inadvertence of counsel for respondent. It seems sometimes to be thought that the highest prerogative of the trial court is to conduct the proceedings so that the cause may be won or lost by virtue of some technical advantage. The truth is, of course, that the trial court should see, if possible, that the case is tried upon its merits and decided fairly and justly."

In *Bare v. Parker*, 51 Cal.App. 106, at page 108, 196 P. 280 it is stated: "Counsel for intervener complains that the court ignored the oral stipulation of himself and counsel for plaintiff and made a finding contrary thereto. Nearing the close of trial, counsel for intervener proposed several stipulations that were assented to by counsel for plaintiff. One was that 'the property which stood in the name of Charles B. Bare and Jennie Bare was, at the date of the deeds, and thereafter, held by them as tenants in common.' Undoubtedly assent was unwittingly given to this stipulation. It negatives the theory of plaintiff's case, and would have stipulated him out of court. The trial court appreciated the situation, and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice.

"A trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits. \* \* \*'  
*Farrar v. Farrar* [41 Cal.App. 452] 182 P. 989."

In *Estate of Dupont*, 60 Cal.App.2d 276, at page 290, 140 P.2d 866, at page 873, the court said: "It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts

so that the important functions of his office may be fairly and justly performed. [Citing cases.]"

And in the recent case of *Feigin v. Kutchor*, 105 Cal.App.2d 744, at page 748, 234 P.2d 264, at page 267, this Court said: "A trial is more than a contest between opposing counsel, and a trial judge is more than an umpire in a battle of wits between opposing counsel. The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice."

[5-7] In view of the foregoing authorities, we are convinced that the trial court, having permitted the non-suit to be granted, should have granted appellant's motion to set aside the non-suit and permit the filing of the amendment showing the assignment, and that, under the peculiar circumstances of the instant case, it was an abuse of discretion to deny said motion. The beneficent provisions of Section 473 of the Code of Civil Procedure are intended to permit amendments and to relieve a party "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect", when such action is in furtherance of justice. Here it is undisputed that defendant was present in court with his witnesses, and with the making of the simple amendment showing the assignment of the note to plaintiff, the trial could have proceeded and the controversy between the parties could have been determined expeditiously upon its merits and in accordance with substantial justice. As was said in *Airline Transport Carriers v. Batchelor*, 102 Cal.App.2d 241, 248, 227 P. 2d 480, 484: "It is, of course, the policy of the law that every case should be heard on its merits, and as stated in *Nicoll v. Weldon*, 130 Cal. 666, 667, 63 P. 63, 64: 'Section 473 \* \* \* is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, \* \* \*.'"

The order appealed from is reversed with directions to the trial court to set aside the judgment of non-suit and to permit the filing of the amended complaint.

ADAMS, P. J., and VAN DYKE, J., concur.



110 Cal.App.2d 266

REYES v. GONZALES et al.

Civ. 4349.

District Court of Appeal, Fourth District,  
California.

April 4, 1952.

Maria Reyes sued Joe Dias Gonzales and another for injuries sustained when automobile in which she was passenger was struck by truck driven by Gonzales which entered intersection to right of automobile. The jury returned a verdict for defendants, and the Superior Court, Fresno County, Philip Conley, J., granted Reyes' motion for new trial based in part on insufficiency of evidence to sustain verdict, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that factual questions were presented with respect to negligence of truck driver and its effect as a proximate cause of accident so that order for new trial was not an abuse of discretion.

Order affirmed.

#### 1. Appeal and Error ⇐979(2), 1015(1)

An order for new trial based upon insufficiency of evidence to sustain verdict will not be reversed unless it appears, as a matter of law, that there was no substantial evidence which would support judgment for moving party or that granting of motion clearly constitutes an abuse of discretion on part of trial court.

#### 2. Appeal and Error ⇐1015(1)

In action against truck operators for injuries sustained by passenger of automobile which was struck by truck which entered intersection to right of automobile, factual questions were presented with re-

spect to negligence of truck driver and its effect as proximate cause of the accident so that order granting passenger's motion for new trial after adverse verdict, was not reversible.

Ray W. Hays, Paul Staniford and James N. Hays, all of Fresno, for appellants.

C. Ray Robinson, R. A. McCormick and William B. Boone, all of Merced, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries sustained by the plaintiff in a collision between an automobile driven by her brother, and a truck belonging to the corporate defendant and driven by the defendant Gonzales.

The collision occurred at 10:15 A.M. at the intersection of "E" Street and Biola Avenue, in Biola, Fresno County. Biola Avenue is the main north and south highway and has a black top surface about 18 feet wide. "E" Street, running east and west, is somewhat narrower. On this occasion the truck was proceeding south on Biola Avenue and the automobile was proceeding west on "E" Street. The vehicles collided at a point three feet north and two feet west of the center of the intersection. There was a vacant lot at the northeast corner of the intersection, so that each driver had an unobstructed view of the other vehicle as it approached the intersection. There was a house at the southeast corner which would obstruct the view to the south for a driver approaching from the east. There was a school ground on the northwest corner with hedges and trees which, while not obstructing the view, would make it more difficult for a driver coming south to observe traffic approaching from his right.

A jury returned a verdict in favor of the defendants, and they have appealed from an order granting the plaintiff's motion for a new trial based in part upon the insufficiency of the evidence to sustain or justify the verdict.

[1] The appellants concede that the rule is well established that such an order will not be reversed unless it appears, as a matter of law, that there was no substantial evidence which would support a judgment for the moving party, or that the granting of the motion clearly constitutes an abuse of discretion on the part of the trial court. *Martin v. Smith*, 103 Cal.App.2d 894, 230 P.2d 679. They contend that the sole proximate cause of this accident was the negligence of the driver of the automobile in which the respondent was riding; that there was no evidence of any negligence on the part of the truck driver; that there was no substantial evidence that would support a judgment in favor of the respondent; and that an abuse of discretion clearly appears.

The driver of the automobile in which the respondent was riding testified, among other things, that he was driving 10 miles an hour as he approached this intersection, and that he intended to turn south on Biola Avenue; that he first looked to his right when he was 10 to 15 feet away; that the truck was traveling 25 to 30 miles an hour; that he thought he could make his turn; and that he "didn't pay any more attention to the truck." His testimony was somewhat evasive and contradictory, and he admitted that just after the accident he had told a traffic officer that he "never saw the truck until the two vehicles hit." The traffic officer testified to the same effect.

There is ample evidence of negligence on the part of this driver and the evidence as a whole strongly supports the jury's conclusion that his negligence was the sole cause of the accident. There was no issue or evidence of contributory negligence on the part of the respondent, and the controlling question here is whether it appears, as a matter of law, that there was no substantial evidence of negligence on the part of the truck driver.

The appellants argue that Gonzales was not negligent at all; that he had the right of way and had the right to assume that the other driver would yield the right of

way; that he had but a few seconds to look for traffic coming from the west, and his view was partially interfered with by vegetation on the school yard; that there was no apparent danger on his left; and that in proceeding as he did he acted as any reasonable man would do.

[2] The fact that the driver of the truck had the right of way, if true, is not controlling and a question of fact would still remain. *Almanerz v. San Diego Electric Ry. Co.*, 15 Cal.App.2d 423, 759 P.2d 513; *Allin v. Snively*, 100 Cal.App.2d 411, 224 P.2d 113. As was said in *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, 194, "Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended." The truck driver testified that when he first saw the automobile it was about 100 feet from the intersection, and that his truck was then about the same distance away; that each vehicle was traveling at about the same speed; that after seeing this car he looked to his right but saw no cars coming east on "E" Street; that he did not blow his horn and did not decrease his speed; that he continued to look to his right until his truck had entered the intersection; that he then looked to his left and observed the other car just as they were about to hit; and that the other car was then in the intersection.

Factual questions were presented with respect to negligence on the part of the truck driver, and its effect as a proximate cause of the accident. Whether he exercised ordinary care under the circumstances shown by the evidence is a question of fact, and not one of law. It cannot be held that there is no substantial evidence which would have supported a judgment for the respondent, or that an abuse of discretion appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



110 Cal.App.2d 286

PEOPLE v. VON MULLENDORF.

Cr. 4706.

District Court of Appeal, Second District,  
Division 2, California.

April 7, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Philip H. Richards, J., of committing an abortion on a pregnant woman and he appealed from the judgment and from the order denying his motion for new trial. The District Court of Appeal, Fox, J., held that evidence justified conviction.

Judgment and order affirmed.

1. Abortion ☞11

Evidence justified conviction of an accused for committing abortion on pregnant woman. Pen.Code, § 274.

2. Criminal Law ☞1159(3)

Jury determination on conflicting evidence in prosecution for committing abortion on pregnant woman was binding upon District Court of Appeal. Pen.Code, § 274.

3. Abortion ☞1

Intent is element of crime of committing abortion on pregnant woman. Pen. Code, § 274.

4. Abortion ☞11

In prosecution for committing abortion on pregnant woman, evidence justified implied finding that defendant intended to commit abortion on such woman. Pen. Code, § 274.

5. Criminal Law ☞642

Failure of trial court to appoint interpreter in prosecution for committing abortion on pregnant woman was not error in absence of a request for appointment of interpreter. Pen.Code, § 274.

6. Criminal Law ☞642

In prosecution for committing abortion on pregnant woman, defendant's testimony disclosed no need for an interpreter and failure of trial court to appoint interpreter was not error. Pen.Code, § 274.

7. Criminal Law ☞834(3)

In prosecution of a doctor for committing abortion on pregnant woman,

wherein defendant proposed instruction which stated that procuring abortion is legal under certain circumstances under statute, and therefore doctor could lawfully possess instruments capable of being used to bring about abortion, modification of such proposed instruction so that it recited that procuring abortion was legal if necessary to preserve life of a woman, so that doctor could lawfully possess instruments capable of being used to bring about abortion, was not erroneous as serving to propose issue of legality of abortion if necessary to preserve life of a woman, which was not an issue. Pen.Code, § 274.

8. Criminal Law ☞823(1)

In prosecution for committing abortion on pregnant woman any confusion in two given instructions as to whether person who accompanied such woman to office of defendant doctor was an accomplice of defendant was clarified by later instruction which advised jury that under evidence such person was an accomplice of defendant as matter of law. Pen.Code, § 274.

9. Abortion ☞1

The gist of crime of committing abortion on pregnant woman is not actual consummation of abortion as such but is performing of any acts prohibited by statute prescribing punishment of a person who provides, supplies, or administers to a woman, or who procures a woman to take medicine, drugs or substance, or uses or employs instrument or other means, with intent thereby to procure miscarriage of such woman, unless same is necessary to preserve her life. Pen.Code, § 274.

10. Abortion ☞1

Where doctor attempted in his office to commit an abortion on pregnant woman, and two days later such woman was taken to motel and operated on again by such doctor because doctor believed that a second operation was necessary, doctor was properly charged in two counts with crime of committing abortion on such woman, and doctor's crime did not amount to only one offense. Pen.Code, § 274.

---

Allan M. Moore, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was found guilty by a jury of the crime of abortion on two counts. He appeals from the ensuing judgment and the order denying his motion for a new trial.

On January 20, 1951, the complaining witness, Joan, accompanied by one Jacobson, visited the office of Dr. Clark for the purpose of having a physical examination. The doctor determined she was three months pregnant. Thereafter Jacobson had a conversation with defendant explaining that the young lady was pregnant. An appointment was made for him to bring her to defendant's office on Hollywood Boulevard on Saturday morning, February 10th. Joan borrowed \$240 for an abortion from her friend, Janice, and together they delivered it in a brown paper bag to Jacobson at a drive-in on the preceding Friday evening; it was in denominations of one and five dollar bills, as requested by him. Saturday morning Jacobson took Joan to defendant's office. He examined her and told her she was two and a half months pregnant. Defendant asked her, "Do you want the abortion"? She said "Yes." He then said, "Well, it will have to be done today or not later than Monday. It can't wait." Defendant told her to "come back to the office about 12:00" and not to eat anything in the meantime. She left defendant's office with Jacobson who still had the paper bag with the money in it. Jacobson then went to defendant's office alone and paid him the money. A few minutes after 12:00 o'clock Jacobson returned Joan to defendant's office. He told her to disrobe and lie on the table; he gave her an injection which resulted in her losing consciousness. However, she regained consciousness and felt pain and knew that something was going on in her plevic region. After it was over Jacobson asked defendant how it went and he replied "Fine, fine. But it was an awful mess. She is a healthy girl."

On the following Monday Joan was in bed at a friend's apartment in Pasadena. Because she was suffering pain Janice

called defendant. Upon his arrival he took Joan's temperature, felt her pulse, and palpated her stomach in various parts. On learning that it pained her he said, in the presence of Janice, "he hadn't got it all the first time, that he would have to operate again." He asked Janice whether there was a place to sterilize his instruments. After some conversation and defendant's refusal to take the patient to his own office, he agreed to convey her to a motel "if it was one with a kitchenette where he could sterilize." Janice located a motel and Joan was removed to it by defendant. There, defendant required a rubber sheet and something in which to sterilize the instruments. After spreading the rubber sheeting on the bed he had Joan undress and lie down for further treatment. She saw an 18 inch long chromium scissors-like instrument. From his anaesthetic she became unconscious. When she awoke Jacobson was there and defendant was closing his black bag. Blood was on a few of the things in the room. The next morning Janice and Jacobson removed Joan to his apartment in Hollywood. When they left the motel they took a little brown paper bag that had the contents taken from Joan and disposed of it in a trash can on the way to Hollywood. Jacobson testified defendant told him to dispose of the contents of this bag in which he saw evidence of human flesh.

Joan testified that her purpose in going to defendant's office on the first occasion was to have an abortion; that she had taken no medication prior to that time for the purpose of causing an abortion, and that she had not suffered any cramps.

Joan was removed to the County Hospital where an examination disclosed an incomplete abortion and pelvic peritonitis. There was also evidence of instrumentation on the cervix.

Defendant's office record book did not contain the names of either Joan, Jacobson, or Janice on February 10th, but it did reveal the names of other patients treated on that date. Defendant admitted requesting a motel with a kitchenette where he could have hot water and sterilize, and he also

admitted taking Joan and Janice to the motel.

[1,2] The first contention of defendant is that "The verdict is contrary to and unsupported by the evidence, and is contrary to law." The simple answer to this contention is found in the foregoing résumé of the evidence. It demonstrates an abundance of proof to support the verdict. Defendant's denial of certain testimony on behalf of the People only served to create a conflict in the evidence which the jury resolved against him. Such determination is of course binding on this court.

[3,4] It is argued that no intent is shown on the part of defendant to commit an abortion on Joan. It is true that intent is an element of this offense. People v. Browning, 132 Cal.App. 136, 147, 22 P.2d 784. Criminal intent, however, is seldom susceptible of direct proof. People v. Murphy, 60 Cal.App.2d 762, 770, 141 P.2d 755, hence the necessity of inferring it from the circumstances connected with the offense. Penal Code, sec. 21. Defendant testified that after examining Joan he knew she was pregnant. This admission, coupled with the circumstances surrounding the payment of his fee by Jacobson; the absence of her name upon defendant's office records; his statement as testified to by Janice that "he hadn't got it all the first time, that he would have to operate again"; the circumstances surrounding Joan's transfer to the motel and what transpired there; the testimony regarding the disposition of the brown bag and its contents, and the testimony of Dr. Crawford, who examined her at the Los Angeles County Hospital, that his examination disclosed an incomplete abortion,—these amply justify the implied finding that defendant intended to commit an abortion on Joan.

[5,6] Defendant's second contention is that his substantial rights were irreparably prejudiced by the failure of the court to appoint an interpreter. There are two complete answers to this: the first is that no request was made for such an appointment; the second is that an examination of defendant's testimony fails to disclose any need for an interpreter. His answers are

intelligent and coherent. There is no indication that anyone was unable to understand what he said. He was not a newcomer to this country. He had been admitted to practice medicine in California since 1933.

[7] Defendant's third claim is that the court erred with respect to certain of his proposed instructions. He complains first about the modification of Instruction No. 1. The court marked out the language through which a line is drawn and inserted the words indicated. This instruction stated that "Under the law it is legal to procure ~~if the same is necessary~~ an abortion ~~under certain circumstances~~ ~~under~~ ~~Section 274 Penal Code~~ ~~and therefore~~ it is ~~perfectly~~ lawful for a doctor to have in his possession certain instruments which are capable of being used to bring about an abortion." The modification was entirely proper. It served to make the instruction more specific and understandable. Defendant, however, contends this modification served "to propose the issue of the legality of an abortion if the same is necessary to preserve the life of a woman, which was not an issue in this case or a defense by defendant herein." The change in the language clearly did not have that effect, and, in any event, it could not possibly have been prejudicial to defendant.

[8] It is argued that there is confusion in two of the earlier instructions as to whether or not Jacobson is an accomplice. Any possible uncertainty about his status is completely clarified in a later instruction which advised the jury that under the evidence he was an accomplice as a matter of law.

[9,10] Defendant's final contention is that he was improperly charged in two counts with a crime that amounted to but one offence and consequently he suffered double jeopardy. To support this proposition he says "\* \* \* the facts surrounding the issuance of said informations by the People were based on one continuous act upon the person of one Joan \* \* \*." This is not factually correct. Count one charges defendant with performing certain



illegal acts on Joan at his office on February 10, 1951; Count two deals with what was done to his victim by defendant on Monday, February 12, at the motel. It is clear that defendant committed two separate and distinct acts upon this young woman with the intent to procure a miscarriage and was therefore properly charged in two counts. In *People v. Rhoades*, 93 Cal.App.2d 448, 450, 209 P.2d 33, this identical problem was considered. It was there pointed out that the gist of the crime is not the actual consummation of an abortion as such but rather it is the performing of any of the acts prohibited by section 274, Penal Code,<sup>1</sup> with the intent to procure a miscarriage which constitutes the crime of abortion.

The judgment and the order denying the motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



110 Cal.App.2d 215

**MARTIN BROS., Inc., v. CITY OF  
CONCORD et al.  
Civ. 15018.**

District Court of Appeal, First District,  
Division 2, California.

April 2, 1952.

Rehearing Denied May 2, 1952.

Petition by Martin Bros., Inc., for a writ of mandate to compel the City of Concord and others to make payment on a contract held by it for the construction of sanitary sewers in the city. The Superior Court, in and for the County of Contra Costa, Jordan L. Martinelli, J., entered judgment directing issuance of the writ and the City and others appealed. The District Court of Appeal, Jones,

J., pro tem., held that where councilman entered into contract of employment with and was given option to purchase shares of stock in corporation which had at the time a contract for construction of sanitary sewers with the City, and councilman had become ill and thereby contracts were cancelled, the councilman never acquired an interest in the corporation sufficient to void the contract for the construction of the sewers.

Judgment affirmed.

**Municipal Corporations** ⇨231(2)

Where city councilman entered into contract of employment with and was given option to purchase shares of stock in corporation which had at that time a contract for construction of sanitary sewers with the city and because of councilman's illness the contract of employment was cancelled and the option agreement terminated, the councilman never acquired an interest in the corporation sufficient to void the contract for construction of the sewers since neither party had changed its status toward the other.

Thomas F. McBride, Martinez, for appellant.

Walter J. Walsh, San Francisco, John L. Garaventa, Concord, of counsel, for respondent.

JONES, Justice pro tem.

Respondent Martin Bros., Inc., a corporation, petitioned the court below for a writ of mandate to compel the City of Concord to make payment on a contract held by it for the construction of sanitary sewers in said city. Judgment was entered directing the issuance of the writ and it is from this judgment that the city has appealed.

It is contended by the appellant that the contract upon which the respondent bases its claim is void because an interest in the corporation doing the work for the city was acquired by one of the councilmen after the contract was let.

1. Section 274, Penal Code, reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with in-

tent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

The record discloses that the plans and specifications for the sewer were prepared by the City Engineer of Concord in August, 1949. At the April election of 1950, E. M. Bradley was elected to the City Council, and on May 8, 1950, Martin Bros., Inc., was awarded the contract for constructing the sewer system and Bradley voted for the award.

On May 17, 1950, Bradley began negotiating with F. E. Martin, president of the petitioner, for the purchase of stock in the corporation and also for employment by the corporation as its general manager. On the 8th of June, 1950, Martin gave Bradley a written option to buy 500 shares of stock at a price of \$30 per share. The right to exercise the option was limited, however, to the period between the first day of August, 1950, and the first day of September, 1950.

On the same date, June 8, 1950, the corporation entered into a written contract of employment with Bradley whereby he was hired to act as general manager of the corporation for a period of one year at a salary of \$500 per month, and, in addition he was to be given the use of an automobile. It was provided in the contract of employment that Bradley "shall not participate in any profits or losses which said Martin Bros., Inc., may earn or sustain by reason of any contracts now in existence between said Martin Bros., Inc. and the City of Concord, a Municipal Corporation of the Sixth Class". The employment contract carried the further provision "that the said corporation shall not enter into any contracts for work and services or sell any material or personal property to the said City of Concord during the term the said manager is in the employ of said corporation or owns stock in said corporation."

Bradley performed no services under the contract of employment and received no salary although there is evidence that he made some use of an automobile owned by the corporation. Neither did he exercise the option to purchase the 500 shares of stock. He became ill, and on July 29, 1950, a contract cancelling the contract of employment was executed "for the mutual benefit and

interest" of the parties as the recited consideration, and, on the same date, the option agreement for the purchase of the stock was terminated upon the same consideration.

The trial court found that Bradley never acquired an interest in the corporation sufficient to void the contract, and with this holding we agree.

The record discloses that the option contract was terminated before it became exercisable, and that the contract of employment was never consummated. At the time the cancellation contracts were executed the corporation had not changed its status toward Bradley nor had he changed his status toward the corporation. They were in exactly the same positions they occupied before the option was given and the contract of employment entered into. Neither had gained any advantage nor had either sustained any detriment by virtue of either contract at the time they were cancelled. Because of his failure to exercise the option and to engage in the employment, Bradley never stood to profit out of the contract through the medium of dividends or by virtue of wages.

The cases cited by appellant are all cases in which the public officer under attack was actually vested with an interest in the contract. In *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, a member of the Council had sold lumber and materials to the city, and for which it was held he could not recover. The case of *Miller v. City of Martinez*, 28 Cal.App.2d 364, 82 P.2d 519, strongly relied on by appellant, involved the sale of petroleum products to the city by the Shell Oil Company. One of the councilmen was manager of the Shell plant and the owner of a large block of stock in the company. It was there held that in view of the existing interest which the councilman held in the corporation the contract with the City of Martinez was void. In *People v. Deysher*, 2 Cal.2d 141, 146, 40 P.2d 259, it was held that where an interest in the contract was arranged or contracted for by the public officer prior to the award, and subsequently acquired, the contract was

void. There is no evidence of any such prior arrangement or contract in this case.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



110 Cal.App.2d 258

**CAMERON v. CAMERON.**

Civ. 18782.

District Court of Appeal, Second District,  
Division 3, California.

April 4, 1952.

Rehearing Denied April 23, 1952.

Hearing Denied May 29, 1952.

Action to set aside property settlement agreement, made prior to divorce, on ground that defendant husband had fraudulently concealed nature and extent of his property. The Superior Court of Los Angeles County, Raymond McIntosh, J., granted motion to dismiss for failure of diligent prosecution, and wife appealed. The District Court of Appeal, Shinn, P. J., held that the dismissal was not abuse of discretion as plaintiff had failed to show existence of bona fide negotiations for settlement to justify delay in prosecuting case.

Order affirmed.

**1. Appeal and Error** ⇨1203(3)

Statute making it mandatory to dismiss action if not brought to trial within three years after remittitur following reversal on appeal, but granting trial court discretion to dismiss action for want of prosecution where action has not been brought to trial within two years after being filed, does not take away trial court's inherent power to dismiss for want of prosecution after two years but before three years have elapsed. Code Civ.Proc. § 583.

**2. Dismissal and Nonsuit** ⇨60(4)

Where there are mutual bona fide efforts to compromise and plaintiff delays bringing action to trial because of reasonable belief, induced by nature of negotiations, that trial can probably be avoided,

dismissal of action because of delay would be abuse of discretion. Code Civ.Proc. § 583.

**3. Appeal and Error** ⇨1203(3)

Demands by one party for settlement and consistent denial of liability and refusal to offer anything in settlement by other party did not amount to negotiations which excused delay in prosecuting litigation after reversal and remittitur. Code Civ.Proc. § 583.

**4. Appeal and Error** ⇨1203(5)

Where judgment for plaintiff in action to set aside property settlement agreement on grounds of fraud was reversed on appeal, and remittitur was filed in January, 1949, but memorandum setting case for trial in June, 1951, was not filed until January, 1951, and plaintiff did not make satisfactory showing that bona fide negotiations for settlement caused delay, granting of motion to dismiss for failure of diligent prosecution in April, 1951, was not abuse of discretion. Code Civ.Proc. § 583.

**5. Appeal and Error** ⇨962

A dismissal for want of prosecution in cases not regulated by statute will not be disturbed upon appeal in absence of showing of clear abuse of discretion.

Lee Combs, Wallace B. Scales, Los Angeles, for appellant.

Meserve, Mumper & Hughes, and Hewlings Mumper, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff Winifred W. Cameron appeals from an order dismissing the action for failure to diligently prosecute it after remittitur was filed reversing a former judgment in her favor. In June, 1941, plaintiff filed an action for separate maintenance against defendant. A final decree of divorce was entered February 18, 1943, on an amended complaint. A property settlement agreement had been entered into by the parties February 16, 1942, and the divorce decree made no disposition of community property. On February 27, 1946, plaintiff filed this action to set aside the property settlement agreement on the



ground defendant had fraudulently concealed the nature and extent of his property. On appeal, a judgment for plaintiff after trial to the court was reversed for insufficiency of the evidence. *Cameron v. Cameron*, 88 Cal.App.2d 585, 199 P.2d 443. Remittitur was filed in the superior court January 19, 1949. A memorandum for setting for trial was not filed until January 3, 1951, and trial was set for June 11, 1951. The motion to dismiss for failure of diligent prosecution was noticed for February 5, 1951, and granted April 18, 1951.

With the motion to dismiss and in opposition thereto affidavits were filed by the parties and their counsel. These related to plaintiff's claim that her delay was due to negotiations for settlement of the litigation. In February, 1949, plaintiff made a motion for leave to file an amended complaint, which motion was denied February 21, 1949. In May, 1949, plaintiff noticed a motion in the divorce action for increase in the allowance for support of the child. The hearing was continued from time to time and the matter was determined September 29, 1949. During June and July there were some discussions between the attorneys relative to settlement of both actions. It was further averred by one of plaintiff's attorneys, somewhat vaguely, that during the first few months of 1950 the matter of compromise was under consideration, and it was not until December, 1950, that plaintiff finally decided the possibility of compromise was remote. Defendant's attorneys denied that any compromise discussions took place after September 29, 1949, and denied dismissal of the fraud suit was mentioned except in connection with attempts to agree upon the amount of support money for the child.

[1] Plaintiff contends that her delay was due to settlement negotiations and that it was an abuse of discretion for the court to dismiss the action. She further contends, under section 583, Code of Civil Procedure, the court has no power to dismiss an action until three years have elapsed after remittitur is filed. We will treat these contentions in reverse order.

Defendant's motion was not based on any statute but was addressed to the inherent power of the court.

Section 583 provides that when "an appeal has been taken and judgment reversed with cause remanded for a new trial \* \* the action *must* be dismissed by the trial court \* \* \* unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court." Plaintiff claims that this expresses a legislative intention that any delay up to three years is reasonable. This argument would be tenable only if section 583 is construed as a limitation of the power of the court to dismiss within the three year period. It is provided in section 583 that the "court may in its discretion dismiss any action for want of prosecution \* \* whenever plaintiff has failed for two years after action is filed to bring such action to trial". This provision takes from the court discretion to dismiss within the two year period. *Johnston v. Baker*, 167 Cal. 260, 139 P. 86. The remaining provisions are mandatory. They require the court to dismiss (with some exceptions) if the action is not brought to trial within five years after it is filed, or within three years after motion for new trial is granted or judgment reversed on appeal. They do not take away any of the court's inherent power to dismiss for want of prosecution. This was expressly decided in *Inderbitzen v. Lane Hospital*, 17 Cal.App.2d 103, 61 P.2d 514.

[2-4] The remaining contention of plaintiff relates to the showing made by the affidavits. She points out that where the reason for delay was the attempt to effect a compromise, orders of dismissal have been reversed. *Jepsen v. Sherry*, 99 Cal.App.2d 119, 220 P.2d 819; *Ferris v. Wood*, 144 Cal. 426, 77 P. 1037. We would agree that when there have been mutual bona fide efforts to compromise and the plaintiff has delayed bringing the action to trial because of a reasonable belief, induced by the nature of the negotiations, that a trial could probably be avoided, it would be an abuse of discretion to dismiss the action. But we do not regard this as such a case.

The affidavits of the respective attorneys were sharply conflicting. We must presume the trial court believed the facts to be as stated in the affidavits of defendant and his attorneys. *Brock v. Fouchy*, 76 Cal.App.2d 363, 369, 172 P.2d 945; *Deyl v. Deyl*, 88 Cal.App.2d 536, 543, 199 P.2d 424. According to those affidavits defendant at no time had any intention of making a settlement of the fraud suit for more than its "nuisance value" in a small amount. There were negotiations with respect to a greater allowance for support of the child and defendant made an offer of \$250 per month with the stipulation that the present action be dismissed. Plaintiff refused the offer and subsequently obtained an increase to \$225 per month by order of court. Defendant at no time made any offer to settle the fraud suit nor did he entertain any offer made by plaintiff. Plaintiff's attorneys asserted that plaintiff intended to try the present action unless she received a large sum in settlement, which defendant's attorneys refused even to discuss. It is clear that defendant and his counsel regarded the reversal of plaintiff's judgment for insufficiency of evidence to be conclusive as to her claim of fraud. The efforts toward settlement were put forth by plaintiff and met with no response. Even in the discussions concerning support for the child defendant steadfastly denied there was any merit in the claim of fraud. Plaintiff's showing of the existence of negotiations for settlement was unsatisfactory. The demands by one party for settlement and the consistent denial of liability and refusal to offer anything in settlement by the other party do not amount to "negotiations," such as would excuse delay in prosecuting the litigation. The trial court would have been warranted in concluding that the action was not set for trial because of plaintiff's lack of confidence in the merits of the claim of fraud, and an unfounded hope that defendant would some day offer a substantial sum in order to avoid a trial. It would also have been a reasonable conclusion that plaintiff's attorneys believed the action could not be dismissed if it was brought to trial within three years, al-

though the motion to dismiss was not opposed upon that ground.

[5] A dismissal for want of prosecution in cases not regulated by statute will not be disturbed upon appeal in the absence of a showing of a clear abuse of discretion. 2 Cal.Jur. p. 902. We are of the opinion that no abuse of discretion has been shown.

The order dismissing the action is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., did not participate.

Hearing denied; CARTER, J., dissenting.



110 Cal.App.2d Supp. 837

**PEOPLE v. AGNEW.**

**Cr. A. 2793.**

Appellate Department, Superior Court,  
Los Angeles County, California.

March 31, 1952.

Defendant was convicted in the Municipal Court of the City of Los Angeles, Roger Alton Pfaff, J., for a traffic violation and from a judgment and order denying defendant's motion for new trial, defendant appealed. The Appellate Department of the Superior Court, Los Angeles County, Bishop, J., held that where defendant appeared in court and pleaded not guilty to traffic violation and between the arraignment on the traffic ticket and the date of trial, a formal complaint was filed, action of trial court in proceeding to trial without calling upon defendant to plead to this complaint was error but did not warrant a reversal.

Judgment and order denying defendant a new trial affirmed, and appeals from verdict and "judgment" denying defendant's motion for dismissal of action dismissed.

**1. Constitutional Law** ⚖️257

**Criminal Law** ⚖️261(1), 1186(4)

Where defendant who was given traffic ticket, appeared in trial court and plead-

ed not guilty to traffic violation, and between the arraignment on traffic ticket and date of trial, a formal complaint was filed, trial of defendant without calling upon him to plead to this complaint was error but was not a denial of due process and did not warrant a reversal of judgment imposing a fine of \$25. Vehicle Code, § 739; Pen. Code, § 1462; Const. art. 6, § 4½.

## 2. Criminal Law ☞1144(13)

Where a great portion of evidence was unintelligible to court in prosecution for traffic violation, due to fact that much of testimony related to little model cars placed on a map by witnesses at points identified only as "here" and "there", court would indulge presumption that these unknown references served to support verdict appealed from. Vehicle Code, § 739; Pen.Code, § 1462.

## 3. Criminal Law ☞656(1), 1166½(12)

In prosecution for traffic violation, where police officer testified on cross-examination that it was not true that police department had policy of reprimanding officers who failed to bring in a certain number of traffic tickets each day, subsequent statement of trial judge that officer's statement was absolutely true, was improper but was not prejudicial. Vehicle Code, § 739; Pen.Code, § 1462.

## 4. Criminal Law ☞785(15), 1173(2)

In prosecution for traffic violation, failure to give requested instruction that a witness false in one part of his testimony is to be distrusted in others was error but was harmless. Code Civ.Proc. § 2061, subd. 3.

---

Robert Wm. Agnew, in pro per.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty. and Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Judge.

When arrested, May 15, on the ground that he had failed to yield the right of way as he made a left turn at an intersection, the defendant was given a traffic ticket, the "written notice to appear" prescribed by

section 739 of the Vehicle Code. Appearing in the trial court on June 6 in response to the notice, the defendant was advised of his constitutional rights, pleaded "not guilty" and his trial was set for July 2. Between the arraignment on the traffic ticket and the date of trial a formal complaint was filed, conforming to the requirements of section 1462, Penal Code, but the defendant was never called upon to plead to this complaint, being tried and found "guilty" without any arraignment other than the one upon the traffic ticket. We agree with the defendant that this was an error in procedure. However, we have concluded that the defect was not at a jurisdictional point, did not involve due process, and neither it nor any other of the errors of which he complains, warrants a reversal of the judgment imposing a fine of \$25.

Section 739.1 of the Vehicle Code prescribes the procedure pertinent to the situation.

"Whenever written notice to appear has been prepared, delivered and filed with the court, as provided in Section 739 hereof, or when ever notice of illegal parking has been given pursuant to the provisions of Section 591 hereof, an exact and legible duplicate copy of said notice when filed with the magistrate specified herein, in lieu of a verified complaint, shall notwithstanding the provisions of Section 1426 of the Penal Code, constitute a complaint to which the defendant may plead 'Guilty.'

"If, however, the defendant shall violate his promise to appear in court or shall not deposit lawful bail, or shall plead other than 'Guilty' of the offense charged, a complaint shall be filed which shall conform to the provisions of said Section 1426, Penal Code, and which shall be deemed to be an original complaint, and thereafter proceeding shall be had as provided by law; provided, that a defendant may, by an agreement in writing, subscribed by him and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon the written notice mentioned in Section 739 hereof."

If the legislature had attempted, by section 739.1, to make the notice to appear serve all the functions of an accusatory



pleading, we might have serious doubts as to the validity of the section, but obviously no such attempt was made. To those who wish to dispose of a traffic violation charge without a formal complaint or trial, sections 739 and 739.1 afford an expeditious method. Those who exercise the option given them to plead "guilty" cannot well complain that they have been denied due process, as long as provision is made for the more formal procedure, in case a plea of "guilty" is not entered. Certain it is that the defendant, who all along has maintained his innocence, who did not plead guilty when arraigned upon the traffic ticket, and against whom a formal complaint was filed, and who had a trial, is not to be heard to contend that the provisions of section 739.1 are unconstitutional.

Had the trial court proceeded to try the defendant and enter judgment without the formal complaint having been filed, the defendant would be in a position to defeat the judgment, for the court's very jurisdiction to try the case depended upon the existence of such a complaint. *Ralph v. Police Court*, 1948, 84 Cal.App.2d 257, 190 P.2d 632. There is another proposition that we regard as settled with equal certainty; section 739.1 requires that a defendant against whom a formal complaint is filed, be arraigned upon it. We see no other possible interpretation to be placed upon its words: "If, however, the defendant shall \* \* \* plead other than 'Guilty' of the offense charged, a complaint shall be filed \* \* \* and thereafter proceeding shall be had as provided by law."

[1] It was, therefore, error not to proceed to arraign the defendant for his plea before putting him to trial. For quite a time in this state's history a reversal of the judgment would have followed such an error, *People v. Corbett*, 1865, 28 Cal. 328, *People v. Gaines*, 1877, 52 Cal. 479, and this even in cases, such as this, where defendant's failure to object to being brought to trial without a plea, might be said to be a waiver of a formal plea. *People v. Monaghan*, 1894, 102 Cal. 229, 36 P. 511. But a reversal is no longer warranted by the mere existence of this error, since the ad-

dition of section 4½ to Article VI, of the Constitution, with its admonition that "No judgment shall be set aside, or new trial granted, \* \* \* for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The rule of the three supreme court cases cited above, and their support of it, was fully recognized in *People v. Tomsy*, 1912, 20 Cal.App. 672, 130 P. 184, but the fact that the defendant had never entered a plea to the information charging him with a felony, was held an error without prejudice and so not a ground for granting a new trial, in view of section 4½, Article VI. See also *People v. Hall*, 1934, 220 Cal. 166, 171-172, 30 P.2d 23, 25.

[2] In the case before us, the defendant, as already indicated, has throughout maintained his innocence of the charge. Had he been arraigned on the formal complaint he would, without doubt, have entered a plea of "not guilty." He was tried on the theory that his guilt and that matter alone was at issue. The evidence, in so far as it is intelligible to us, is sufficient to support the verdict. A great portion of the evidence is unintelligible to us, due to the fact that much of the testimony related to little model cars, placed by the witnesses "here" and "there," and to places, only identified as "here" and "there," on a map. As we are to presume that these unknown references serve to support rather than defeat the verdict, *Neale v. Atchison, T. & S. F. Ry. Co.*, 1918, 178 Cal. 225, 227, 172 P. 1105; *Lesser v. McCullough*, 1949, 90 Cal.App.2d 586, 589, 203 P.2d 832, 834; *Pomerantz v. Bryan Motors, Inc.*, 1949, 92 Cal.App.2d 114, 117, 206 P.2d 440, 441, we must hold the evidence ample to support it. It is proper, therefore, to apply to this case these words taken from *People v. Tomsy*, supra, 20 Cal.App. 684, 685, 130 P. 189-190: "That it is strictly true that the defendant in this case, *in point of fact*, by his omission to enter a formal plea to the information, could not have been and, indeed, was not prejudiced in the remotest degree as to his sub-

stantial rights, or, in other words, could not have been, and, in truth, was not thus deprived of a full and fair trial upon the merits of the charge, is the statement of a proposition too obvious to admit of legitimate discussion. To the contrary, it is plainly manifest that, the cause having been tried by both sides upon the theory that a plea of not guilty had been regularly entered, the defendant received the benefit of such a plea as fully and effectually as if the same had been formally interposed."

One remaining question troubled us. Was it possible that the error of proceeding to trial without a plea was a violation of due process? This question was first answered in the affirmative, by a divided court, in *Crain v. United States*, 1896, 162 U.S. 625, 645, 16 S.Ct. 952, 40 L.Ed. 1097, 1103, but a few years later the affirmative decision was overruled in *Garland v. Washington*, 1914, 232 U.S. 642, 645, 34 S.Ct. 456, 58 L.Ed. 772, 775, the court quoting with approval from the dissenting opinion in the *Crain* case. The procedure is erroneous but not a denial of due process.

[3] We note briefly two further errors complained of by the defendant. After a police officer had testified in cross-examination that it was not true that the Police Department had the policy of calling officers on the carpet who failed to bring in a certain number of tickets each day, the trial court volunteered: "What the officer states is absolutely true. There isn't any such thing as a 'quota' system in Los Angeles." The trial judge should not have added his unsworn testimony to that of the traffic officer, but here again we have an error that was without influence upon the outcome of the case. If an officer faced censure by his superiors unless he made a minimum number of arrests each day, the fact would lend credence to any defendant's position that he had been given a traf-

fic ticket when he did not deserve one. There was, however, no evidence of a quota system, nor any fact from which its existence could be inferred. The trial court's espousal of the department, therefore, was concerning a matter not in controversy and, we are satisfied, did not tip the scales against the defendant.

[4] Another error has to do with an instruction. Section 2061, Code of Civil Procedure, lays down the rule that the jury are "to be instructed by the court on all proper occasions: \* \* \*

"3. That a witness false in one part of his testimony is to be distrusted in others". An instruction embodying this and other like principles (being number Alternate 52 of Calif. Jury Instructions, Criminal) was requested but not given. While it should have been given, because the code so declares, there is no case, of which we are aware, that reverses a judgment because of the absence of this instruction. It expresses an obvious truth, *People v. Delucchi*, 1911, 17 Cal.App. 96, 110, 118 P. 935, concerning a subject matter peculiarly within the province of the jury, that is, the credibility of a witness. We deem it improbable that there would have been any different result had the requested instruction been given. The failure to give it was, therefore, another harmless error. *People v. Newson*, 1951, 37 Cal.2d 34, 45, 230 P.2d 618, 624.

We have considered other contentions made by the defendant, but find none of them warrants a reversal of the judgment, nor justifies an extension of this opinion.

The judgment and the order denying the defendant a new trial are affirmed; the appeals from the verdict, and from the "judgment" denying defendant's motion for a dismissal of the action, are dismissed.

SHAW, P. J., and STEPHENS, J., concur.





33 Cal.2d 718

## SEI FUJII v. STATE.

L. A. 21149.

Supreme Court of California, in Bank.

April 17, 1952.

Action by Sei Fujii against the State of California to determine whether an escheat had occurred, under provisions of the Alien Land Law, as to certain real property acquired by plaintiff. From a judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., adjudging that the property described in the deed to plaintiff had escheated to the state on the date of the deed, the plaintiff appealed. The Supreme Court, Gibson, C. J., held that the Alien Land Law was invalid for violation of the Fourteenth Amendment.

Reversed.

Schauer, Shenk, and Spence, JJ., dissented in part.

Prior opinions, 217 P.2d 481; 218 P.2d 595.

## 1. Treaties ⇐7

The United Nations Charter is a "treaty", within the purview of the constitutional provision making treaties a part of the supreme law of the land and binding upon judges in every state. United Nations Charter, arts. 1, 55, 56, 104, 105, 59 Stat. 1037, 1045, 1046, 1053; U.S.C.A.Const. art. 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Treaty".

## 2. Treaties ⇐11

Under constitutional provision making treaties the supreme law of the land and binding upon judges in every state, a treaty does not automatically supersede local laws which are inconsistent with it unless treaty provisions are self-executing. U.S.C.A. Const. art. 6.

## 3. Treaties ⇐12

A treaty is to be regarded, in courts of justice, as equivalent to act of Legislature whenever it operates of itself, without aid of any legislative provision, but when terms of stipulation import contract, that is, when either of parties engages to perform a particular act, treaty addresses itself to political, not judicial, department, and Legislature must execute contract before it can

become rule for court. U.S.C.A.Const. art. 6.

## 4. Treaties ⇐12

In determining whether a treaty is self-executing, courts must look to intent of signatory parties as manifested by language of instrument, and, if instrument is uncertain, recourse may be had to circumstances surrounding its execution. U.S. C.A.Const. art. 6.

## 5. Treaties ⇐12

In order for treaty provision to be operative without aid of implementing legislation and to have force and effect of statute, it must appear that framers of treaty intended to prescribe rule that, standing alone, would be enforceable in courts. U.S.C.A.Const. art. 6.

## 6. Treaties ⇐11, 12

The United Nations Charter provisions pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race are not "self-executing" and therefore do not, merely by virtue of constitutional provision relating to treaties, automatically supersede local laws inconsistent therewith. United Nations Charter, arts. 1, 55, 56, 104, 105, 59 Stat. 1037, 1045, 1046, 1053; U.S. C.A.Const. art. 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Self-Executing".

## 7. Treaties ⇐7

The humane and enlightened objectives of the United Nations Charter are entitled to respectful consideration by courts and Legislatures of every member nation, since that document expresses universal desire of thinking men for peace and for equality of rights and opportunities and represents moral commitment of foremost importance, and the spirit of the pledge made by the United States, as a member nation, must not be permitted to be compromised or disparaged in either its domestic or foreign affairs. U.S.C.A.Const. art. 6.

## 8. Treaties ⇐11

The United Nations Charter provisions pledging the member nations to promote the

observance of human rights and fundamental freedoms without distinction as to race did not operate to invalidate Alien Land Law. U.S.C.A.Const. art. 6; Gen. Laws, Act 261, §§ 1, 2, 7.

#### 9. Courts ⇐89

The authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it.

#### 10. Courts ⇐97(3)

Where United States Supreme Court's decision that Alien Land Law was not violative of Fourteenth Amendment had been greatly weakened by subsequent decisions, which appeared to invite, rather than foreclose, further consideration of constitutional issue, re-examination of question by California Supreme Court would not be foreclosed by the decision upholding the statute. Gen.Laws, Act 261, §§ 1, 2, 7.

#### 11. Constitutional Law ⇐238(1)

The rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment; and therefore power of state to regulate the use and ownership of land must be exercised subject to controls and limitations of that amendment. U.S.C.A. Const.Amend. 14.

#### 12. Constitutional Law ⇐210

The Fourteenth Amendment protects aliens, including those ineligible to citizenship, as well as citizens, from arbitrary discrimination. U.S.C.A.Const.Amend. 14; Nationality Act of 1940, § 303, 8 U.S.C.A. § 703; Immigration Act of 1924, § 13(c), as amended, 8 U.S.C.A. § 213(c).

#### 13. Constitutional Law ⇐48, 211

As a general rule, legislative classification will be sustained if it is reasonable and has substantial relation to legitimate object, and existence of any reasonably conceivable state of facts sufficient to uphold legislation will be presumed. U.S.C.A. Const.Amend. 14.

#### 14. Constitutional Law ⇐48

The presumption in favor of the validity of a legislative classification is greatly narrowed in scope, if not entirely dis-

pelled, whenever it is shown that legislation actually discriminates against certain persons because of their race or nationality. U.S.C.A.Const.Amend. 14.

#### 15. Aliens ⇐10

##### Constitutional Law ⇐215

The federal immigration law was enacted under the plenary power of Congress over immigration and naturalization, free from the inhibitions of the Fourteenth Amendment, and therefore the classification system imposed by the Alien Land Law, restricting ownership of real property by aliens ineligible for citizenship, could not be justified as merely carrying congressional policy into effect, but would have to stand or fall on its own merits. U.S.C.A. Const.Amend. 14; Nationality Act of 1940, § 303, 8 U.S.C.A. § 703; Immigration Act of 1924, § 13(c), as amended, 8 U.S.C.A. § 213(c); Gen.Laws, Act 261, §§ 1, 2, 7.

#### 16. Aliens ⇐10

##### Constitutional Law ⇐215

Even if purpose of Alien Land Law, classifying persons on basis of eligibility to citizenship, was to restrict use and ownership of land to persons who were loyal and had interest in welfare of state, classification would have been unreasonable, since ineligibility for citizenship does not establish lack of loyalty or absence of interest in welfare of country. U.S.C.A. Const.Amend. 14; Gen.Laws, Act 261, §§ 1, 2, 7.

#### 17. Evidence ⇐28

It is generally recognized that real purpose of Alien Land Law was elimination of competition by alien Japanese in farming California land. Gen.Laws, Act 261, §§ 1, 2, 7; Nationality Act of 1940, § 304 et seq., 8 U.S.C.A. § 704 et seq.

#### 18. Constitutional Law ⇐238(1)

Prevention of agricultural competition between residents of state may be proper legislative objective under some circumstances, but arbitrary or unreasonable means cannot be used to accomplish that result. U.S.C.A.Const.Amend. 14.

#### 19. Aliens ⇐4

All aliens lawfully in the United States have right to work for living in common.

occupations of community. Nationality Act of 1940, §§ 303, 701, as amended, 8 U.S.C.A. §§ 703, 1001; Immigration Act of 1924, § 13(c), as amended, 8 U.S.C.A. § 213(c).

## 20. Constitutional Law ⇨238(1), 275(1)

Since the right to earn a living in many occupations is inseparably connected with the use and enjoyment of land, and since the supposed distinction between the right to engage in common callings and the right to own or use real property had its roots and justification solely in ancient common-law system of feudal tenure and no longer has any rational basis, the right, guaranteed by the Fourteenth Amendment, to earn one's livelihood by following any ordinary occupation includes the right to use and enjoy land. U.S.C.A.Const.Amend. 14.

## 21. Aliens ⇨10

### Constitutional Law ⇨215

The Alien Land Law was invalid, as violative of the Fourteenth Amendment. Gen.Laws, Act 261, §§ 1, 2, 7; U.S.C.A. Const.Amend. 14.

J. Marion Wright and Owen E. Kupfer, Los Angeles, for appellant.

A. L. Wirin, Fred Okrand, Los Angeles, and Will Maslow, New York City, as amici curiae on behalf of appellant.

1. The pertinent portions of the alien land law, 1 Deering's Gen.Laws, Act 261, as amended in 1945, are as follows:

"§ 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

"§ 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed

Fred N. Howser and Edmund G. Brown, Attys. Gen., Everett W. Mattoon, Asst. Atty. Gen., and John F. Hassler, Jr., Deputy Atty. Gen., for respondent.

Ralph G. Lindstrom and Lindstrom & Bartlett, Los Angeles, as amici curiae on behalf of respondent.

GIBSON, Chief Justice.

Plaintiff, an alien Japanese who is ineligible to citizenship under our naturalization laws, appeals from a judgment declaring that certain land purchased by him in 1948 had escheated to the state. There is no treaty between this country and Japan which confers upon plaintiff the right to own land, and the sole question presented on this appeal is the validity of the California alien land law.<sup>1</sup>

### United Nations Charter

It is first contended that the land law has been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race. Plaintiff relies on statements in the preamble and in Articles 1, 55 and 56 of the Charter, 59 Stat. 1035.<sup>2</sup>

[1-3] It is not disputed that the charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of

by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

"§ 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, \* \* \* shall escheat as of the date of such acquiring, to, and become and remain the property of the state of California. \* \* \*"

2. The preamble recites that "We the peoples of the United Nations determined \* \* \* to reaffirm faith in fundamental human rights \* \* \* and for these ends \* \* \* to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims."



the supreme law of the land and that the judges in every state are bound thereby. U.S.Const., art. VI. A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing. In the words of Chief Justice Marshall: A treaty is "to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court." *Foster v. Neilson*, 1829, 2 Pet. 253, 314, 7 L.Ed. 415.<sup>3</sup>

[4, 5] In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. See *Foster v. Neilson*, 2 Pet. 253, 310-316, 7 L.Ed. 415; *United States v. Percheman*, 7 Pet. 51, 58-59, 8 L.Ed. 604; *Jones v. Meehan*, 175 U.S. 1, 10-23, 20 S.Ct. 1, 5-10, 44 L.Ed. 49; *Chew Heong*

*v. United States*, 112 U.S. 536, 539-543, 5 S.Ct. 255, 256-258, 28 L.Ed. 770; *Cook v. United States*, 288 U.S. 102, 119, 53 S.Ct. 305, 311, 77 L.Ed. 641; cf. *Nielsen v. Johnson*, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607. In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. See *Head Money Cases* [*Edye v. Robertson*] 112 U.S. 580, 598, 5 S.Ct. 247, 254, 28 L.Ed. 798; *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386; *Cook v. United States*, 288 U.S. 102, 118-119, 53 S.Ct. 305, 311, 77 L.Ed. 641; *Valentine v. United States*, 299 U.S. 5, 10, 57 S.Ct. 100, 103, 81 L.Ed. 5; *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161, 61 S.Ct. 219, 225, 85 L.Ed. 98.

[6-8] It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to

Article 1 states that "The Purposes of the United Nations are: \* \* \* 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; \* \* \*."

Articles 55 and 56 appear in Chapter IX, entitled "International Economic and Social Cooperation." Article 55 provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: "a. higher standards of living, full employment, and conditions of economic and social progress and development;

"b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 provides: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

3. In *Foster v. Neilson*, certain treaty provisions were held not to be self-executing on the basis of construction of the English version of the document. Subsequently, upon consideration of the Spanish version, the provisions in question were held to be self-executing. *United States v. Percheman*, 7 Pet. 51, 8 L.Ed. 604. Chief Justice Marshall's language in the *Foster* case, however, has been quoted with approval in later cases. *United States v. Rauscher*, 119 U.S. 407, 417-418, 7 S.Ct. 234, 239-240, 30 L.Ed. 425; *Valentine v. United States*, 299 U.S. 5, 10, 57 S.Ct. 100, 103, 81 L.Ed. 5.

create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations "shall promote: \* \* \* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and in Article 56, the member nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. For example, the treaty involved in *Clark v. Allen*, 331 U.S. 503, 507-508, 67 S.Ct. 1431, 1434, 91 L.Ed. 1633, relating to the rights of a national of one country to inherit real property located in another country, specifically provided that "such national shall be allowed a term of three years in which to sell the [property] \* \* \* and withdraw the proceeds \* \* \*" free from any discriminatory taxation. See, also, *Hauenstein v. Lynham*, 100 U.S. 483, 488-490, 25 L.Ed. 628. In *Nielsen v. Johnson*, 279 U.S. 47, 50, 49 S.Ct. 223, 73 L.Ed. 607, the provision treated as being self-executing was equally definite. There each of the signatory parties agreed that "no higher or other duties, charges, or taxes of any kind, shall be levied" by one country on removal of property therefrom by citizens of the other

country "than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively." In other instances treaty provisions were enforced without implementing legislation where they prescribed in detail the rules governing rights and obligations of individuals or specifically provided that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country's own citizens. *Bacardi Corp. v. Domenech*,<sup>4</sup> 311 U.S. 150, 158-159, 61 S.Ct. 219, 224, 85 L.Ed. 98; *Asakura v. City of Seattle*, 265 U.S. 332, 340, 44 S.Ct. 515, 516, 68 L.Ed. 1041; see *Maiorano v. Baltimore & Ohio R. Co.*, 213 U.S. 268, 273-274, 29 S.Ct. 424, 425-426, 53 L.Ed. 792; *Chew Heong v. United States*, 112 U.S. 536, 541-542, 5 S.Ct. 255, 257, 28 L.Ed. 770.

It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention. For example, Article 104 provides: "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." Article 105 provides: "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." In *Curran v. City of New York*, 191 Misc. 229, 77 N.Y.S.2d 206, 212, these articles were treated as being self-executory. See, also, *Balfour, Guthrie & Co. v. United States, D.C.*, 90 F.Supp. 831, 832.

The provisions in the charter pledging cooperation in promoting observance of

4. It should be noted, however, that the treaty involved in the *Bacardi* case also contained a specific provision, not discussed by the court, that its terms "shall have the force of law in those States

in which international treaties possess that character, as soon as they are ratified by their constitutional organs." 311 U.S. 150, 159, 61 S.Ct. 219, 224, 85 L. Ed. 98.

fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations. Secretary of State Stettinius, Chairman of the United States delegation at the San Francisco Conference where the charter was drafted, stated in his report to President Truman that Article 56 "pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes." Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, Department of State Publication 2349, Conference Series 71, p. 115; Hearings before the Committee on Foreign Relations, United States Senate [Revised] July 9-13, 1945, p. 106. The same view was repeatedly expressed by delegates of other nations in the debates attending the drafting of article 56. See U.N.C.I.O. Doc. 699, II/3/40, May 30, 1945, pp. 1-3; U.N.C.I.O. Doc. 684, II/3/38, May 29, 1945, p. 4; Kelsen, *The Law of the United Nations* [1950], footnote 9, pp. 100-102.

The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge

to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law.

#### Fourteenth Amendment of the Federal Constitution

The next question is whether the alien land law violates the due process and equal protection clauses of the Fourteenth Amendment. Plaintiff asserts, first, that the statutory classification of aliens on the basis of eligibility to citizenship is arbitrary for the reason that discrimination against an ineligible alien bears no reasonable relationship to promotion of the safety and welfare of the state. He points out that the land law distinguishes not between citizens and aliens, but between classes of aliens, and that persons eligible to citizenship are given all the rights of citizens regardless of whether they desire or intend to become naturalized. Secondly, he contends that the effect of the statute, as well as its purpose, is to discriminate against aliens solely on the basis of race and that such discrimination is arbitrary and unreasonable.

[9, 10] The issue of the constitutionality of the alien land law is thus again presented to this court,<sup>5</sup> and we are met at the outset with the contention that a re-examination of the question is foreclosed by decisions of the United States Supreme Court rendered in 1923 upholding the statute. *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278; *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323; cf. *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255. See, also, *Cockrill v. People of State of California*, 1925, 268 U.S. 258, 45 S.Ct. 490,

5. See, for example, *Porterfield v. Webb*, 1924, 195 Cal. 71, 231 P. 554; *Mott v. Cline*, 1927, 200 Cal. 434, 253 P. 718; *Dudley v. Lowell*, 1927, 201 Cal. 376, 257 P. 57; *People v. Osaki*, 1930, 209 Cal. 169, 286 P. 1025; *People v. Morrison*, 1932, 125 Cal.App. 282, 13 P.2d 800 [hearing denied]; *Alfajara v. Fross*,

1945, 26 Cal.2d 358, 159 P.2d 14; *People v. Oyama*, 1946, 29 Cal.2d 164, 173 P.2d 794; cf. *Takahashi v. Fish & Game Comm.*, 1947, 30 Cal.2d 719, 185 P.2d 805 [involving legislation prohibiting issuance of commercial fishing licenses to aliens ineligible to citizenship].



69 L.Ed. 944. This objection is a serious one, and we have rejected it only after the most careful deliberation.

In 1946, this court applied the rule of *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278, in the case of *People v. Oyama*, 29 Cal.2d 164, 173 P.2d 794, and in following year, in *Takahashi v. Fish and Game Comm.*, 30 Cal.2d 719, 185 P.2d 805, it upheld other legislation which classified aliens on the basis of eligibility to citizenship. Both judgments were reversed upon certiorari in 1948. *Oyama v. State of California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249; *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. These and other recent decisions of the United States Supreme Court, which we shall discuss later, state and apply concepts of rights under the Fourteenth Amendment that are at variance with the opinions in the earlier cases.

The holding of the United States Supreme Court in the *Oyama* case was that a presumption declared by section 9 of the alien land law<sup>6</sup> violated the rights of citizens who were children of ineligible aliens and discriminated against such citizens solely because of their parents' ancestry. The court was also confronted with the claim that the general provisions of the land law denied ineligible aliens the equal protection of the laws, and it is significant that the contention was not discussed by the majority opinion although it could easily have been disposed of by citation of *Porterfield v. Webb* had there been no question in the minds of the members of the court with respect to the correctness of that decision. In rejecting an argument that the presumption was necessary to prevent evasion of the prohibition against ownership of land by ineligible aliens, the court speaking through Chief Justice Vinson said, "This reasoning presupposes the validity of that prohibition, a premise which we deem it unnecessary and therefore inappropriate to reexamine in this case. But assuming, for purposes of argument only,

that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it." 332 U.S. at page 646, 68 S.Ct. at page 275, 92 L.Ed. 249; see, also, footnote 27 to majority opinion. Four justices concurred in the result on the broad ground that the basic provisions of the alien land law violate the Fourteenth Amendment, stating that previous decisions upholding the statute should be overruled.

*Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, gives further indication that the *Porterfield* decision is no longer to be regarded as settled law. In the *Takahashi* case a California statute which denied commercial fishing licenses to "aliens ineligible for citizenship" was invalidated on the ground that it violated the equal protection clause and conflicted with federal immigration power when it prevented ineligible aliens from earning a living as fishermen. In answer to arguments relying by analogy on *Porterfield v. Webb* and similar cases, the court said: "Assuming the continued validity of those cases, we think they could not in any event be controlling here." 334 U.S. at page 422, 68 S.Ct. at page 1144, 92 L.Ed. 1478. There was thus another intimation that the court might not regard those decisions as binding authority if the constitutionality of the alien land laws were again squarely presented for determination.

Our view that we are not precluded from re-examining the question is reinforced by the recent case of *Kenji Namba v. McCourt*, 1949, 185 Or. 579, 204 P.2d 569, where the Supreme Court of Oregon, in holding invalid the alien land law of that state, reviewed the opinions of the United States Supreme Court and concluded that the *Porterfield* and related cases had been disapproved by *Oyama v. State of California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249, and *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478.

It thus appears that the decisions of the

6. This section provides for a prima facie presumption of intent to evade escheat upon proof that the consideration for a conveyance of realty was paid or

agreed to be paid by an ineligible alien and that title was taken in the name of a citizen or eligible alien.

United States Supreme Court do not foreclose, but rather invite, further consideration of the constitutional issues which have been raised.

The leading case involving alien land legislation, *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, upheld a Washington law prohibiting landholding by any alien who had failed to file a declaration of intention to become an American citizen. While that statute did not mention eligibility for naturalization, the court noted that a class composed of nondeclarant aliens necessarily included all ineligible aliens, and it concluded that discrimination between aliens on the basis of ineligibility to citizenship did not violate the equal protection clause. The following reasons were given in support of the decision: (1) "Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership \* \* \*." (2) "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries." (3) "If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens." It was also said that the "quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself." 263 U.S. at pages 220–221, 44 S.Ct. at page 20, 68 L.Ed. 255.

*Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278, upholding the constitutionality of the California alien land law, was decided the same day as *Terrace v. Thompson* and was held to be controlled by that decision. The court, in a short

opinion, reasoned as follows: The prohibited class under the Washington law consisted of nondeclarant aliens; this necessarily included all aliens ineligible for citizenship, which was the prohibited class defined by the California act; and the failure of California to extend the prohibition to eligible aliens who failed to declare their intent to become citizens could not be said to be arbitrary or unreasonable.

The foregoing summary covers all the grounds upon which our alien land law has heretofore been upheld by the United States Supreme Court. As we shall see, *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278, has been greatly weakened by subsequent decisions, and it is settled that the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it. See, for example, *Olsen v. State of Nebraska*, 313 U.S. 236, 244–246, 61 S.Ct. 862, 864–865, 85 L.Ed. 1305. Constitutional principles declared in recent years are irreconcilable with the reasoning of the earlier cases and lead us to conclude that the statute violates the equal protection clause of the Fourteenth Amendment.

[11] There can be no question that the rights to acquire, enjoy, own and dispose of property are "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment," and that the power of a state to regulate the use and ownership of land must be exercised subject to the controls and limitations of that amendment. *Shelley v. Kraemer*, 334 U.S. 1, 10, 68 S.Ct. 836, 841, 92 L.Ed. 1161; see *Terrace v. Thompson*, *supra*, 263 U.S. 197, 218, 44 S.Ct. 15, 19, 68 L.Ed. 255.

[12] The California act, in the absence of treaty, withholds all interests in real property from aliens who are ineligible to citizenship under federal naturalization laws, and the Nationality Code limits the right of naturalization to certain designated races or nationalities, excluding Japanese and a few racial groups comparatively small in numbers. 8 U.S.C.A. § 703. Congress, however, at least prior to 1924,<sup>7</sup> saw

7. For all practical purposes, immigration of ineligible aliens was halted by the

Exclusion Act of 1924. 8 U.S.C.A. § 213 (c).

fit to permit aliens who are ineligible for citizenship to enter and reside in the United States despite the fact that they could not become naturalized, and such aliens are entitled to the same protection as citizens from arbitrary discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131. Accordingly, the statute cannot be sustained unless it can be shown that the public interest requires limitation of their rights to acquire and enjoy interests in real property.

By its terms the land law classifies persons on the basis of eligibility to citizenship, but in fact it classifies on the basis of race or nationality. This is a necessary consequence of the use of the express racial qualifications found in the federal code. Although Japanese are not singled out by name for discriminatory treatment in the land law, the reference therein to federal standards for naturalization which exclude Japanese operates automatically to bring about that result.<sup>8</sup> This was recognized in *Oyama v. State of California*, supra, 332 U.S. 633, 640, 644, 68 S.Ct. 269, 272, 274, 92 L.Ed. 249, where Chief Justice Vinson, speaking for a majority of the court, concluded that the alien land law as applied in that case discriminated against a Japanese-American citizen, and that the "only basis for this discrimination \* \* \* was the fact that his father was Japanese and not American, Russian, Chinese, or English." It was on this ground that the court invalidated a presumption contained in the California land law, stating that "only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause". 332 U.S. at page 646, 68 S.Ct. at page 275.

Subsequent to the *Oyama* case the Supreme Court condemned the enforcement by state courts of covenants which restrict occupancy of real property on the basis of race or color, and it expressly pointed out that statutes incorporating such restrictions

would violate the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 11, 68 S.Ct. 836, 841, 92 L.Ed. 1161. While the persons discriminated against in the *Shelley* and *Oyama* cases were citizens, it is clear, as we have seen, that the Fourteenth Amendment protects aliens as well as citizens from arbitrary discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131.

[13, 14] As a general rule a legislative classification will be sustained if it is reasonable and has a substantial relation to a legitimate object, and the existence of any reasonably conceivable state of facts sufficient to uphold the legislation will be presumed. *Leland v. Lowery*, 26 Cal.2d 224, 232, 157 P.2d 639, 175 A.L.R. 1109; *Sacramento M. U. Dist. v. Pacific Gas & Electric Co.*, 20 Cal.2d 684, 693, 128 P.2d 529. Where, however, as here, the classification is on the basis of race, it is "immediately suspect" and will be subjected "to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194. In *Perez v. Sharp*, 32 Cal.2d 711, 719, 198 P.2d 17, 21, Justice Traynor pointed out that "Race restrictions must be viewed with great suspicion, for the Fourteenth Amendment 'was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color' (*Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072; *Williams v. International Brotherhood of Boilermakers*, 27 Cal.2d 586, 590, 165 P.2d 903) and expresses 'a definite national policy against discrimination because of race or color.' *James v. Marinship Corp.*, 25 Cal.2d 721, 740, 155 P.2d 329, 339, 160 A.L.R. 900. Any state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption inherent in this constitutional policy." See also *Shelley v. Kraemer*, 334 U.S. 1, 23, 68 S.Ct. 836, 847, 92 L.Ed. 1161, for discussion of

8. Compare legislative devices to deprive Negroes of franchise without express mention of race. See *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed.

1340; *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.



purpose of Fourteenth Amendment with regard to race and color.

The clear import of the statements quoted above from the *Korematsu*, *Oyama* and *Perez* cases is that the presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown, as here, that legislation actually discriminates against certain persons because of their race or nationality. This view, now established by the latest declarations of the United States Supreme Court, is irreconcilable with the approach previously taken by that court in the *Porterfield* case in determining whether there was a reasonable relation between the purposes sought to be accomplished, and the classification adopted, in the California alien land law.

The opinion of Justice Butler in the *Porterfield* case overlooked the fact that the classification resulted in racial discrimination, and it did not consider the validity of the California law in the light of the present rule that restrictive measures which curtail the rights of a racial group must be carefully scrutinized. As noted above, that decision was based upon the authority and reasoning of *Terrace v. Thompson*, *supra*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, which involved a statute classifying aliens on the basis of whether or not they had filed a declaration of intention to become citizens. The court there rejected a contention that such classification discriminated because of race or color by pointing out that under the terms of the statute all non-declarant aliens, of whatever race or color, were prohibited from owning land. The statement is obviously inapplicable to the California statute, and the *Porterfield* case is entirely silent on the question whether race discrimination is implicit in the method of classification adopted in California. Accordingly, it devolves upon us to examine with care the reasons which have heretofore been advanced in support of alien land legislation.

[15] One of the most persistent arguments popularly advanced in support of the validity of the restrictive provisions of the alien land law is that the statute merely carries into effect a legislative policy of

Congress and that the regulations established by federal law, as to who may and may not become citizens, in themselves furnish a reasonable basis for classification. This view has the effect of evading every other legal attack on the statute, for it concedes that the state law is discriminatory and shifts the blame to the federal immigration law which was enacted under the plenary power of Congress over immigration and naturalization free from the inhibitions of the Fourteenth Amendment. The argument also conveys the suggestion that the courts need not seriously concern themselves with this particular denial of fundamental rights, since Congress in due time may change its immigration policy so as to render the alien land law a dead letter.

The fallacy in the contention that the California statute merely carries a congressional policy into effect appears from a cursory examination of the two totally distinct types of legislation. Congress has enacted a naturalization law, not a property law. Congress regulates admission to citizenship, not ownership of property. Congress has neither declared nor assumed that landowners ineligible to citizenship are a danger to the state; our Legislature has so declared or assumed. The purposes and factual assumptions of the alien land law all originate in our own legislation, without direction or even suggestion from Congress. It may be noted in passing that only a small minority of states have such alien legislation, although the same immigration regulations apply throughout the country. See 5 *Vernier, American Family Laws* [1938], 304-346; *McGovney, The Anti-Japanese Land Laws* [1947], 35 *Cal.L.Rev.* at pp. 21-24.

The view that federal naturalization classifications are automatically proper for purposes of state legislation was specifically rejected in *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143, 92 L.Ed. 1478. It was there pointed out by Justice Black, speaking for a majority of the court, that the power of Congress to put racial groups in special classifications for purposes of regulating immigration and naturalization is very broad and wholly distinguishable from the power of the state

to discriminate between such groups in determining which of its residents shall have the right to acquire, enjoy, own, and dispose of property. Accordingly, if a state wishes to borrow a federal system of grouping, it must justify the adopted classification in its new setting, and the state's use of the distinction must stand or fall on its own merits.

[16] The state asserts that the purpose of the alien land law is to restrict the use and ownership of land to persons who are loyal and have an interest in the welfare of the state. As we shall see later, this is not the true objective of the legislation, but even if it were there is no reasonable relationship between that asserted purpose and the classification on the basis of eligibility to citizenship. Just as eligibility to citizenship does not automatically engender loyalty or create an interest in the welfare of the country, so ineligibility does not establish a lack of loyalty or the absence of interest in the welfare of the country. Nor does it follow that a person has no stake in the economic and social fortune of a state merely because the federal law denies him the right to naturalization. His American-born children are citizens, and, having made his home here, he has a natural interest, identical with that of an eligible alien, in the strength and security of the country in which he makes a living for his family and educates his children.

In determining the propriety of a classification on the basis of ineligibility to citizenship, consideration must necessarily be given to the nature of the requirements for naturalization. The Nationality Code sets forth a number of conditions in addition to racial qualifications; for example, a person is ineligible to become a citizen who cannot speak English, or does not believe in our form of government and in property rights, or has been convicted of desertion from the armed forces or evasion of the draft during war, or has not resided in the United States for a prescribed time, or is not of good moral character. See 8 U.S.C.A. § 704 et seq. It may be that some of these requirements for naturalization bear a reasonable relationship to the asserted purpose of

singling out a class of persons who are not loyal to this country or interested in its welfare. Other requirements, however, and particularly the provisions regarding race, obviously do not constitute an accurate or reasonable method for distinguishing between loyal and disloyal persons. Likewise, even if it be assumed that there might be some justification for a statute denying rights in property to aliens who can become citizens, but who have not displayed sufficient interest in this country to seek naturalization, there can be no justification for a classification which operates to withhold property rights from some aliens, not because of anything they have done or any beliefs they hold, but solely because they are Japanese and not French or Italian. The only disqualification urged against Sei Fujii is that of race, but it may be said of him as it was said of Kumezo Kawato, "Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them." Ex parte Kawato, 317 U.S. 69, 71, 63 S.Ct. 115, 117, 87 L.Ed. 58.

One of the grounds given for the decision in *Terrace v. Thompson*, 263 U.S. 197, 220–221, 44 S.Ct. 15, 20, 68 L.Ed. 255, was that it was within the "realm of possibility" that all the real property in a state might pass to the ownership or possession of persons ineligible to citizenship in the absence of restrictive legislation. Whatever justification there may have been for fear of this sort in 1923, any basis for such apprehension is now entirely lacking. Changes in the naturalization and immigration laws since the *Terrace* and *Porterfield* decisions, together with other factors, have reduced that possibility to the vanishing point. See concurring opinion of Justice Murphy, in *Oyama v. State of California*, 332 U.S. 633, 667–669, 68 S.Ct. at pages 285–286, 92 L.Ed. 249. When those cases were decided, only white persons and persons of African nativity and descent were eligible to become citizens. Naturalization

Act of 1790; 18 Stats. 318 [1875]. At the time the present proceeding was begun, in 1949, the naturalization laws had been amended to provide that the following may become citizens: "descendants of races indigenous to the Western Hemisphere," 8 U.S.C.A. § 703, 54 Stats. 1140, ch. 876 [1940]; "any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States," 8 U.S.C.A. § 1001, 56 Stats. 182 [1942]; Chinese persons and persons of Chinese descent, 8 U.S.C.A. § 703; 57 Stats. 601 [1943]; Filipinos and persons indigenous to India, 8 U.S.C.A. § 703; 60 Stats. 416 [1946]. Thus, in 1949, the California alien land law could operate only against Japanese and a small number of residents of a few other races, such as Polynesians. According to 1940 census figures, the alien Japanese population of California was 33,569. Immigration of persons ineligible to citizenship was halted by the Exclusion Act of 1924, 43 Stats. 161, 8 U.S.C.A. § 213(c), hence Japanese aliens in the state in 1949 were necessarily of mature years, and their number must have been materially less than in 1940 due to death, changes of residence, deportation and other causes.

Moreover, if, as indicated in the Terrace case, 263 U.S. at pages 217-221, 44 S.Ct. at pages 18-20, 68 L.Ed. 255, a state may properly bar all non-citizens from owning land, the method of classification here involved was not designed to bring about that result. The California statute leaves in possession and control of land many eligible aliens who have never declared their intention to seek naturalization and who have been residents for so long a time without becoming declarants that one may infer a settled purpose on their part never to become citizens.

[17, 18] In the foregoing discussion, we have assumed, as asserted by the attorney general, that the purpose of the alien land law is to limit the use and ownership of land to those who are loyal to this country and have an interest in the welfare of this state. It is generally recognized, however, that the real purpose of the legis-

lation was the elimination of competition by alien Japanese in farming California land. The argument presented in favor of adoption of the act in the 1920 voters pamphlet stated that the statute's "primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands," that "Orientals, largely Japanese, are fast securing control of the richest irrigated lands in the state," and that "control of these rich lands means in time control of the products and control of the markets." A former attorney general of California declared that the basis of the alien land law legislation was "race undesirability" and that "It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer." See Ferguson, California Alien Land Law [1947] 35 Cal.L.Rev. 61, 68; McGovney, Anti-Japanese Land Laws [1947] 35 Cal.L.Rev. 7, 14, 49; State Board of Control report, "California and the Oriental" [1920 ed.] pp. 8-9, 45, 49-52. Shortly after the statute was enacted this court recognized that the legislation was directed at the Japanese and that its purpose was to discourage them from coming into this state. In re Estate of Yano, 188 Cal. 645, 206 p. 995. Moreover, the state has enforced the law solely against persons ineligible to citizenship because of race and primarily against Japanese. See statistics collected in concurring opinion by Justice Murphy in *Oyama v. State of California*, 332 U.S. 633, 661-662, 68 S.Ct. 269, 283, 92 L.Ed. 249; Ferguson, California Alien Land Law [1947] 35 Cal.L.Rev. at pp. 61, 73. Although the prevention of agricultural competition between residents of the state might be a proper legislative objective under some circumstances, arbitrary or unreasonable means may not be used to accomplish that result, and discrimination on the basis of race, whether by the terms of a statute or the manner of its administration, is obviously contrary to the Fourteenth Amendment.



[19, 20] It is well established that all aliens lawfully in this country have a right "to work for a living in the common occupations of the community". *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 10, 60 L.Ed. 131; *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. Much emphasis has been placed in argument on an asserted distinction between the right to engage in common callings and the right to own or use real property, but an examination of the authorities shows that the distinction had its roots and justification solely in the ancient common law system of feudal tenure,<sup>9</sup> and it has no rational basis today. As pointed out above, the United States Supreme Court, in *Takahashi v. Fish and Game Comm.*, 334 U.S. 410, 68 S.Ct. 1138, 1141, held that a California code provision denying commercial fishing licenses to persons "ineligible to citizenship" violated the equal protection clause and conflicted with the federal power to regulate immigration. It was assumed for the purposes of the *Takahashi* decision that one objective of the licensing law was "to protect California citizens engaged in commercial fishing from competition by Japanese aliens". The opinion necessarily determined that such a purpose did not justify discrimination against persons ineligible to citizenship. If there is no constitutional basis for such discrimination in regard to work in "ordinary occupations," such as

commercial fishing, in what way does the identical type of discrimination become valid where the work involves, as an incident, the ownership or possession of real property?

The truth is that the right to earn a living in many occupations is inseparably connected with the use and enjoyment of land. Farming, for example, is one of the most ancient and common ways of making a living, but the rule of the *Porterfield* case permits a state, in the absence of treaty, to so restrict an ineligible alien resident that he can farm land only in the capacity of an employee or hired hand. See *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323. Moreover, under the *Porterfield* rule, ineligible aliens who are not protected by treaty may be restricted in following many ordinary occupations other than farming, since it is reasonably necessary to the operation of most private businesses to own or lease land upon which an office, shop or factory may be located.<sup>10</sup> Legislation which results in such discrimination imposes upon the ineligible alien an economic status inferior to that of all other persons living in the state and interferes with his right to earn a living. See *Kenji Namba v. McCourt*, 185 Or. 579, 204 P.2d 569, 583; concurring opinion, *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 66-67, 195 P.2d 1.

9. See *McGovney, Anti-Japanese Land Laws*, [1947], 35 Cal.L.Rev. 7, 18-20, 39-41.

At early common law an alien could acquire real property by gift, purchase or devise, but his rights in the property were subject to forfeiture by the crown. The historical basis for this disability has been traced to fear that the safety of the English crown was threatened by the large number of Normans and Frenchmen owning English land in the thirteenth century. See *Pollack and Maitland, History of English Law* [2d ed., 1898] 463; 9 *Holdsworth, History of English Law* [1926] 92-93. Early commentators offered such explanations for the rule as the fact that aliens, owing a foreign allegiance, were regarded as incapable of performing military service for the king, one of the most important incidents of the feudal tenure system. See 2 *Blackstone Comm.*

250; *State v. Boston C. & M. R. R. Co.*, 25 Vt. 433, 438. Further, in time of war aliens "might fortify themselves in the heart of the realm" and, in time of peace, so much of the freehold land might be held by aliens that there would not be enough English freeholders to man the juries and hence "there should follow a failure of justice." *Calvin's Case* [1609] 77 Eng.Rep. 377. France and England abolished discrimination against aliens with regard to property rights in 1819 and 1870, respectively.

10. When the alien land law was enacted a treaty permitted alien Japanese to lease commercial and residential property. This treaty was subsequently abrogated, but the statute was construed as having incorporated the treaty provisions and as permitting such leases. *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 195 P.2d 1.

As the Supreme Court of Oregon recently said, in declaring invalid an alien land law substantially the same as the California statute, "Our country cannot afford to create, by legislation or judicial construction, a ghetto for our ineligible aliens. And yet if we deny to the alien who is lawfully here the normal means whereby he earns his livelihood, we thereby assign him to a lowered standard of living." *Kenji Namba v. McCourt*, *supra*, 204 P.2d at p. 583.

[21] In the light of the foregoing discussion, we have concluded that the constitutional theories upon which the *Porterfield* case was based are today without support and must be abandoned. The California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, we hold that the alien land law is invalid as in violation of the Fourteenth Amendment.

The judgment is reversed.

EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal.

The sole justification of the statute barring Japanese aliens from owning or occupying property in California is, that such persons will not be legal citizens familiar with American concepts and will use the property to the detriment, rather than the welfare, of the nation. Authority for that conclusion is a similar statement made by Mr. Justice Butler in *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, in 1923, who, in turn, took it from the decision of the judge in the lower court. There was not then, much less now, any basis for it. Regardless of what may

have been the popular concept when our present immigration, naturalization and alien land laws were adopted and upheld by our courts, the trend of thought influenced by subsequent events is diametrically opposed to the philosophy underlying those laws and the decisions upholding them. The basic fallacy of the argument advanced in support of the validity of the alien land laws is in making ineligibility for citizenship the postulate of the classification of persons who are prohibited from owning land.

Mr. Justice SCHAUER, in his dissenting opinion, charges the majority of this court with refusal to perform its judicial duty by the rendition of its decision declaring the California alien land law unconstitutional. Our decision, he says, stems "from the strong social views of the justices who write it and from their desire to make the law what they think it should be", and is based on the conjecture that the Supreme Court of the United States "which has previously upheld the law may eventually reverse itself."

For my part in participating in the decision, I deny the charge. I have always considered that the decisions upholding the alien land laws were based upon a false premise and that those laws were never valid because they contravened constitutional mandates. I did not join with the majority of this court in *People v. Oyama*, 29 Cal.2d 164, 173 P.2d 794, which was reversed by the Supreme Court of the United States, see *Oyama v. State of California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249, and I dissented in *Takahashi v. Fish and Game Comm.*, 30 Cal.2d 719, 185 P.2d 805, which was likewise reversed by the Supreme Court of the United States, see *Takahashi v. California*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. I took the position when those cases were before this court that the statutes there involved violated constitutional mandates and should be stricken down. I took this position without regard to the conclusion which might finally be reached by the Supreme Court of the United States. While the majority of the Supreme Court of California upheld the statutes involved in those

cases, its decisions were reversed by the Supreme Court of the United States. I can see no distinction in the disposition of those cases by this court and the case at bar. In my opinion this court has the right to say at this time that the statute here involved is unconstitutional even though the former decisions of the Supreme Court of the United States appear to have upheld it as constitutional. What conclusion that court may ultimately reach in this particular case cannot change my view with respect to what the decision of this court should be. I am fully cognizant that this position may be in conflict with the following declaration in the dissenting opinion of Mr. Justice SCHAUER: "Justice is pictured as being blind but not in the posture of an ostrich, and judicial duty is not performed when a court refuses to follow a law because it conjectures that a higher court which has previously upheld the law may eventually reverse itself." Contrary to this expressed belief of Mr. Justice SCHAUER, it is my view that the judge who closes his mind and refuses to apply constitutional principles in the light of present day concepts confuses the ostrich which hides his head when danger approaches with the mythical Goddess of Justice whose blindfold is depicted to illustrate her impartiality and freedom from external influences.

My philosophy of the law is and always has been that it is the duty of a judge, in construing the Constitution, to give effect to its provisions and strike down legislation in contravention thereof. *Werner v. Southern Cal. etc. Newspapers*, 35 Cal.2d 121, 137, 216 P.2d 825, 13 A.L.R.2d 252; *Perez v. Sharp*, 32 Cal.2d 711, 732, 198 P.2d 17; *In re Blaney*, 30 Cal.2d 643, 184 P.2d 892; *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 171 P.2d 8; *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 163 P.2d 704; *County of L. A. v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 393, 196 P.2d 773; *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 66, 195 P.2d 1; *Takahashi v. Fish and Game Comm.*, 30 Cal.2d 719, 737, 185 P.2d 805; *Hollman v. Warren*, 32 Cal.2d 351, 196 P.2d 562; *Lockard v. City of Los Angeles*, 33 Cal.

2d 453, 468, 202 P.2d 38, 7 A.L.R.2d 990; *Sandstrom v. Cal. Horse Racing Board*, 31 Cal.2d 401, 415, 189 P.2d 17, 3 A.L.R.2d 90; *Del Mar Canning Co. v. Payne*, 29 Cal.2d 380, 384, 175 P.2d 231; *Ferrante v. Fish & Game Comm.*, 29 Cal.2d 365, 375, 175 P.2d 222.

The Constitution of the United States is the supreme law of the land and all judges take an oath to support it. In my opinion this oath is violated when courts permit laws to stand or acts to be done in conflict with its provisions. See *People v. Rochin*, 101 Cal.App.2d 140, 143, 225 P.2d 1, 913, reversed by the Supreme Court of the United States, *Rochin v. People of State of California*, 342 U.S. 165, 72 S.Ct. 205.

Convinced as I am and always have been that this statute violates basic constitutional guarantees, it is my plain duty to so declare. Even conceding that the Supreme Court of the United States has not overruled *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278, *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318, *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323, *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, or *Cockrill v. People of State of California*, 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944, it has reversed this court on the only recent cases which have considered the problem here involved. Furthermore, that court has recently declared in *Oyama v. State of California*, 332 U.S. 633, at page 646, 68 S.Ct. 269, at page 275, 92 L.Ed. 249: "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land. In *Hirabayashi v. United States*, this Court sustained a war measure which involved restrictions against citizens of Japanese descent. But the Court recognized that, as a general rule, 'Distinctions between citizens solely because of their ancestry are by their very nature odious



to a free people whose institutions are founded upon the doctrine of equality.' 1943, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774." The foregoing declaration is clearly out of harmony with the basic philosophy announced in the decisions of that court hereinabove cited upholding the alien land laws.

The fundamental principle enunciated by the equal protection clauses of our Constitutions, both state and federal, means equality for aliens within our country, as well as for citizens. It has both antiquity and sanctity for its background. "And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself." Leviticus 19: 33, 34. And recently this admonition has been fostered by the United Nations Charter as an international policy. Any curtailment of equality must necessarily, therefore, be carefully scrutinized.

After Pearl Harbor, one of the chief arguments advanced for the evacuation from California of the Japanese was, as has been expressed: "Economic practices made Japanese undesirable competitors, and their productive contribution to the nation's economy was negligible." Grodzins, *Americans Betrayed*, p. 401. If the impact of the Japanese on agriculture shortly after 1941 was "negligible"—of no importance—then it cannot be said to be *now* so important as to justify depriving them of their constitutional rights. Indeed, even less importance now exists, for they were placed in detention camps and since their release have been widely dispersed.

In March, 1951, hearings were conducted by Subcommittees of the House and the Senate Judiciary Committees on measures revising the laws on immigration, naturalization and nationality. One of the basic features of the proposed revision was the *elimination of discrimination on the basis of race for both entry of aliens into the country and their eligibility for naturalization*. Many people representing various organizations testified at the hearings. Some of those organizations have heretofore actively participated in sponsoring and

fostering the alien land law of California. Yet no one opposed the departure from race as a basis for denying citizenship, and most of them expressly endorsed it. Although not representing any organization, Congressman Judd's statement is typical. He said: "To me, this [the elimination of the racial discrimination] is a matter of simple justice. These people are here. They are legally here. They are entitled to stay here the rest of their lives. Their average age is above 50. They pay taxes; they are good, law-abiding members of their communities. They have proved through their conduct during the war, and especially through the conduct of their children who served with heroism, distinction, and valor in our Armed Forces, that they are loyal to the United States and fully worthy of American citizenship. From the standpoint of our own society, it would be better to have them fully incorporated as citizens than as alien residents.

"Certainly it is better to have them a part of our country than a foreign body in it. I cannot believe there can be substantial objection to allowing them to become naturalized citizens, as they want to. \* \* \*

"I think that, both from the standpoint of our own conscience and from the standpoint of the respect we want the rest of the world to have for us, this is an injustice which should be corrected. It is merely good sense to naturalize those of that group who want to become full-fledged American citizens, as almost every one of them does. That is, everyone, so far as I know." Joint Hearings before the Subcommittees of the Judiciary, Congress of the United States, 82nd Congress, March 6-April 9, 1951, p. 31.

It is clear, therefore, that there is not now and never has been any rational basis for excluding the Japanese from land ownership. Even in the field of naturalization and immigration, where Congress may act without constitutional restriction, reason appears to prevail over prejudice. Since there is no logical reason for excluding aliens from naturalization on the basis of race, there is even less reason to exclude

them from land ownership when they legally reside here.

Milton R. Konvitz, Associate Professor, Cornell University, had this to say in 1946: "The Japanese were pioneers who reclaimed the San Joaquin Valley from the desert. They turned this land 'from its unhealthy barren state of wasteland into the richest and most productive district in the state of California.' Through sheer perseverance they gained control of the berry, potato, flower and truck-garden markets. Organized labor and the corrupt politicians, having put the Chinese 'in their place,' turned their attention to the Japanese, who became the scapegoat for every misfortune. The anti-Japanese agitation, it has been said, was predominantly motivated by economic factors; though it has been suggested that the fear of racial intermarriage was not absent.

" 'Man for man, the Japanese immigrants compared very favorably with the European immigrants of this period,' Treat has observed. 'They were generally literate, almost always law-abiding, industrious, and ambitious to rise in the world.' The Chinese were hated because they were 'servile'; the Japanese were hated because they were industrious and ambitious. The Chinese were hated because they lived in urban ghettos and worked in cities rather than on farms; the Japanese were hated because they preferred agriculture and worked on farms.

"As early as 1907 attempts were made in the California legislature to pass bills to drive the Japanese from the land (and ultimately from California). Owing to the efforts of President Theodore Roosevelt the bills did not then pass. The animus of the persons behind this anti-Japanese drive in the state legislature is well illustrated by the following passage from an address by one of them: 'I would rather,' he told an audience, 'every foot of California was in its native wilderness than to be cursed by the foot of these yellow invaders, who are a curse to the country, a menace to our institutions, and destructive of every principle of Americanism. I want no aliens, white, red, black or yellow to own

a foot of land in the State of California.'

\* \* \*

"The facts show that there is no relationship between the character of the Japanese in the United States and the prohibition on ownership of land by them, in so far as concerns the public health, morals, or welfare. The record of the Japanese in California is today an open book, and anyone who wants may read it. The record shows them to have been a law-abiding group, loyal to American political institutions, industrious, economically self dependent. They have not used the soil of California to plant in it mines to blow California to the heavens; they used it for the cultivation of vegetables and berries which were the delight of the consumer. They offered economic competition to members of the white race; but can the law be used to *compel* a racial group to give up its habits of industry and skills, and fundamental human rights, and assume a position of economic and social dependence?

"The Supreme Court has said that the differentiation between aliens eligible for citizenship and ineligible aliens is a rational one, for the ineligible cannot be assumed to have a great interest in the welfare of the people. The facts concerning the Japanese and Chinese and other Asiatics in this country do not bear out this judgment of the court. These people have never hindered the development of our national policy in the furtherance of the public welfare; they have built railroads for us; they have made berries grow where thistles grew before; they have contributed less than their 'quota' to our prison population. Despite economic handicaps, and placement in positions of social inferiority, they have managed to shift for themselves without leaning on others. How, then, can it be said that their ineligibility for citizenship is a rational justification for depriving them of fundamental human rights?" Konvitz, *The Alien and the Asiatic in American Law*, pp. 157, 168.

Eugene V. Rostow, Professor of Law, Yale University, with comprehensive citations of scientific authority has this to say: "\* \* \* the Supreme Court's doctrine of ethnic disloyalty belongs with folk proverbs

—'blood is thicker than water'—and the pseudo-genetics of the Nazis. It is flatly contradicted by the evidence of the biological sciences, of cultural anthropology, sociology, and every other branch of systematic social study, both in general, and with specific reference to the position of Japanese groups on the West Coast. The most important driving urge of such minority groups is to conform, not to rebel. This is true even for the American minorities which are partially isolated from the rest of society by the bar of color. The desire to conform is stronger than resentments and counter-reactions to prejudice and discrimination. Insecure and conscious of the environment as a threat, such minorities seek to establish their status by proving themselves to be good Americans." 54 Yale Law Journal, 489, 506.

The late Dudley O. McGovney, Professor of Law, University of California, made a searching analysis of the entire problem in 1947, and said: "In what respect does the ownership of some of the farm lands in a state by persons who owe no allegiance to the United States affect the safety of a state, either in time of peace or of war? Has this ancient idea by which early English law writers rationalized the exclusion of all but the King's subjects from certain feudal land tenures any validity in our time? Tenure by knight service, or military tenure, was then conceived of as something that none but persons under allegiance to the King might owe. But 'by the end of the thirteenth century, tenure by knight service had ceased to provide either soldiers or their pay.' Maitland says that if it had been abolished in 1300 the military strength of the realm would have been unaffected. When the statute of 1660 completely abolished military tenure it was merely clearing away what had long been a dead letter so far as military service was concerned. A connection between tenure and military service had existed only in theory when Coke saw 'destruction of the realm' in landholding by aliens. In our time liability to military service is not dependent upon allegiance. *Resident aliens are now subjected to compulsory military service even in international warfare, and*

nothing but legislative policy exempts enemy aliens. An alien is not exempt from draft because he owns farm land. So also Coke's Trojan-horse idea, that aliens owning land 'might fortify themselves in the heart of the realm,' never had any validity in the United States, certainly not since 1798. Congress then passed a statute, ever since in force, authorizing the arrest, confinement, or removal of enemy aliens in wartime. It also authorized the President 'to direct the conduct to be observed, on the part of the United States, toward' enemy aliens. During the war of 1812 with Great Britain, orders by the President and other officials acting under his authority directed all British nationals, fourteen years of age and over, residing within forty miles of tidewater to surrender to United States marshals and be retired further into the interior of the country or to be kept in close confinement. \* \* \*

"The fact that an enemy alien owns farm lands in nowise affects his liability to evacuation. Indeed the ownership of any property by an enemy alien in the United States is an asset to us, rather than a liability or a handicap, in view of the authority given the Alien Property Custodian to seize it, hold it, sell it or otherwise deal with it in the interest, and for the benefit, of the United States.

"Coke's Trojan-horse now lives only in law books or in the minds of persons who unthinkingly accept antiquated 'reasons' for the ancient discrimination that the common law made against aliens with respect to land holding.

"Turning to peacetime, how does alien landholding then affect the safety of the state? I think the complete answer was given to that question by Chief Justice Redfield of Vermont in 1853. The question before the Vermont supreme court [State v. Boston, C. & M. R. Co., 25 Vt. 433, 438] was whether the common law against landholding by aliens had been received, or had survived, in the state, and in particular whether Vermont law contained any procedure for the forfeiture of estates of aliens. The court held 'no,' the Chief Justice saying, 'it must, I think, be regarded as questionable how far any



such procedure could ever be enforced, for the mere purpose of escheating to the State the lands of a quiet resident or non-resident alien, in time of profound peace, where no danger was apparent, imminent, or even remotely threatened.'

"If the allegiance of farm owners is of 'highest importance' and the alienage of farm owners affects the safety of the state, the legislators of forty-one of our states are lacking in statecraft, for by their laws the allegiance of those who own farm lands is regarded as of no significance whatever. Rightly included in the forty-one states are the nine 'ineligible alien' land law states for they also regard the allegiance of land-owners of no significance except in case of the small numbers of aliens racially ineligible to naturalization. *So California lawmakers see no reason for denying to a half million alien residents the privilege of owning land without limit, though denying that privilege to less than thirty thousand other alien residents because of their race.*

"\* \* \* Even if the allegiance of farmers had significance why is it of significance with respect to the less than thirty thousand 'ineligible aliens' in California but of no significance with respect to a half million other aliens in California who may never seek or acquire citizenship? Moreover, the statement smacks of Coke's exaggeration when he said that if aliens could hold land in England, there would not be enough British freeholders to man the juries. If all the 'ineligible aliens' in California were to exhaust themselves in share cropping, there would be millions of acres of farm lands left for the citizens and other aliens. The same exaggeration is found in a statement with which Justice Butler said he agreed: 'If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens.' Even if that were a possibility the evil inherent therein is not specified. \* \* \*

"If some evil condition in farming existed in any state, the state might set up a licensing system for farmers and prescribe

qualifications deemed essential to overcome the evil, and the Supreme Court would doubtless pay deference to the local judgment on the rationality of the discrimination made thereby. Thus if tillable land were scarce in California relative to the food needs of her population, the state might prescribe qualifications for farming that would exclude all not well qualified as productive operators. If such was the purpose of the California law it fits ill with the fact that the chief charge against 'ineligible aliens,' and the Japanese in particular, was that they were especially skillful and unduly industrious—particularly in intensive cultivation, involving hard personal labor. It would take a high degree of judicial deference to local judgment to believe that Japanese were the worst offenders in nonproductivity." (Emphasis added.) 35 Cal.L.Rev. 7, 39.

Further, it has been said: "They [the Japanese] possessed a remarkable knowledge of soils and how to treat soils for the production of certain crops; an expert knowledge of the use of fertilizers and of fertilizing methods; a great skill in land reclamation, irrigation, and drainage; and a willingness to put in the enormous amount of labor required in intensive farming operations. They pioneered in the production of many crops. They reclaimed vast areas of the West, including the cut-over timber lands of the Northwest and the valuable delta lands in California. \* \* \* the *San Francisco Chronicle* readily conceded that 'the most striking feature of Japanese farming in California has been the development of successful orchards, vineyards, or gardens on land that was either completely out of use or employed for far less profitable enterprises.'

"It was George Shima, an immigrant, who taught the Californians how to develop a good potato seed. It was Japanese farmers who developed berry production in the West by increasing the yield four or five times over what it had been (planting strawberries and grapevines at the same time so that when the strawberries were replanted three years later a profitable vineyard would be in production). It was the Japanese who took over the semi-

abandoned community of Livingston and made it a profitable farming area, and who succeeded in the mountain-fruit section in Placer County after other groups had failed. 'In the Imperial Valley and the Delta country,' observed Robert Welles Ritchie, 'the Japanese never displaced white men, for white men would not work there; and in the mountain fruit district, the Chinese and after them the Japanese came in, after nearly every white man had quit, and made a go of a crippled industry.' In later years the Californians contended that the Japanese were monopolizing the best lands; but candor should have compelled the admission that most of these lands were originally marginal in character.

"\* \* \* Their most important contribution to the economy of the West, however, was the manner in which they organized produce production on a year-round basis so as to provide a steady flow of produce to the markets." McWilliams, *Prejudice*, p. 79.

In a recent article by Mr. Blake Clark published in *The Freeman* on July 16, 1951, he states: "Mrs. Nawa Munemori is the mother of an American World War II hero. A grateful nation bestowed the Congressional Medal of Honor on her son Sadao for wiping out two machine-gun nests and throwing himself on an exploding hand grenade to save his fellow soldiers. The United States Army transport, *Pvt. Sadao Munemori*, which brought his regiment home from Europe, bears his name today. Yet Mrs. Munemori, his widowed mother, is denied citizenship by the country for which her son sacrificed his life.

"Mrs. Munemori symbolizes the plight of victims of our outmoded immigration and naturalization laws, which discriminate against worthy people purely on the basis of their race. These antiquated statutes give the Communists in the Far East a powerful anti-American propaganda weapon, and damage our relations with the people of Asia.

"The situation of some 85,000 aliens in this country demonstrates the unfairness of the position we have taken. About

80,000 are Japanese; 5000 are Koreans and Polynesians, with a sprinkling of other nationalities. These residents legally entered this country before 1924. The Immigration Act of that year permitted them to remain here but continued to deny them the rights of naturalization that were granted to European immigrants. *The sole consideration affecting our treatment of these long-time settlers is their race.*

"Sir Peter Buck, for example, a former professor of anthropology at Yale University, is one of the world's outstanding scientists in his field. England was proud to knight him, but he is refused the privilege of U. S. citizenship. Sir Peter is the son of an Irish father and a Maori mother. The fact that he is half-Maori—and that alone—bars Sir Peter from citizenship in his beloved adopted country.

"Before his recent appointment as Korean Ambassador to the United States, Dr. Y. C. Yang was a prominent Honolulu physician, and had practiced in this American community for half a lifetime. He was educated in the United States, is married to an American, and is the father of an American daughter. Dr. Yang would have welcomed American citizenship long ago had it been possible.

"When Pearl Harbor was attacked, Dr. Yang responded immediately to an emergency appeal for medical volunteers to treat the wounded. He worked indefatigably to save the lives of many American seamen. He then volunteered in the Hawaii National Guard. After being commissioned a captain and serving two weeks, he was notified that his service could no longer be accepted. As a Korean, he was classified as an enemy alien. He could not serve his chosen country—because of his race.

"The Japanese, the largest group affected, have probably contributed more to America than any other Asiatics. Their sons formed the famous 442nd Regimental Combat Team, which probably received more decorations and suffered more casualties than any unit of similar size in the entire U. S. Army. Yet these parents cannot become citizens.

"The abuses against those of Japanese origin are compounded in California, where many of them live. There state laws forbid an alien ineligible for citizenship from owning a farm. Men who have turned acres of desert waste into green, producing fields can cultivate the land only as hired hands.

"The California law makes it a crime for a Japanese alien to 'enjoy, use, occupy, be or remain on the land, or have a beneficial interest in the land, its crops or proceeds.' Temporarily in abeyance pending court decision on a case, this prejudiced law has been so strictly enforced in some counties that families cannot live together. California filed a suit to seize the property of Mrs. Roy K. Hirata, born an American citizen and mother of three citizen children, because her alien husband had helped her cultivate her farm and lived on it. Hirata had to leave home and watch hired strangers gather the crops he had planted.

"Akira Iwamura was eager to get home after two years with Army Intelligence in the Pacific. His father had bought 60 acres of good Fresno grape land in his citizen son's name in 1938, and had been taking care of it for him. California welcomed Akira home from war service with a demand that he forfeit his land—because his alien parent had a beneficial interest in it. Akira's lawyer advised him to settle out of court. In exchange for the state's 'quieting the title,' Akira had to pay half the assessed value of the land to buy back his own acres.

"California is not alone in making the racially ineligible alien run a stiff obstacle course for his livelihood. Nowhere from the Pacific to the Atlantic can he be a lawyer or certified public accountant. Despite shortages in important professions, 26 states prohibit his making a living as a dentist; 25 as a physician; 18 as a teacher. Some 500 laws passed by various states bar him from such work as a real estate or insurance agent, pharmacist or civil servant. In some states he cannot even accept an old-age pension, although money toward it may have been withheld from his wages!

"The Immigration Act of 1924 was passed to prevent a horde of foreigners from

flooding our shores and depressing our wage scale. Legislators worked out an equitable system, as far as the nations of the Old World were concerned. It was agreed that America could readily assimilate 150,000 immigrants a year, about one sixth of one percent of our population as reported in the 1920 census. A quota was assigned to each nation, based on the number of residents each had contributed to our population.

"But, with the exception of Persia and parts of Afghanistan and Russia, Oriental nations received no quota at all. Instead, they were described as constituting the 'Asiatic barred zone,' and were told to keep out. According to Joseph C. Grew, former Ambassador to Japan, it was perhaps the worst mistake we ever made in our relations with the Orient. This gross insult placed a potent weapon in the hands of the Japanese militarists. They used it to promote 'Asia for the Asiatics' throughout the Far East.

"During the war the folly of asking aid from the Chinese while barring them as racially inferior became so obvious that in 1943 we exempted them from the excluded groups. Later the bans against India and the Philippines were lifted. It is time to wipe our record clean of the remaining blots which mar our relations with potential friends and allies.

"On a recent trip around the world I heard repercussions of this short-sighted race prejudice at every stop. In Bangkok a newspaperman said that Communist editors in the Far East constantly told their readers that we consider Orientals racially inferior and despise them. An American official in Rangoon declared that the Burmese ask constantly if the status of our 'outcast law' has been changed.

"The Communists,' said a Korean, 'accuse America of fighting a colonial war here. If you extend us a quota, it will help show you mean it when you say we deserve equal democratic rights.' In Japan the chief news over Radio Tokyo for days dealt with the hearings in the House of Representatives on a bill to abolish this racial clause.



"Correcting these abuses would not result in a large flow of foreigners into the United States. Japan's annual quota would be a mere 185, most of the other Asiatic areas would have 100 each. If every excluded group used a full quota each year, their total would not equal one percent of our 150,000 yearly immigrants. In actual practice, the number of arrivals would be even fewer. Qualifications such as literacy, health and ability to earn a living would keep the number of immigrants from some countries low. In all we could expect each year less than a thousand newcomers, a comparatively infinitesimal number.

"Public-opinion polls show that the great majority of Americans, including Californians, do not want any person denied citizenship because of his race. A bill to this effect, supported by church and civic groups and by our Departments of Justice and State, has three times passed the House by unanimous vote, only to be stopped in Senate committee. Representative Walter Judd, well-known authority on the Far East and one of the bill's sponsors, is convinced that if it could be brought to the floor for a vote the majority of Senators would agree with the majority of other Americans.

"Before the end of World War II, the United States and Nazi Germany were the only two major nations that used race as a test for naturalization. Now, *we alone* maintain this discrimination. In Asia we face a well-organized minority attempting to unite the East against us. We can show the people of the Orient we stand back of our national pledge of 'liberty and justice for all' by welcoming worthy persons and providing them equality under our naturalization and immigration laws. From a purely selfish standpoint, wiping discrimination off the books as well as out of our hearts would be worth more to us in the Orient than a dozen army divisions."

Numerous other publications and reports have dealt with the impact of Japanese immigrants on the American way of life. I will refer to some of them:

Brown, Francis J. and Joseph S. Roucek, eds. *One America*. The history, contribu-

tions and present problems of our racial and national minorities. Rev. ed. Prentice-Hall, 1945;

Bloom, Leonard and Riemer, Ruth. *Removal and Return*. The socio-economic effects of the war on Japanese Americans. University of California Press;

Foote, Caleb. *Outcast!* The story of America's treatment of her Japanese-American minority. Fellowship of Reconciliation. 1944;

442nd Combat Team. *The Album*. Camp Shelby, Mississippi.

La Violette, Forrest E. *Americans of Japanese Ancestry*, a study of assimilation in the American community. Toronto; The Canadian Institute of International Affairs. 1945;

Leighton, Alexander H. *The Governing of Men*. General principles and recommendations based on experience at a Japanese relocation camp. Princeton, N. J., Princeton University Press;

Redfield, Robert. *The Japanese Americans*. The problems of divided loyalty; the evacuation. The University of Chicago Press;

Smith, Bradford. *People From Japan*. The history of the Japanese in America and Hawaii. J. B. Lippincott Co.;

Shirey, Orville C. *Americans: The Story of the 442nd Combat Team*. From activation to occupation with the 442nd Regimental Combat Team. Infantry Journal Press;

U. S. Army. Western Defense Command and Fourth Army. Final report, Japanese evacuation from the West Coast. Washington, U. S. Govt. Print. Off., *Pt. I through IX*. Signed by Lt. Gen. J. L. DeWitt, U. S. army, commanding;

U. S. Bureau of Agricultural Economics. *Japanese farm holdings on the Pacific Coast*, by Adoni Poli. Berkeley, Calif. Processed. Detailed tables; and

U. S. Congress. Select Tolan Committee Investigating National Defense Migration.

These publications and reports, like those from which I have quoted above, demonstrate the fallacy of the basic concept underlying the decisions holding that the race or nationality of a person is a proper basis

for the classification of those who are ineligible to own land or other property. This concept is based upon a factual background which was assumed at the time our present immigration, naturalization and alien land laws were adopted and upheld by our courts, but which has since been shown to be without foundation. It would seem, therefore, that the maxim that "when the reason for the rule ceases, the rule itself ceases," should be applicable here.

I am, therefore, of the opinion that the race or nationality of a person is not a proper basis for a classification of aliens eligible to own land or other property, and that the provisions of the California alien land law barring aliens ineligible to citizenship from owning land here are in violation of the equal protection clauses of both the Constitution of the United States and the Constitution of California.

SCHAUER, Justice (dissenting and concurring).

This case is remarkable and regrettable in judicial annals for this reason: A majority of the justices of this court join in an opinion which recognizes the law as it is but refuses to follow it.

There is no question as to what the law is. It was enacted in the year 1920 by the people of California through the initiative (Deering's Gen. Laws, Act 261); it is based, as to the classification established, on an act of the Congress of the United States;<sup>1</sup> for the past thirty-two years this law, as will appear more fully in the cases hereinafter cited and discussed, has been consistently upheld by this court and by the Supreme Court of the United States as against the precise attack now made on it. But now, say the majority, upon an elaborate analysis of the trend of recent decisions of the Supreme Court of the United States, they think that that court, if the question were to be again presented to it might or would change its holding. The most careful study of the majority opinion discloses no other legal basis for their holding than this conjecture.

If this court may properly anticipate that the United States Supreme Court may in the future reverse its prior holdings and if we may act in reliance upon such anticipation, then what criticism can we in good grace offer if hereafter parties litigant anticipate that our judgments may be reversed by ourselves or stricken down by the federal Supreme Court, and upon such anticipation flaunt our judgments? Have we not today established a precedent for just such action? What labor union or employers' organization or little man could consistently be denied the right to follow us in speculation and anticipation and to act in reliance thereon?

The majority opinion, I think, is not motivated by an effort to find the law, and to uphold it as found. I think it stems more from the strong social views of the justices who write it and from their desire to make the law what they think it should be. But whether this law should be modified or repealed or continued in force is not, I think, a proper subject for our debate or ruling. The people enacted it and, as already noted, the only classification it makes is created by an act of the Congress of the United States. By constitutional processes the people, if they will, can amend or repeal it or the Congress can abolish the classification. But until and unless the people or the Congress act by the constitutional process, the law should not unnecessarily be stricken down by judicial intervention.

That the justices who join in striking down this law find it obnoxious to their personal social views and to their concepts of desirable international relations is quite understandable, and that they shall examine the law in the light of their personal views and concepts is of course a part of our judicial process. But our legitimate judicial process likewise requires that we indulge every reasonable presumption in favor of the validity of a law whether we like it or not; that, when personal views and public law differ, we subjugate our personal social views and concepts to the law adopted by the people; and that we not strike down

1. Naturalization Act of 1790, 18 Stat. 318 (1875); 8 U.S.C.A. § 703, 54 Stat. 1140, ch. 876 (1940).

as unconstitutional any law which, consistently with constitutional precepts, can be sustained. That this law can be sustained is indubitably demonstrated by the plain fact that for twenty-two years it has been sustained both by this court and the United States Supreme Court. As recently as *People v. Oyama* (1946), 29 Cal.2d 164, 173 P.2d 794 (opinion for the court by Mr. Justice Edmonds), we upheld the validity of the act today held void. It is noteworthy and commendable that Mr. Justice Traynor therein concurring said (29 Cal.2d at page 181, 173 P.2d at page 804): "I concur in the judgment on the ground that the decisions of the United States Supreme Court cited in the main opinion are controlling until such time as they are reexamined and modified by that court." This concurrence by Justice Traynor exemplifies conformance to the duty of a judge as it is usually understood and respected; it suggests that the judicial duty is obnoxious to personal desire but that respect for the law must and will prevail. The decisions he refers to have been re-examined but they have not been modified in the controlling point by the court which rendered them. The implicit and utter soundness of the principles of constitutional law upon which they rest, stand unweakened and untarnished—until today. Compliance with the law and faithful discharge of judicial duty, in my view, furnish a light which is as clear today as it was in 1946. Certainly the law may progress. But change is not necessarily progress; it may be destruction rather than growth.

Also recently this court (again speaking through Mr. Justice Traynor for the majority) said, in *Werner v. Southern Cal. etc. Newspapers* (1950), 35 Cal.2d 121, 131, 216 P.2d 825, 13 A.L.R.2d 252, quoting from *County of L. A. v. Southern Cal. Tel. Co.* (1948), 32 Cal.2d 378, 196 P.2d 773, quoting in turn from *People v. Western Fruit Growers* (1943), 22 Cal.2d 494, 507, 140 P.2d 13, "“When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification.”” If that prin-

ciple were followed here the Alien Land Law could not be stricken down. It has been upheld by the Supreme Court of the United States; it still stands except as this court today refuses to abide by it, refuses to uphold the will of the people of California and concludes, contrary to the announced decisions of the Supreme Court of the United States, and to the many earlier determinations of this court, that the law contravenes the federal Constitution. It is, indeed, an unusual procedure when a state court holds unconstitutional on federal grounds a state act which the United States Supreme Court holds to be constitutional as against the same attack. In my view, the only unconstitutional procedure apparent here is the act of the majority justices in using the judicial process to impose their social views on the people of California, rather than, if they were so minded, actively pursuing the obvious legislative remedy.

Of substituting the judicial process for the legislative, again in *Werner v. Southern Cal. etc. Newspapers* (1950), *supra* (page 129 of 35 Cal.2d, page 830 of 216 P.2d, 13 A.L.R.2d 252) the majority of this court said: "It is for the Legislature \* \* \* to choose between conflicting policies, and this court may not presume that in reaching its decision it acted upon improper motives \* \* \*. 'We cannot undertake a search for motive in testing constitutionality \* \* \*.'"

"This court cannot invoke the due process clause to invalidate a legislative policy that it may deem unwise without exercising judicial censorship directed not at the constitutionality of legislation but at its wisdom, a censorship whose dangers Mr. Justice Holmes clearly envisaged: 'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its pro-



hibitions.' (Baldwin v. State of Missouri, 281 U.S. 586, 595 [50 S.Ct. 436, 74 L.Ed. 1056], dissent.) This view has found increasing acceptance by the United States Supreme Court. 'This Court beginning at least as early as 1934 when the *Nebbia* case was decided, [*Nebbia v. People of State of New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940] has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. [*Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L. Ed. 436.] In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [Citations.] Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' (*Lincoln Federal Labor Union v. Northwestern I. & M. Co.*, 335 U.S. 525, 536-537 [69 S.Ct. 251, 93 L.Ed. 212, 6 A.L.R.2d 473].)

"Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.

"Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.' (*Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224 [69 S.Ct. 550, 93 L.Ed. 632, 10 A.L.R.2d 945].)

"The responsiveness of a legislature reflects the alertness of the electorate, and legislation ill-considered in a climate of indifference may continue to flourish in such a climate to the dismay of interested citizens whose numbers may be small. If these few then turn impatiently to the courts, however, abandoning the hard task of dispelling the general lethargy, they accomplish nothing to improve legislation, for if courts are called upon to set their judgment as to what is wise against the popular judgment they may summarily put an end to certain laws that may be foolish but also to certain laws that may be wise, and particularly to laws that may be wise in the long run although they appear foolish at the moment. 'Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people.' (Mr. Justice Frankfurter concurring in *A. F. L. v. American Sash & D. Co.*, 335 U.S. 538, 553 [69 S.Ct. 258, 93 L.Ed. 222, 6 A.L.R.2d 481].)"

This case today is probably not of such immediately grave importance to the citizens of California, and to the United States as a nation, as it would have been prior to the events of the period between December 7, 1941, and August 14, 1945. The long-planned occupation and conquest of California by Japan has been at least for the foreseeable future averted. That nation, finally defeated at horrible cost to the United States and to other freedom-loving peoples of the world, as well as to itself, is now building a new government. It is to be hoped that this new government may in time prove its right to, and thereupon be welcomed in, the family of nations as a champion of peace and good will and a defender against aggressors, their stealth,

their devices, their cunning and their violence. It is indeed to be fervently hoped that the people of this late enemy nation, though perhaps unwillingly rescued from totalitarianism, may espouse the principles of democracy, and of forthrightness, honesty, reason and gentleness for their own government and in their dealings with all. But the validity of a law should be decided on facts as they existed at the time of its enactment, not on social theories or expectation for the future, or speculation that the United States Supreme Court may eventually change its ruling on a constitutional issue. Justice is pictured as being blind but not in the posture of an ostrich, and judicial duty is not performed when a court refuses to follow a law because it conjectures that a higher court which has previously upheld the law may eventually reverse itself.

Even if we forsake completely the doctrine of *stare decisis* and re-examine the statute in question in all its aspects, its validity is unquestionable on any sound approach.

The question is whether one of the states of our union may properly place restrictions upon the rights in real property within its boundaries which may be enjoyed by an alien resident whom the Congress of the United States has not made eligible to citizenship.<sup>2</sup>

Regulation of the devolution and ownership of land within its borders has been traditionally considered an attribute of state sovereignty (*United States v. Fox* (1876), 94 U.S. 315, 320, 24 L.Ed. 192; *Hauenstein*

*v. Lynham* (1879), 100 U.S. 483, 484, 25 L. Ed. 628; *Blythe v. Hinckley* (1901), 180 U.S. 333, 21 S.Ct. 390, 393-394, 45 L.Ed. 557). Plaintiff, however, contends that the Alien Land Law of this state violates the due process and equal protection clauses of the Fourteenth Amendment, invades the field of federal power over immigration, and is inconsistent with the United Nations Charter. He also contends that the law is invalid special legislation prohibited by the Constitution of this state, and that it unlawfully delegates state legislative power to Congress.

### Constitutionality

With regard to equal protection, plaintiff urges, first, that statutory classification of aliens on the basis of eligibility to citizenship is arbitrary insofar as discrimination against the ineligible bears no reasonable relationship to promotion of the safety and welfare of the state. He argues that the statute distinguishes not between citizens and aliens, but between classes of aliens, and that persons eligible to citizenship are given all the ownership rights of citizens regardless of whether they intend to become naturalized. Secondly, he contends that the purpose and effect of the statute is to discriminate against aliens solely on the basis of race and that such discrimination is arbitrary and irrational.

Although it is declared by the United States Supreme Court in the restrictive covenants case, *Shelley v. Kraemer* (1947), 334 U.S. 1, 68 S.Ct. 836, 841, 92 L.Ed. 1161, relied upon by plaintiff, that "It cannot be

2. Restrictions on the right of aliens to hold land are no innovation in the law. Since 1887 there has been a federal Alien Land Law which, with certain exceptions, prohibits aliens who have not declared their intention to become citizens from owning territorial land. (8 U.S.C.A. §§ 71-86.) Every state has made some provision with regard to the rights of aliens to own real property. (See 5 *Vernier, American Family Laws* (1938), 304-346; *McGovney, "The Anti-Japanese Land Laws of California \* \* \*," 35 Cal.Law Rev.* at pp. 21-24.) Of these about twenty-one states expressly allow aliens, at least those residing in the state, all the property

rights of citizens. All the remaining states impose some kind of disabilities on aliens, and these vary from outright prohibition of land ownership to limitations on the size of holdings or the time land may be held. Some of these statutory restrictions apply to all aliens. Other states distinguish between classes of aliens, such as those who have and have not declared their intention to become citizens, those who are and who are not eligible to citizenship, those who are enemies and those who are friends. Nine states, other than California, classify on the basis of eligibility to citizenship.

doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property," it must be borne in mind that the Shelley case involved the property rights of a Negro citizen.<sup>3</sup> The rule is, of course, settled that the Fourteenth Amendment protects aliens as well as citizens from unreasonable or discriminatory state action. (*Yick Wo v. Hopkins* (1885), 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Truax v. Raich* (1915), 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131.) And, as to equal protection, where rights *other* than those relating to land ownership are involved the United States Supreme Court has stated that "The power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." (*Takahashi v. Fish and Game Commission* (1948), 334 U.S. 410, 68 S.Ct. 1138, 1143, 92 L.Ed. 1478.) However, in 1923 the United States Supreme Court upheld the Washington and California Alien Land Laws against attack on due process and equal protection grounds, and those decisions have never been overruled. (*Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 [Washington statute]; *Porterfield v. Webb*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278 [California statute]; see also, *Webb v. O'Brien*, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318, and *Frick v. Webb*, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323, sustaining constructions of the California statute which prohibited aliens ineligible to citizenship from entering into cropping contracts or holding stock in farming corporations, respectively.)

3. It should be noted that federal legislation enacted pursuant to the Thirteenth and Fourteenth Amendments does *not* secure to aliens any rights to acquire real property. The Civil Rights Act provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." (8 U.S.C.A. § 42, based on 14 Stat. 27 and 16 Stat. 144.) However, no similar provision is made for non-citizens. The Act merely

The leading case, *Terrace v. Thompson*, involves the Washington law which prohibited land holding by all aliens except those who had declared an intention to become American citizens.<sup>4</sup> The court disposes of the due process argument in the following manner (pages 216-217 of 263 U.S., page 18 of 44 S.Ct., 68 L.Ed. 255): "The Fourteenth Amendment \* \* \* protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of adoption of the Constitution [citations]. \* \* \* And, while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders." The court points out the common law rule that an alien could not hold land against seizure by the crown and concludes that state legislation withholding from all aliens equally the right to hold land "can not be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause." (Page 218 of 263 U.S., page 19 of 44 S.Ct.)

Turning to the equal protection argument the court rejects as "without foundation" the contention that the Washington statute discriminated on grounds of race or color, stating that, by the terms of the statute, all aliens, of whatever race or color, who failed to declare their intention to become citizens were prohibited from owning agri-

provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. \* \* \*" (8 U.S.C.A. § 41, based on 14 Stat. 27 and 16 Stat. 144.)

4. This classification automatically places aliens ineligible to citizenship within the prohibited group.



cultural lands. The court then holds that discrimination on the basis of ineligibility to citizenship did not violate the equal protection clause, for the following reasons (pages 220-221 of 263 U.S., pages 19-20 of 44 S.Ct.): "Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. *The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership.* [Italics added.]

\* \* \*

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. \* \* \* The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."

The court in the Terrace decision discusses the case of *Truax v. Raich* (1915), *supra*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, which involves an Arizona statute requiring all employers of more than five persons to employ not less than eighty per cent qualified electors or native-born citizens. It is there held that the statute violated the equal protection clause in discriminating against alien inhabitants, lawfully in the state, with regard to the "right to work for a living in the common occupations of the community," and, further, that the denial of such right to aliens would be tantamount to denying them entrance and abode in the state and would conflict with the exclusive Federal power over immigration.

The "right to work for a living in the common occupations of the community," secured to *all* aliens by the *Truax* case, was urged as a reason for invalidating alien land laws in the Terrace case but is dis-

tinguished by the court as follows (page 221 of 263 U.S., page 20 of 44 S.Ct., 68 L.Ed. 255): "In the case before us the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself."

*Porterfield v. Webb* (1923), *supra*, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278, upholding the constitutionality of the California Alien Land Law, was decided the same day as *Terrace v. Thompson* and was held to be controlled by the Terrace decision. The court, in a short opinion reasons as follows: The prohibited class in the Washington Alien Land Law were all non-declarant aliens; this necessarily included all aliens ineligible for citizenship, which smaller group constituted the prohibited class defined by the California act; forbearance of California to extend the prohibition to eligible aliens who failed to declare their intent to become citizens could not be said to be arbitrary or unreasonable.

As noted above, *Terrace v. Thompson* and its companion cases have not only never been overruled by the United States Supreme Court, but the constitutionality of the California statute was again upheld by this court as recently as *People v. Oyama* (1946), *supra*, 29 Cal.2d 164, 173 P.2d 794. Although the Supreme Court of the United States reversed our decision (*Oyama v. State of California* (1948), 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249), upon the narrow ground that a presumption declared by section 9(a) of the act, and relied on in the case, violated the rights of *citizens* who were the children of ineligible aliens and arbitrarily discriminated against such citizens, I cannot overlook the highly important fact that that court refused to overrule its earlier holdings that the Alien Land Law is constitutional insofar as it relates to the land rights of ineligible aliens themselves. These holdings, as well as our own antecedent expressions to the same effect,

are sound expositions of the best constitutional precepts.

It is inescapable that it is settled by the foregoing cases and numerous other decisions sustaining the validity of specific provisions of the Alien Land Law that classification on the basis of eligibility to citizenship is proper for the purpose of determining who may own and enjoy land.

With reference to the statement made in the Terrace case that if aliens ineligible to citizenship could own farm land, they might possibly acquire all such land in the state, plaintiff argues that natural events and changes in the naturalization and immigration laws since the Terrace decision have reduced such a possibility to the vanishing point. Moreover, he urges, these changes in circumstances of themselves warrant re-examination of the land law.

When the Terrace case was decided, in 1923, only white persons and persons of African nativity and descent were eligible to become citizens. (Naturalization Act of 1790; 18 Stat. 318 (1875).) At the time the present proceeding was begun, in 1949, the naturalization laws had been amended to provide that the following may become citizens: "descendants of races indigenous to the Western Hemisphere" (8 U.S.C.A. § 703; 54 Stat. 1140, ch. 876 (1940)); "any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States" (8 U.S.C.A. § 1001; 56 Stat. 182 (1942)); Chinese persons and persons of Chinese descent (8 U.S.C.A. § 703; 57 Stat. 601 (1943)); Filipinos and persons indigenous to India (8 U.S.C.A. § 703; 60 Stat. 416 (1946)). Thus, in 1949, the California Alien Land Law could operate only against Orientals who are Japanese and against certain other races, such as Polynesians.<sup>5</sup> According to 1940 census figures, the alien Japanese population discovered and counted in California was 33,569. Immigration of persons ineligible to citizen-

ship was halted by the Exclusion Act of 1924 (43 Stat. 161, 8 U.S.C. § 213(c)); hence the number of Japanese aliens legally in the state in 1949 was probably less than in 1940 due to death, changes of residence, deportation and other causes. For the purposes of the constitutional test of state legislation, however, it is immaterial that the number of races embraced in the ineligible class has been narrowed by the Congress through recent amendments to the naturalization laws; the Congress itself has made and it has preserved the class; it has set and defined the limits and the qualifications of eligibles; the class of ineligible may be broadened again in the future and it is still within the realm of possibility that ineligible aliens might acquire a disproportionate share, or dangerously located and extensive areas, of land in the state.

Plaintiff further contends that most, if not all of the reasoning of the Terrace and Porterfield cases has been repudiated by the United States Supreme Court in *Oyama v. State of California* (1948), *supra*, 68 S.Ct. 269; *Ex parte Endo* (1944), 323 U.S. 283, 302, 65 S.Ct. 208, 89 L.Ed. 243; and *Takahashi v. Fish and Game Commission* (1948), *supra*, 68 S.Ct. 1138, and that a state court may "properly" disregard them, as, it is said, was recently done by the Oregon Supreme Court in *Namba v. McCourt* (1949), 185 Or. 579, 204 P.2d 569. It was there held that the Oregon Alien Land Law, one similar to the California statute, violated the Fourteenth Amendment in placing restrictions on aliens ineligible to citizenship but not on other aliens, since there was no valid reason why the ineligible, as a class of aliens, should not be permitted to own and rent agricultural land. The court reviewed the decisions of the United States Supreme Court on the subject, giving particular attention to the *Oyama* and *Takahashi* cases, and conjectured that the United States Supreme Court "no longer deems the [Terrace and related] cases

5. For purposes of this discussion, defendant excludes from consideration all persons ineligible to citizenship for reasons other than their race, such as those who do not speak English or have not satis-

fied the residence requirement or are not attached to the political principles of this country. (See 8 U.S.C.A. § 704, *et seq.*)

binding." (No petition for certiorari to the United States Supreme Court was filed.) Regardless of the thought expressed by the Oregon court, it is my view that since none of the cases relied upon by plaintiff passed upon the power of the state to regulate alien ownership of land within its boundaries, such cases are not controlling here.

In reliance upon the statements in the *Truax* and *Takahashi* cases that discrimination is invalid when it deprives an alien of the "right to work for a living in the common occupations of the community," or prevents him from "earning a living in the same way that other state inhabitants earn their living" (*Truax v. Raich* (1915), *supra*, 36 S.Ct. 7, 10; *Takahashi v. Fish and Game Commission* (1948), *supra*, 68 S.Ct. 1138, 1142), plaintiff urges that although farming is one of the most ancient and common ways of earning a living, the *Terrace v. Thompson* rule permits a state, in the absence of a treaty, to so restrict an alien that he can farm land only in the capacity of an employee or hired hand, and also permits a state to restrict an alien in following occupations other than farming, since it is necessary to the operation of any ordinary business or industry to own or lease land upon which a shop or factory may be located. The effect of such legislation, argues plaintiff, is to impose upon the alien ineligible to citizenship an economic status inferior to that of all other persons living in the state. Such argument ignores the fact that land ownership is held by only a relatively few of the inhabitants of this state and nation, is not at all a necessary attribute of an equality of economic status, and is not desired or availed of by many who enjoy ample economic security. It is, therefore, not persuasive to the end of striking down a law which has been duly enacted by the people of the state and which has been sustained by the highest courts of state and nation for more than a quarter of a century.

The critical question (if this court assumes to re-examine the problem) in determining whether the land law accords with the guarantee of equal protection is whether the discrimination between persons ineligible to citizenship and those who are

citizens or eligible to citizenship is "based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished." (See *Takahashi v. Fish and Game Comm.* (1947), 30 Cal.2d 719, 727, 185 P.2d 805 (reversed 334 U.S. 410, 422, 68 S.Ct. 1138, 92 L.Ed. 1478, on the ground that the classification there involved was unconstitutionally discriminatory, but expressly distinguishing the land law cases); see also *Werner v. Southern Cal. etc. Newspapers* (1950), *supra*, 35 Cal.2d 121, 131, 216 P.2d 825, 13 A.L.R.2d 252; *Watson v. Division of Motor Vehicles* (1931), 212 Cal. 279, 284-285, 298 P. 481.) And, as plaintiff concedes, upon the outcome of this question will depend the answer to plaintiff's contention that the Alien Land Law constitutes special legislation in violation of the California Constitution. (See *Leland v. Lowery* (1945), 26 Cal.2d 224, 232, 157 P.2d 639, 175 A.L.R. 1109; *County of L. A. v. Southern Cal. Tel. Co.* (1948), *supra*, 32 Cal.2d 378, 389, 196 P.2d 773.)

The following pertinent principles are well established: "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." (*Sacramento M. U. Dist. v. Pacific Gas & Electric Co.* (1942), 20 Cal.2d 684, 693, 128 P.2d 529; see also *In re Herrera* (1943), 23 Cal.2d 206, 212, 143 P.2d 345; *Reclamation District v. Riley* (1923), 192 Cal. 147, 156, 218 P. 762.) "The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant." (*Takahashi v. Fish and Game Comm.* (1947), *supra*, 30 Cal.2d 719, 728, 185 P.2d 805; see also *People v. Western Fruit Growers* (1943), *supra*, 22 Cal.2d 494, 507, 140 P.2d 13; *In re Fuller* (1940), 15 Cal.2d 425, 437, 102 P.2d 321; *California Physicians' Service v. Garrison*



(1946), 28 Cal.2d 790, 803, 172 P.2d 4, 167 A.L.R. 306.) The classification should be reasonable; i. e., "have a substantial relation to a legitimate object to be accomplished \* \* \*." [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. [Citations.] (Leland v. Lowery (1945), supra, 26 Cal.2d 224, 232, 234, 157 P.2d 639, 175 A.L.R. 1109.)

In *Werner v. Southern Cal. etc. Newspapers* (1950), supra, 35 Cal.2d 121, 131, 216 P.2d 825, 13 A.L.R.2d 252, quoting from *County of L. A. v. Southern Cal. Tel. Co.* (1948), supra, 32 Cal.2d 378, 390, 196 P.2d 773, and *People v. Western Fruit Growers* (1943), supra, 22 Cal.2d 494, 506, 140 P.2d 13, the rule is reaffirmed in these words: "Problems of classification under the California Constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification."

Applying these rules to the present controversy, it can hardly be seriously doubted that use or ownership of land by persons

ineligible to citizenship may reasonably be determined by the people of a state to constitute a threat to the safety or welfare of the state because such ineligible persons cannot be bound by an oath of allegiance to the United States, of which each state is an inseparable part, and, as a class, their loyalty to and interest in the state are suspect, and further, such ownership of the land by its citizens, or those who can become such, bears a vital relationship to the strength of a free country. As declared in *Mott v. Cline* (1927), 200 Cal. 434, 447, 253 P. 718, "It has been firmly settled by the decisions of both federal and state courts [citations] that the adoption of the Alien Land Acts was a lawful exercise of the police power. In fact, it is the exercise of that power in its highest and truest sense. The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of the state. It directly affects its welfare and safety."<sup>6</sup> (See also *Palermo v. Stockton Theatres, Inc.* (1948), 32 Cal.2d 53, 63, 195 P.2d 1.) The question is not whether every individual ineligible alien may be said to be disloyal to this nation, but whether the loyalty of such ineligible aliens *as a class* may be doubted.<sup>7</sup> It is not within the province of this court, especially in the light of history which need go no further back than December 7, 1941, to declare that such doubt is unreasonable and bears no substantial relationship to the public welfare.

Likewise without merit is plaintiff's contention that the purpose and effect of the Alien Land Law is to discriminate against him solely because of his race, and that despite the fact that the law does not mention race or color on its face we should determine that it was the result of race prejudice against Orientals and particularly Japanese, and declare it therefore

6. The importance attached to domestic control of land ownership is not merely local to this state or nation; its far flung recognition must be obvious to every reader of history or current events. We need mention only two examples: (1) The relatively recent expropriation acts of the Republic of Mexico; (2) The pending controversy between Great

Britain and Iran over the petroleum bearing lands of the latter nation.

7. As is pointed out by Walter Pitkin in his "Must We Fight Japan?" (1921, The Century Co., p. 440), "The loyalty of the Japanese to his Government stands above all else. That is his religion."

unconstitutional. In this respect plaintiff relies upon certain arguments in favor of the legislation contained in the official pamphlet<sup>8</sup> mailed to the voters prior to the election at which the Act was to be voted upon, as well as on statements in *Re Estate of Yano*<sup>9</sup> (1922), 188 Cal. 645, 654, 658, 206 P. 995. Plaintiff's position on this point ignores the fundamental and controlling fact, however, that it is those who are ineligible for citizenship, regardless of race or color, to whom the Alien Land Law applies, and that it is Congress and not the State of California that determines such ineligibility. It is clear that the statements in *Estate of Yano* upon which plaintiff relies have no application to the problem here involved and do no more than

recognize that Japanese fall within the class whom Congress has refrained from declaring eligible. Moreover, as pointed out in the *Terrace* case (page 223 of 263 U.S., page 20 of 44 S.Ct., 68 L.Ed. 255), it was in accordance with the desire of Japan that the right to own land was not conferred by either that nation or the United States upon the nationals of the other. To argue, in the face of such circumstance, that the California Alien Land Law is directed at plaintiff solely because of his race simply denies reality. Furthermore, the fact that the attention of the citizens was being attracted chiefly to the Japanese *by the very nature and extent of their activities*<sup>10</sup> in the state, far from showing racial prejudice as the motivating

8. The following argument appears in the pamphlet: "Its primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands \* \* \*. Orientals, and more particularly Japanese, [have] commenced to secure control of agricultural lands in California." Further arguments in the pamphlet in support of the measure were directed against the Japanese alone, without reference to other Orientals or to others who were ineligible for American citizenship.

9. *Yano* involves a provision of the Act prohibiting the appointment of an ineligible alien as guardian of land. The court, in holding that the right of a father to be appointed guardian of the person and estate of his citizen minor child did not depend upon his own eligibility to citizenship, stated that the prohibitory provision "is clearly a discrimination against citizens of Japan residing in this state," and that the object thereof was "to discourage the coming of Japanese into this state."

10. The California State Board of Control in 1920 prepared a report on the situation then confronting the state. In a letter of transmittal of the report (and published therewith), written by Governor Wm. D. Stephens of California to Hon. Bainbridge Colby, Secretary of State, Washington, D. C., dated June 19, 1920, the following reference is made to facts which appear more fully in the report itself: "The Japanese in our midst have indicated a strong trend to land ownership and land control, and by their unquestioned industry and application, and by standards and methods that

are widely separated from our occidental standards and methods, both in connection with hours of labor and standards of living, have gradually developed to a control of many of our important agricultural industries. Indeed, at the present time they operate 458,056 acres of the very best lands in California. The increase in acreage control within the last decade, according to these official figures has been 412.9 per cent. In productive values—that is to say, in the market value of crops produced by them—our figures show that as against \$6,235,856 worth of produce marketed in 1909, the increase has been to \$67,145,730, approximately tenfold.

"More significant than these figures, however, is the demonstrated fact that within the last ten years Japanese agricultural labor has developed to such a degree that at the present time between 80 and 90 per cent of most of our vegetable and berry products are those of the Japanese farms. Approximately 80 per cent of the tomato crop of the state is produced by the Japanese; from 80 to 100 per cent of the spinach crop; a greater part of our potato and asparagus crops and so on. So that it is apparent that without much more effective restrictions that in a very short time, historically speaking, the Japanese population within our midst will represent a considerable portion of our entire population, and the Japanese control over certain essential food products will be an absolute one." ("California and the Oriental" by State Board of Control of California, 1920 ed., pp. 8, 45, 49-52.)

Again, Walter B. Pitkin in "Must We Fight Japan?" (The Century Co., 1921), speaks of the competition imposed on

cause for the land act, indicates a sound basis for the law.

Plaintiff's argument that the Alien Land Law interferes with the power of Congress over legislation is answered by the declaration in the Terrace case (page 217 of 263 U.S., page 18 of 44 S.Ct.) that "while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders." *Truax v. Raich* (1915), supra, 239 U.S. 33, 42, 36 S.Ct. 7, 60 L.Ed. 131, and *Takahashi v. Fish and Game Commission* (1948), supra, 334 U.S. 410, 419, 68 S.Ct. 1138, 92 L.Ed. 1478, do not involve land

laws, and statements therein which are relied upon by plaintiff are not controlling here.

Plaintiff's further contention that the law under attack unlawfully delegates state legislative powers to Congress because amendments to the naturalization laws changing eligibility provisions operate to amend the state law without the consent of the people or the Legislature of this state has already been rejected by this court in *People v. Oyama* (1946), supra, 29 Cal.2d 164, 178, 173 P.2d 794,<sup>11</sup> in the following language: "The Legislature of this state has set up eligibility to citizenship as a primary standard, and because the determination of some fact or condition incorporated in this primary standard

the non-Oriental American farmer who made a practice of taking Sundays off and of working only ten or twelve hours a day, by the Japanese whose schedules ran from fourteen to eighteen hours a day. Says Mr. Pitkin (pp. 207-8): "The results of such competition can be clearly read all over California. For the statistics we need not go to American observers, who may be suspected of prejudice. We have luckily at hand a comprehensive study of the expansion of Japanese farmers which has been made by one of their own countrymen, one Yamato Ichihashi, instructor in Japanese history and economics at Leland Stanford University. In 1915 Mr. Ichihashi published a volume on 'Japanese Immigration,' in which he presented detailed charts that brought out the following remarkable facts:

"Out of every 100 people growing berries in California, 88 are Japanese. Out of every 100 who raise sugar beets, 67 are Japanese. Out of every 100 who grow grapes, 52 are Japanese. Out of every 100 who raise vegetables (for market, of course), 46 are Japanese. Out of every 100 who grow citrous fruits, 39 are Japanese. Out of every 100 who grow deciduous fruits, 36 are Japanese.

"The State board [of Control], in commenting upon these findings, holds that the percentages would run considerably higher today."

In the same letter of transmittal of the report of the state board, the attitude of California in respect to the Japanese people was officially expressed by Governor Stephens as follows:

"It is also proper to state that I believe I speak the feelings of our people

when I express to you a full recognition of the many admirable qualities of the Japanese people. We assume no arrogant superiority of race or culture over them. Their art, their literature, their philosophy, and, in recent years, their scientific attainments have gained for them a respect from the white peoples in which we, who know them so well, fully share. We have learned to admire the brilliancy of their art and the genius that these people display. We respect that deep philosophy which flows so placidly out of that wonderful past of theirs and which has come down through ages that antedate our Christian era. We join with the entire civilized world in our admiration of the tremendous strides which the Japanese nation itself has made in the last two generations unparalleled as its career is in the history of nations. We respect the right of the Japanese to their true development and to the attainment of their destiny.

"All these matters I am at pains to emphasize so as to convince you, and, through you the people of the United States, that this problem of ours is not an insignificant or temporary one. It is not factious. It has no origin in narrow race prejudice or rancor or hostility. It is, however, a solemn problem affecting our entire Occidental civilization." (P. 9 of "California and the Oriental" by State Board of Control of Calif., 1920 ed.)

See also discussion "Is This a Racial War?" in "Report From Tokyo" (Grew, 1942, p. 65, Simon and Schuster).

<sup>11</sup> See *Oyama v. State of California* (1948), 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249.



rests elsewhere than in the Legislature, or this requirement is to be measured by another standard not under the control of the state and which may be subject to change, does not amount to an unconstitutional delegation of legislative authority. [Citations.]” (See also *Palermo v. Stockton Theatres, Inc.* (1948), *supra*, 32 Cal.2d 53, 59, 195 P.2d 1.)

I agree that the United Nations Charter, as presently constituted and accepted was not intended to, and does not, supersede existing domestic legislation of the United States or of the several states and territories.

I would hold that provisions of the Alien Land Law here invoked by the State of California do not contravene either the federal or state constitutions; and would affirm the judgment of the trial court.

**SHENK and SPENCE, JJ., concur.**



110 Cal.App.2d 302

**McAULAY et al. v. JONES et al.**  
**Civ. 14941.**

District Court of Appeal, First District,  
Division 1, California.

April 8, 1952.

Howard McAulay, and others, brought an action against Orville B. Jones, Alfred Williams, and Irene Winslow McAulay, and Ione Fosmark, as trustee for Irene McAulay and Kathleen McAulay, for judgment declaring whether term of lease has been extended so as to permit defendant Orville B. Jones to remain in the leased premises, and defendant Orville Jones cross-complained. The Superior Court, County of Monterey, Anthony Brazil, J., rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The District Court of Appeals, Bray, J., held that plaintiffs were estopped from claiming that request of defendant Orville B. Jones as tenant for extension of lease was not accepted.

Judgment affirmed.

# **1. Landlord and Tenant** ⇨86(1)

Under lease of realty providing that if tenant desired to secure extension of lease term, tenant should so notify landlords during specified year of term of original lease, and providing that landlords should notify tenant within specified time as to whether request would be accepted, request was to be considered as accepted if landlords gave no communication to tenant as to offer within time specified. Civ.Code, §§ 1643, 1654.

# **2. Landlord and Tenant** ⇨83(1)

Generally in construing provisions of lease relating to renewals, if there is any uncertainty, tenant rather than landlord is to be favored.

# **3. Estoppel** ⇨95

Where lease of realty upon which tenant was to build auto court provided that if tenant desired extension of lease term he should so notify landlords during specified year of term of original lease, and provided that landlords should notify tenant within specified time as to whether request for extension would be accepted, and landlords knew when request for renewal was received that tenant was expending time, money and effort to build up business, most of which would be lost to tenant if lease was not renewed, although tenant under lease was entitled to receive 40 percent of appraised value of auto court at termination of lease, landlords who failed to notify tenant within time provided by lease as to whether request for extension was accepted were estopped from claiming request was not accepted.

Foster & Redhead, Pacific Grove, for appellants.

Thompson & Thompson, Monterey, W. H. Orrick, San Francisco, of counsel, for respondent Orville B. Jones.

Campbell & McHarry, Monterey, for respondents Irene Winslow McAulay, individually, and as trustee for Kathleen McAulay.

**BRAY, Justice.**

Plaintiffs appeal from a judgment in favor of defendants holding that the term of a certain lease had been extended.

Question Presented.

Was the term of the lease extended?

Record.

Plaintiffs brought an action for declaratory relief to determine primarily if defendant Orville Jones was entitled to remain in the leased premises. Defendant Alfred Williams was alleged to be Jones' manager of the motel on the leased premises. The other defendant is a devisee with plaintiffs of the improvements by reason of the decree of distribution in the Estate of Martin McAulay, deceased. Defendant Jones answered and cross-complained, setting up his claim to an extended term of the premises by reason of a certain lease. Defendant Irene McAulay, individually, and Ione Fosmark as trustee for Irene McAulay and Kathleen McAulay, answered, alleging among other things that defendant Jones duly exercised "his option to extend the period of such lease for an additional ten years." The court found that the term had been extended.

Facts.

On November 1, 1939, defendant Jones entered into a lease with plaintiffs and Martin McAulay (since deceased), for the lease of certain real property in Monterey County. Under it, Jones was to clear the ground and build an auto court on it. Lessors were to furnish the material from time to time. Jones was to furnish his labor free of charge. Labor necessary to the operation of the court, other than that of Jones, was to be a charge against income. As rental, lessors were to receive 50 per cent of the net income, the remaining 50 per cent to be retained by Jones. Rental was to be paid every month, submitted with a statement of income and disbursements. This statement was not to be binding until approved, such approval to be made within 15 days after submission. At termination of the lease, Jones was to receive 40 per cent of the appraised value of the auto court. Expense of replacement of improvements was to be a charge against income. If "the lessee does not elect to exercise the option of renewing said lease as hereinafter provided"

he is to deliver premises in reasonably good condition. Plaintiff Howard McAulay was appointed their agent by the lessors. The real property is owned by plaintiffs. The improvements are owned  $\frac{3}{4}$ ths by plaintiffs and  $\frac{1}{4}$ ths by Ione Fosmark as trustee for Irene McAulay and Kathleen McAulay.

The renewal clause which caused this litigation follows: "In the event that the lessee should desire to secure an additional ten years' lease upon the termination of the term herein granted upon the same terms as provided for in this lease, lessee shall notify the lessors in writing during the eighth year of the term of this lease of his desire for an additional ten years' lease. Lessors, upon receiving said written request for an additional ten years' lease, *shall notify lessee in writing within ninety days from the receipt of said request advising the lessee whether or not lessors will accept or reject said request for an additional ten years' lease from the expiration of the term herein granted.*"<sup>1</sup>

Jones testified, corroborated by his wife and defendant Irene McAulay, and the court found, that on November 7, 1946, he sent Howard a three months' statement of income and disbursements and appended thereto the following statement: "Also under our lease I believe that it is necessary for us to make written request if we wish to re-new our lease for another Ten Year Period. Please consider this as my request for a re-newal of our Lease with you and the McAulay Estate and concerning the El Rio Carmelo Motor Court. The terms and wording of the Lease of course to remain the same." Irene McAulay testified that she mailed at the Monterey post office the envelope containing the renewal request, directed to Howard. A check was enclosed which later was received back cancelled. Howard replied to matters in the statement other than the request. Howard denied receiving this part of the statement. Howard produced the statement but it shows that the bottom portion had been torn off. Howard claimed he received it that way. Howard never answered this request for renewal. The

1. All italics added unless otherwise stated.

court found that the request was made and received by Howard.

Jones had new roofs put on some of the buildings at a cost of \$1,332, which he testified he would not have put on the buildings had he thought he was not to be in possession for another ten years. Howard knew about this and in fact sent the man out who put on the roofs. This cost was paid out of income of the motor court. Jones never consulted Howard about other expenditures hereafter named, but they were apparently listed in the monthly reports. Such other items were a new water heater and a new septic tank, although there is testimony that its replacement was needed in September, 1948. The water heater was not necessary, but was put in as more convenient in capacity. Insurance policies were taken out by Howard in November, 1947, July, 1949, and April, 1949, for three year periods. He sent the bills to Jones, who paid them, deducting them from income. Howard testified that he considered no expenditures out of the ordinary except the roofs.

The court found that replacement of water heaters, roofs, septic tank, the obtaining of long term insurance, "and portions of other effort and expense" done by Jones were done and incurred in reliance upon the express acknowledgment of Irene (who was then trustee for herself and Kathleen McAulay and as such owner of  $\frac{3}{4}$ ths of the improvements) and upon *his belief* that he had the implied acquiescence of plaintiffs.

Did the Circumstances Constitute an Acceptance of the Renewal Request?

As there is substantial evidence to support the court's finding that the statement of November 7, 1946, did have attached to it the renewal request and that Howard, the agent for plaintiffs and with whom all the business between Jones and plaintiffs was transacted, received it, we start with the premise that he did. Secondly, it is obvious that the renewal clause does not provide an option to renew in the usual sense. It provides a means by which the lessee may offer to renew and requires the affirmative act of the lessee to make that offer. In the event he does the lessors agree that they,

too, will act affirmatively. Within 90 days, they "will accept or reject said request." This agreement they very definitely violated. The situation is different from that in *LaSalle Theatre v. Taft*, 156 Ill.App. 356, where the notice which was held to give no right to renew was to be given the landlord "for his consideration." The landlord there had not promised to act on the notice.

[1,2] The contention of plaintiffs that the requirement that their acceptance be in writing and within 90 days is a *condition* to the renewal is not well founded. It was merely a *covenant* to act in writing and within the 90 days. A reasonable interpretation of it is, that if no communication as to the offer is given within the time specified, it must be considered that the offer is accepted. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable \* \* \*", Civ.Code, § 1643, and " \* \* \* the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Civ.Code, § 1654. Here, the Lessors. (The lease was drafted by the lessors' attorneys.) Moreover, "It is generally held that in construing provisions of a lease relating to renewals, if there is any uncertainty, the tenant rather than the landlord is to be favored. *Streicher v. Heimburge*, 205 Cal. 675, 683, 272 P. 290." *Erickson v. Boothe*, 79 Cal.App.2d 266, 272, 179 P.2d 611, 615.

Here there was a duty to speak. For upwards of seven years the parties had dealt with one another. Numerous reports were made by Jones to Howard. The lessors knew that Jones was expending time, money and effort to build up the business, most of which would be lost to him if the lease was not renewed, even though at termination he was to receive 40 per cent of the appraised value. Although the parties were in the relationship of landlord and tenant there was also considerable of a partnership relation included. They shared the expense and the profit. The situation was one which calls for the application of the rule quoted in *Wood v. Gunther*, 89 Cal.App.2d 718, 731, 201 P.2d 874, 882:

"The rule which must be deemed controlling in this case is well-established. In



Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495, Justice Holmes, speaking for the court, pointed out that in certain situations, as where there is a duty to speak, an offer may be accepted by silence and so bind the offeree. In that case the Justice said: "The proposition stands on the general principle that *conduct* which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party,—a principle sometimes lost sight of in the cases."

"So in Laredo Nat. Bank v. Gordon, 5 Cir., 61 F.2d 906, it is said: "It is true that, generally speaking, an offeree has a right to make no reply to offers, and hence that his silence is not to be construed as an acceptance. But, where the relation between the parties is such that the offeror is justified in expecting a reply, *or the offeree is under a duty to reply*, the latter's silence will be regarded as acceptance. Under such circumstances, 'one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct,' etc. Williston on Contracts, sections 91, 91a."'" (Italics included.)

"\* \* \* \* in this case she was one of three fiduciary partners in a firm of persons, who had a contract with one another, under which they owed duties, one to the other; and, consequently, silence made the acceptance. \* \* \*'" Meherin v. Meherin, 93 Cal.App.2d 459, 466, 209 P.2d 36, 40.

Our case differs from Leslie v. Brown Brothers Incorporation, 208 Cal. 606, 283 P. 936, where it was held that an offer cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent. In that case the offeree had not agreed to reply, as was the case here. Moreover, the relationship of the parties was different, raising there no duty to speak.

Jones as offeror was not, as in cases cited by plaintiffs, and in the reference to 17 C.J.S., Contract, § 41, p. 376, attempting to impose a condition in his offer that silence would amount to acceptance. That

condition was in effect made by plaintiffs in agreeing to reply to the offer.

There was acceptance by conduct. Jones made the expenditures for the water heaters, roofs, septic tank and the three year insurance believing the lease was renewed. The evidence supports the conclusion that while there was leaking in the roofs, Jones would not have done any more than patch those leaks had he not believed his term was extended. Howard sent the roof man to do the work, so that he had full knowledge of the situation both from that fact and later from the receipt of the statement showing the deduction from income of the cost. As to the other expenditures made by Jones on the assumption of a renewal, Howard's knowledge came from the statements showing the fact of such expenditures and their deduction from income. This gave him notice that Jones was changing his position financially, relying upon the notice which he had sent Howard. He must be considered to have known, too, that the fact that Jones would receive 40 per cent of the appraised value at termination would not justify him in making these expenditures if the lease was not renewed. The 90 days acceptance period and the right to have the acceptance in writing was a covenant for Jones' benefit and therefore he could waive it. See Knickerbocker Insurance Co. v. Norton, 1877, 96 U.S. 234, 240, 24 L.Ed. 689: "But a party always has the option to waive a condition or stipulation made in his own favor." "The right to receive written notice of acceptance may be waived by parol." 17 C.J.S., Contract, § 42, p. 381. When the lessors made no reply to his offer of renewal but acquiesced in the improvements which showed the belief of the tenant that the lease had been extended, there was an acceptance by acquiescence. The principle applicable here is recognized in Pierce Oil Corp. v. Gilmer Oil Co., Tex.Civ.App., 230 S.W. 1116, cited by plaintiffs: "Silence does not often constitute assent, but it may, coupled with other circumstances, have some weight in ascertaining the conclusion to be drawn from the other acts of the party charged with having given the assent." 230 S.W. at page 1117.

[3] This acceptance of the benefits estops lessors from claiming they did not accept Jones' offer of renewal. Jones' acts in reliance on the renewal created damage as to him. It is no answer to say that he would not be damaged by a denial of the renewal because he would receive 40 per cent of the appraised value. Fifty per cent of the cost of every expenditure which he did not have to make pursuant to the lease (the evidence shows and the court found that the enumerated expenditures need not and would not have been made had he known there was to be no renewal) was paid for from profits Jones would otherwise have received. Irene McAulay, who as trustee then held  $\frac{8}{14}$ ths interest in the improvements and who mailed the offer of renewal from Jones to Howard, believed that the offer had been accepted. In the summer of 1947 (the year after the letter was sent and about two years before the first term would have expired), a conversation was had between Howard, Irene and Jones. Jones suggested that it was advisable to build some more cottages. Howard did not then suggest that Jones' lease had only two years to go but objected to building more cottages on the ground that the cost of building was too high. It is reasonable to assume that Howard must have known that Jones would not have been interested in building additional cottages for a period of approximately two years only.

The long term fire insurance policies, extending several years beyond the original term of the lease, were taken out by Howard, through his insurance agency, after Jones sent the notice of renewal. The premiums were charged against the income of the business. Thereby 50 per cent of the premiums were paid by Jones by deduction from his share of the income. The reasonable interpretation of this action of Howard is that he considered the term of the lease to have been renewed.

The question of acceptance by silence or acquiescence is a question of fact. Refer-

ring to this subject, Williston on Contracts, section 91A, page 283, states: "\* \* \* It is better to deal with each case as one of fact, the question being whether an inference of a promise is fairly warranted by the facts; but it is at least clear as matter of law that silence and total inaction of the defendant may operate as assent to the formation of a contract. Generally taking the benefit of the services will involve some action on his part indicating assent, but a situation is perfectly possible where though he has knowledge of them, he neither speaks nor acts." There is substantial evidence here to support the court's finding on the subject.

#### Findings.

In plaintiffs' closing brief they state that the court found that the renewal was by "a written 'election of an *option*.'" We fail to locate such a finding. The court did find, among other findings on the subject, that "such Lease was renewed by the Lessee \* \* \* in accordance with the provisions of such Lease \* \* \*." This, of course, is not a finding that Jones had an *option*. Perhaps plaintiffs are referring to the blanket finding that certain paragraphs of the Jones answer and cross-complaint are true. In some of these, it is alleged that defendant gave "written notice of exercise of *option*." If such a finding means that the right to offer to renew was an *option* to renew, it is incorrect. It may be disregarded as there are sufficient other findings to support the judgment. It should be pointed out that in the answer of defendants Irene McAulay individually and Ione Fosmark as trustee for Irene and Kathleen McAulay, it is alleged that pursuant to the provisions of the lease, Jones "by notice in writing duly exercised his *option* to extend the period of such lease \* \* \*."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

110 Cal.App.2d 262

In re WELFER.

WELFER v. WELFER.

Civ. 18865.

District Court of Appeal, Second District,  
Division 3, California.

April 4, 1952.

Proceeding in the matter of the estate of Richard Carew Welfer, a minor, wherein Ida R. Welfer petitioned for appointment as guardian of the person and estate of the minor, and Margaret Irene Welfer petitioned for appointment as guardian of the estate of the minor. The Superior Court of Los Angeles County, Victor R. Hansen, J., entered an order appointing Ida R. Welfer as guardian of the estate of the minor, and Margaret Irene Welfer appealed. The District Court of Appeal, Vallée, J., held that an individual beneficiary named in an insurance policy upon the life of the insured did not take the proceeds by succession upon the death of the insured.

Affirmed.

#### 1. Guardian and Ward ☞11

While in a general sense "succession" refers to change in legal relations by which one person takes title to any property from another person, the word "succession" in statute providing that parent may appoint guardian by will or by deed for property which child may take by will or "succession" refers to succession ab intestato and is synonymous with "descent": the title which is vested in a person by single operation of law or the title whereby a person on death of his ancestor acquires his estate by right of representation as his heir at law, and the word "succession" clearly excludes those who take by gift or any form of contract. Probate Code, § 1402.

See publication Words and Phrases, for other judicial constructions and definitions of "Succession" and "Descent".

#### 2. Descent and Distribution ☞8

##### Executors and Administrators ☞46

A beneficiary named in life policy does not take the proceeds by the law of succession upon death of insured but takes by

virtue of contract of insurance, and the proceeds do not become a part of the estate of insured, and the law of descent and distribution has no applicability to such a case.

#### 3. Insurance ☞586

Where life insurance policy reserves to the insured the right to change beneficiary, beneficiary's right to the insurance proceeds becomes vested upon the death of decedent, the gift thereof is not revoked.

#### 4. Guardian and Ward ☞11

##### Insurance ☞586

Under statute providing that parent may appoint guardian by will or deed for property which child may take by will or succession, minor's right to insurance proceeds as beneficiary thereof, became vested upon death of deceased parent and minor did not take proceeds by succession, and testamentary appointment of a guardian by deceased parent had no compelling force on court in making an appointment of a guardian for such minor. Probate Code, § 1402.

---

Harry M. Irwin, Los Angeles, for petitioner and appellant.

Warner, Peracca & Cowan, Los Angeles, for contestant and respondent.

VALLÉE, Justice.

Appeal by Margaret Irene Welfer from an order denying her petition for appointment as guardian of the estate of Richard Carew Welfer, a minor aged 15 years, and appointing Ida R. Welfer as guardian of the estate of the minor.

The sole estate of the minor consists of part of the proceeds of an insurance policy upon the life of his deceased father, Clarence R. Welfer, in which the minor was named as one of the beneficiaries. The policy reserved to the deceased the right to change beneficiaries. The deceased left an holographic will, admitted to probate, which provides: "The insurance money due my son Richard is to be handled and spent by her [Margaret Irene Welfer] for his care and education, when and how she



sees fit to do so, with no bond or accounting necessary."

Ida R. Welfer, the mother of the minor, with whom he resides, petitioned for appointment as guardian of his person and estate. Appellant, Margaret Irene Welfer, the widow of Clarence R. Welfer, also petitioned for appointment, but only as guardian of the estate of the minor. Her petition is grounded on the provisions of the will.

The court found that neither of the petitioners is unfit to act as guardian of the estate of the minor; that the minor nominated Ida R. Welfer to act as his guardian and expressed such preference to the court; and concluded that the petition of Ida R. Welfer for appointment as guardian of the estate of the minor be granted, and the petition of Margaret Irene Welfer be denied. An order followed accordingly.

The sole question is whether an individual beneficiary named in an insurance policy upon the life of the insured takes the proceeds by succession upon the death of the insured.

Section 1402 of the Probate Code provides: "A parent may appoint a guardian by will or by deed for the property of any child of such parent, living or likely to be born, which such child may take from such parent by will or succession." This section limits the power to appoint a guardian by will to that property of the testator taken by the minor by will or succession. Appellant contends the proceeds of the insurance policy passed to the minor beneficiary by succession, that section 1402 is controlling, and compels her appointment.

[1,2] While in a general sense "succession" refers to the change in legal relations by which one person takes title to any property from another person, we think it apparent that, as used in section 1402, it refers to *succession ab intestato*. Section 200 of the Probate Code defines "succession" as "the acquisition of title to the property of one who dies without disposing of it by will." "Succession" as used in section 1402 is synonymous with

"descent": the title which is vested in a person by the single operation of law, or the title whereby a person on the death of his ancestor acquires his estate by right of representation, as his heir at law. In re Estate of Miner, 143 Cal. 194, 198, 76 P. 968. The word "succession" clearly excludes those who take by gift or any form of contract. Quarles v. Clayton, 87 Tenn. 308, 10 S.W. 505, 507, 3 L.R.A. 170. It is well settled that a beneficiary under an insurance policy takes by virtue of the contract of insurance rather than by the law of succession; that the proceeds do not become a part of the estate of the insured; and the law of descent and distribution has no applicability to such cases. Turner v. Metropolitan Life Ins. Co., 56 Cal.App.2d 862, 865, 133 P.2d 859; In re Estate of Ward, 127 Cal.App. 347, 359, 15 P.2d 901; Heydenfeldt v. Jacobs, 107 Cal. 373, 377, 40 P. 492; Burke v. Modern Woodmen of America, 2 Cal.App. 611, 612, 84 P. 275; 11 Cal.Jur. 466, § 214.

[3,4] The fact that the policy reserved to the insured the right to change the beneficiaries is of no moment here. "The interest of a beneficiary named in a policy in which the insured may change the beneficiary is not a vested right, but merely an expectancy of an incomplete and inchoate gift, which is revocable at the will of the insured and which does not become vested as a right until fixed by death." Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 98, 243 P. 431, 434. The gift becomes complete upon the death of the insured if not revoked. Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 506-507, 238 P. 1034. Upon the death of the deceased, the minor's right to the insurance proceeds became vested. It follows, therefore, that the minor did not take the insurance proceeds by succession, and that the testamentary appointment of a guardian thereof had no compelling force on the court in making the appointment.

Affirmed.

SHINN, P. J., concurs.

PARKER WOOD, J., did not participate.

110 Cal.App.2d 354

**PEOPLE v. VILLEGAS.**

**Cr. 4754.**

District Court of Appeal, Second District,  
Division 2, California.

April 9, 1952.

As Modified April 11, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., of possession of a preparation of heroin and he appealed from the judgment of conviction and from the order denying the motion for a new trial. The District Court of Appeal, Moore, P. J., held that in view of defendant's prior conviction for possession of a preparation of heroin defendant was properly determined to be ineligible for probation.

Judgment and order denying motion for new trial affirmed.

**1. Criminal Law ☞982**

Where defendant was charged with violating section of Health and Safety Code prohibiting possession, transportation, sale, administering or giving away narcotics and in naming sections, violators of which may not be granted probation, lawmakers failed to include section which defined crime of possession but referred to section which provided only punishment for one convicted of possession, Legislature intended to include a denial of probation to any person found guilty of any offense named in such section. Health and Safety Code, §§ 11500, 11712, 11715.

**2. Criminal Law ☞982**

Under statute prohibiting the granting of probation by trial court to any person convicted of violating certain named sections of the narcotic laws or committing any offense referred to in those sections on a second or subsequent conviction of section enlarging punishment for prior offenders, phrase in statute prohibiting the granting of probation under the named section "or on a second or subsequent conviction of section 11712" was intended to read "or on a second or subsequent conviction of any crimes mentioned in section 11712 or of committing any offense

referred to in such section" and under such construction court is authorized to deny probation to person convicted for first time of having had possession of a narcotic. Health and Safety Code, §§ 11500, 11712, 11715.6.

**3. Statutes ☞181(1), 184, 206**

A statute must be so construed as to make sense, to make every clause and phrase effective in deriving the legislative intent, and when true purpose of statute has been determined, it must be liberally construed in order to effectuate the purpose.

**4. Statutes ☞183**

The manifest reason and purpose of a statute must not be sacrificed to a literal interpretation of its verbiage, and when legislative intent has been ascertained it must be enforced as intended notwithstanding derived meaning may be inconsistent with strict letter of statute as enacted.

**5. Criminal Law ☞982**

Neither the written opinion nor the extemporaneous remarks of the trial judge may be used to impeach his findings.

**6. Criminal Law ☞982**

Where defendant had been previously convicted of possession of a preparation of heroin and placed on probation, following his second conviction for the same offense, trial court did not violate provisions of statute prohibiting the granting of probation to any person convicted of violating the sections named therein or of a second or third subsequent conviction of statute enlarging punishment for prior offenders in holding that defendant was not eligible for probation. Health and Safety Code, §§ 11500, 11712, 11715.6.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted in August, 1950, of possessing a preparation of heroin and

placed on probation, appellant was again accused of having committed the same offense in May, 1951. Following conviction, he was denied probation. He was thereupon sentenced to the State Prison and at the same time his first probation was revoked and for the first conviction he was sentenced for a term to run concurrently with the sentence pronounced upon his offense of May, 1951. He has appealed from the judgment of conviction of the later offense and from the order denying his motion for a new trial.

No question is raised as to the sufficiency of the evidence to support the conviction. Indeed, appellant pleaded guilty to the charge. After presenting statements of the trial judge to show that the latter "felt considerable sympathy toward appellant", it is contended that at the time appellant appeared for sentence and judgment he came within the provisions of section 11712 of the Health and Safety Code as amended in 1941 which provided for imprisonment in the county jail for not less than ninety days nor more than one year, or imprisonment for not more than six years on a first offense nor more than ten years on a second offense. From this he argues (1) that there was nothing in section 11712<sup>1</sup> to preclude the granting of probation for a second offense; (2) that since section 11715.6 was amended in 1951, appellant is not chargeable under that section as then amended; therefore he must be punished under the law of 1949 which governed at the time of the offense committed in May, 1951.

Section 11712 contains nothing but provisions for penalties for cultivating certain narcotic plants, for maintaining resorts to which narcotic addicts may go; also, it enlarges the punishment for prior offenders. It does not prohibit probation for

violators of either provision. But appellant was not accused under that section. He was charged with violating section 11500 of the Health and Safety Code which inhibits the possession of a narcotic by any person except upon the written prescription of one of those authorized to prescribe narcotics.

In his attempt to obtain probation, appellant contends that section 11715.6 of the Health and Safety Code as amended in 1949 is the guiding rule. It is as follows: "In no case shall any person convicted of violating Sections 11713, 11714, 11715, or of committing any offense referred to in those sections, or upon a second or subsequent conviction of Section 11712, be granted probation by the trial court, nor shall the execution of the sentence imposed upon such person be suspended by the court." That section expressly prohibits probation in every case to violators of the specified sections. Because section 11712 is not included among the statutes first listed in section 11715.6 appellant contends that the legislature did not aim to forbid probation to a person who has violated section 11712 and that inasmuch as the trial court was sympathetic toward appellant, it unjustly denied probation because of its misinterpretation of the law. There are two answers to such contention.

[1] (1) Appellant was not accused under section 11712. An accusation could not have been framed under that statute for the reason that it merely provides penalties for the violations of other statutes. He was charged with violating section 11500 which inhibits possession, transportation, sale, administering or giving away narcotics. In naming the sections, the violators of which may not be granted probation (11713, 11714, 11715), the law-makers failed to include the section which defines

1. "Any person convicted under this division for having in possession any narcotic, or of violating the provisions of Sections 11530 or 11557 shall be punished by imprisonment in the county jail for not less than 90 days nor more than one year, or in the State prison for not more than six years.

"If such a person has been previously convicted of a felony under the laws of

the United States or of this or any other State, and if the previous conviction of a felony is charged in the indictment or information and is found to be true by the jury, upon a jury trial, or is found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the State prison for not more than 10 years." Stats. 1941, ch. 744 section 2, page 2264.



the crime of possession, to wit, 11500. Statutes, 1945, p. 1840. However, it is a reasonable interpretation that they intended to include possession by their reference to section 11712 which provides only the punishment for one convicted of possession. In view of the inclusion in section 11715.6 of all the sections relating to the uses of narcotics and of the phrase "*or upon a second or subsequent conviction of Section 11712*" it is a fair interpretation that the legislature intended to include a denial of probation to any person found guilty of any offense named in section 11712.

[2] (2) It could not reasonably have been intended in writing the 1949 edition of section 11715.6 to exclude section 11500 for the reason that it defines the crime of *possession*, whereas section 11713 prescribes the punishment for transporting or selling; 11714 defines the crime of employing minors in transporting or selling; and 11715 makes it a crime and prescribes the penalty for forging a prescription for a narcotic. Possession is the most popular of all the acts inhibited by the narcotic statutes. 11530 to 11797, Health and Safety Code sections. Before a man can sell, transport or give a narcotic, he must possess it. It is therefore reasonable to construe the italicized phrase in section 11715.6 (*supra*) as having been intended to read as follows: "*or upon a second or subsequent conviction of any of the crimes mentioned in section 11712 or of committing any offense referred to in such section.*"

When so construed, the court is authorized to deny probation to a person convicted for the first time of having had possession of a narcotic. The suggested construction finds further support in the 1951 edition of section 11715.6 which the Legislature caused to be revised to read as follows: "In no case shall any person convicted of violating sections 11712, 11713, 11714, 11715, or of committing any offense referred to in those sections, be granted probation by the trial court, nor shall the execution of the sentence imposed upon such person be suspended by the court." By the last amendment, the statute was

restored to the identical words used in 1939 when it was first enacted. From this fact it is a fair deduction that in 1949 the lawmakers attempted to restore the statute to its quondam language which resulted in the unfortunate omission of section 11712 from the series of statutes specified in the 1951 amendment.

[3,4] A statute must be so construed as to make sense; to make every clause and phrase effective in deriving the legislative intent; and when the true purpose of the statute has been determined, it must be liberally construed in order to effectuate the purpose. The manifest reason and purpose of an act must not be sacrificed to a literal interpretation of its verbiage. When the legislative intent has been ascertained, it must be enforced as intended notwithstanding the derived meaning may be inconsistent with the strict letter of the statute as enacted. *Dickey v. Raisin Proration Zone No. 1*, 24 Cal.2d 796, 802, 151 P.2d 505, 157 A.L.R. 324; *People v. Black*, 45 Cal.App.2d 87, 94, 113 P.2d 746; *In re Haines*, 195 Cal. 605, 621, 234 P. 883. A literal construction of the 1949 edition of section 11715.6 would nullify the legislative will and result in an absurdity.

[5,6] Because the trial judge indicated sympathy for appellant while considering the application for probation, the suppliant conceived that the judge was favorable to a suspension of sentence and that he would have yielded to the petition but for his erroneous interpretation of section 11715.6. It has become a commonplace that neither the written opinion, nor the extemporaneous remarks of the trial judge may be used to impeach his findings. While the remarks of Judge Ambrose may here serve the purpose of showing how he would gladly lighten the punishment for the truly contrite transgressor, they do not reduce the enormity of the offense, nor do they indicate that appellant should receive less punishment than any other person guilty of the same offense. The judge had found appellant guilty as charged and at the time of the probation hearing had before him the probation officer's report which declared that defendant's conformance with the rules of the officer "has been merely

superficial in scope," that to continue "defendant on probation would not appear to be beneficial to the defendant or an effective solution to his problem." The judge thereupon observed that appellant "had previously been convicted of possession of the same drug; he has a prior conviction of the same offense." In view of appellant's criminal record prior to the violation here involved, the trial court did not violate either the provisions of section 11715.6 as herein construed, or the judicial proprieties in holding that appellant was not eligible for probation. *People v. Brigham*, 72 Cal.App.2d 1, 7, 163 P.2d 891.

The judgment and the order denying a motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



110 Cal.App.2d 340

**ORLOFF v. HOLLYWOOD TURF CLUB et al.**

**ORLOFF v. LOS ANGELES TURF CLUB, Inc. et al.**

Civs. 18807, 18808.

District Court of Appeal, Second District,  
Division 1, California.

April 9, 1952.

Rehearing Denied April 25, 1952.

Hearing Denied June 5, 1952.

Actions by Morris Orloff, against the Hollywood Turf Club, and others, and against the Los Angeles Turf Club, Inc., and others, to recover damages for alleged refusal to admit plaintiff to race tracks. The Superior Court of Los Angeles County, Philbrick McCoy, J., ruled that complaint did not state cause of action, and entered judgments against plaintiff, and he appealed. The District Court of Appeal held that where race track officials told plaintiff that he would not in the future be admitted to the tracks, parties were legal strangers without corresponding rights and duties and plaintiff could not recover damages without having tendered ticket or price therefor.

Judgments affirmed.

**1. Theaters and Shows ⇐4**

All citizens are entitled to full and equal accommodations, advantages, privileges and facilities of race tracks, subject only to conditions and limitations established by law, and applicable alike to all citizens. Civ.Code, § 51.

**2. Civil Rights ⇐6**

**Theaters and Shows ⇐4**

If a charge is made for admission to race track, equally applicable to all citizens, failure or refusal by citizen to pay such charge, and resulting refusal of admission, does not create liability on part of race track owner. Civ.Code, §§ 51, 52.

**3. Carriers ⇐250**

**Innkeepers ⇐12**

**Theaters and Shows ⇐4**

It is privilege of an inn, a railroad or a race track to demand, in advance, pay for accommodation, facility or privilege to be rendered.

**4. Civil Rights ⇐6**

Where race track imposes equally and without discrimination, admission charge upon all citizens, failure of person to comply with demand for payment in advance for admission is not refusal of equal accommodation, facility or privilege accorded to those who do comply. Civ.Code, §§ 51, 52.

**5. Action ⇐2**

There is a right of action upon which a cause of action can be predicated only where defendant has breached an obligation or duty owed to plaintiff.

**6. Civil Rights ⇐6**

**Theaters and Shows ⇐4**

Where race track officials allegedly told plaintiff he would not in future be admitted to tracks and if inadvertently admitted he would be ejected, parties were legal strangers without corresponding rights and duties either contractual or statutory, in absence of tender of admission ticket or price therefor, and plaintiff was not, by officials' declaration nor by fact that defendants resisted injunction suit to restrain refusal of admission into tracks, excused from performing contractual and statutory

conditions precedent as to tender, necessary to recover damages. Civ.Code, §§ 51-54.

### 7. Judgment ☞597

Where plaintiff originally instituted separate actions to restrain refusal to admit him to racing arenas, and charged ejection from tracks and that such ejection constituted continuing wrong thereafter, damages were recoverable in injunction suits and hence would not be recoverable in action for damages based on same contentions as in the injunction suits.

---

William Katz, Los Angeles, for appellant.

Freston & Files, and Eugene D. Williams, Los Angeles, for respondents Hollywood Turf Club and others.

Victor Ford Collins, Los Angeles, for respondents Los Angeles Turf Club, Inc. and others.

### PER CURIAM.

This is just another appeal in that large category of appeals, wholly devoid of merit, which come to this court for decision.

The appellant, as plaintiff below, instituted two actions, one against the Hollywood Turf Club and the other against the Los Angeles Turf Club, Inc., which he submits for decision on consolidated briefs. On January 31, 1946, plaintiff after having purchased a ticket from the Los Angeles Turf Club, Inc., was ejected after his admission from its Santa Anita race track for a cause, not stated by him, but which he avers, by way of conclusion and not ultimate fact, was unlawful and unjustified. Likewise, after purchasing a ticket and being admitted on February 2, 1946, he was again ejected. He avers that on both occasions he was told by the agents of the Los Angeles Turf Club, the owners of the Santa Anita race track, that even though he should thereafter, at any time, purchase a ticket or tender the cost of admission he would not be admitted to the track and, if by chance he should happen to be admitted he would be ejected. As a result of these alleged statements appellant on April 6, 1951, instituted an action against the Los Angeles Turf Club, Inc., as the owner

along with its agents to recover damages and penalties predicated upon Civil Code, secs. 51, 52, 53 and 54. The action was not based upon the two particular acts of ejection as narrated (as the statute of limitations had run) but on the theory that he was entitled to damages for his non-admission or ejection on each and every racing day the track was open thereafter within three years of the date of the filing of his complaint, even though he had not personally appeared at the track or purchased a ticket or been ejected on any of such days. The basis for this claim of damages and penalties is rested (1) on the statement made by the owners of the racing track, or their agents, that even if plaintiff purchased a ticket he would not be admitted and, if he succeeded in being admitted, that he would be ejected; (2) that the defendants waived any legal obligation of the plaintiff to purchase a ticket and seek admission thereafter because in suits for injunction to restrain the defendants from refusing to admit him to the racing arena the defendants resisted the suits. This then is the sole basis for his alleged cause of action.

The trial court ruled that the amended complaint did not state a cause of action and plaintiff having declined in writing to amend the court entered a judgment against him.

The amended complaint against the Hollywood Turf Club, to which a demurrer was likewise sustained, does not differ in any material particular from that against the Los Angeles Turf Club, Inc., except for the allegation that the plaintiff appeared at the Hollywood Park race track, purchased a ticket, was admitted and ejected on May 24, 1947.

[1] Section 51 of the Civil Code expressly provides, as interpreted by our decisions, that all citizens are entitled to the full and equal accommodations, advantages, privileges and facilities of race tracks subject only to the conditions and limitations established by law, and applicable alike to all citizens, and by Section 52, that any such failure or discrimination by reason of color or race or otherwise creates for each and every such offense a liability in dam-



ages in an amount not less than \$100. No question of race or color is involved in the cases before us.

[2-4] It is at once apparent that under the provisions of Sections 51 and 52 of the Civil Code that if a charge is made for admission to a race track, equally applicable to all citizens, that a failure or refusal by a citizen to pay such charge does not create a liability under the statute. It is the privilege of an inn, a railroad or a race track to demand, in advance, pay for the accommodation, facility or the privilege to be rendered. Hence, a failure of a person to comply therewith is not a refusal of any equal accommodation, facility or privilege accorded to those who do comply. The statute expressly provides that the equality called for by the statute is subject "to the conditions and limitations established by law, and applicable alike to all citizens." Among such conditions and limitations applicable to all citizens is that they shall pay the charges imposed, equally and without discrimination, upon all citizens.

Civil Code, secs. 53 and 54, expressly provide that a refusal by a racing course to admit a person 21 years of age or over presenting a ticket, or the price thereof, is unlawful unless the person is under the influence of liquor, is guilty of boisterous conduct, or is a person of lewd or immoral character, in which event he may be excluded. If improperly excluded such a person is entitled to "his actual damages, and one hundred dollars in addition thereto." The amended complaint against the Los Angeles Turf Club, Inc., as has been stated, does not charge that the plaintiff was refused admission or that he was ejected from its race track at any time within three years of the date of its filing. Instead the amended complaint relies and is based merely upon a statement or declaration of its officials or agents made more than three years prior to the filing of the complaint, to the effect that the plaintiff would not be admitted, or if admitted he would be ejected, and that such statement it is averred along with the position taken by defendants in the injunction suits mentioned above made it unnecessary for the

plaintiff to present a ticket or offer the price thereof on any racing day thereafter in order to charge the Turf Club with the offense prohibited by the statutes. We fail to see any basis whatsoever for the contention.

[5] There is a *right* of action upon which a *cause* of action can be predicated by a plaintiff only where the defendant has breached an obligation or a duty owed to the plaintiff. In the case before us there was no duty or obligation on the part of the defendant to the plaintiff arising out of a contractual obligation and none arising out of law, unless and until the plaintiff tendered to the defendant a ticket of admission issued by it or its price charged to all persons who alike sought admission to its track. At the time the defendant told the plaintiff he would not in the future be admitted to the track, and if he was inadvertently admitted would be ejected, there was no status or legal relation of any kind or character between the parties which could give rise to a future right or duty on the part of one to the other. The parties in every sense of the word were legal strangers to one another and, hence, without any rights or duties to one another. It follows that as there was no legal relationship or status between the parties at the time the defendant made its alleged declaration to the plaintiff, which in no sense embodied an offer for his acceptance, that the declaration was not a waiver of any right which the defendant had against plaintiff as, at the moment, it had no legal right against him, and likewise the declaration could not estop the defendant in the future as the plaintiff at the moment was possessed of no right to future action by the defendant. Accordingly, it was necessary for the plaintiff in order to become vested with a legal right against the defendant along with a correlative duty on its part that the plaintiff achieve that result either by virtue of a contract or of law.

It was not achieved by contract, as there was none, and it was not achieved by law as the plaintiff did not comply with the conditions precedent set forth in the statute, i. e., presenting to the defendant a ticket

issued by it or tendering to the defendant in lieu thereof the price of a ticket. The gratuitous declaration made by the defendant was without any consideration whatever and made to a person to whom the defendant owed no duty either to state it or to withhold it, for the reason that as between them there was no legal relationship or status that would engender either a duty or a right. Surely, it must be regarded as obviously plain that if an authorized agent of the defendant had made the declaration, here attributed to the defendant, to a person not at the track and who had never sought admission thereto, but stated he intended to seek admission, he would not be entitled to recover damages based upon the declaration alone. If that be true, and we think it is, then it seems equally plain to us that such a case cannot be distinguished in the legal principle applied to it from the case of the plaintiff before us.

[6] It is of course true, as plaintiff contends that in certain instances the law rules that a plaintiff is excused from performing a condition imposed upon him by a contract or a statute where the defendant has made it clear that performance by the plaintiff of the condition will not induce the defendant to perform conditions imposed upon him. But this is true only where there is an existing legal right or duty or both by virtue of contract or of law. In the case before us there was no legal right or duty at the time the declaration was made. Hence, the plaintiff was not excused by the mere fact of the declaration from performing the conditions precedent imposed upon him by the statute, nor by the defense by defendants in the injunction suits.

[7] Quite apart from what we have so far said, we observe from the allegations in each of the amended complaints that the plaintiff originally instituted separate actions against the respondents here to restrain each respondent from refusing to admit him to its racing arena, and for other relief. In those actions the plaintiff charged, as he does in the instant actions, his ejectment from the tracks and that such ejectment constituted a continuing wrong thereafter—which he likewise con-

tends in the cases before us. Accordingly, it seems apparent that under the rule laid down in *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 118 P. 425, that the damages sought in the instant actions were recoverable in the injunction suits and hence are not recoverable here. However, as the point has not been briefed we do not choose to rest our decision on it. Moreover, it is unnecessary to discuss other and additional reasons urged by respondents for an affirmation.

The judgments are affirmed.



110 Cal.App.2d 373

**PEOPLE v. HARRIS.**

**Cr. 4748.**

District Court of Appeal, Second District,  
Division 1, California.

April 14, 1952.

The defendant was convicted of incest, and conviction was affirmed on appeal. Thereafter defendant filed notice of intention to petition for writ of error coram nobis and made a motion to certify the case for investigation and rehearing before the probation department. The Superior Court of Los Angeles County, Percy Hight, J., denied the motion, and defendant appealed. The District Court of Appeal, Doran, J., held that action of Superior Court was valid.

**Affirmed.**

**Criminal Law** ← 1001

Where defendant was found guilty of incest, and leave to file application for probation was granted, and defendant was sentenced to state prison for term prescribed by law, and an appeal was taken and conviction was affirmed, and thereafter defendant filed notice of intention to petition for writ of error coram nobis and made a motion to certify case for investigation and rehearing before probation department, superior court properly overruled motion. Pen.Code, § 1265.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The Notice of Appeal is as follows:

"I hereby give Notice to the District Court of Appeals from the denial of the Motion to Certify my above case for Investigation and re-hearing to the Probation Dept. From the denial of the motion to suspend Proceedings for the purpose of a Sex Psychopathy Hearing, from a denial of the appointments of Psychy, and from a denial of all other requests and Motions by me, thru my respective Councils on the 28th day of September, and denied by the Honorable Percy Hight Sitting as Judge.

Oct 8-51".

There is no merit whatever to the appeal.

The record reveals, as noted briefly by respondent, that

"By information appellant was charged with two counts of incest, alleged to have been committed upon his own daughter. Appellant entered pleas of not guilty and not guilty by reason of insanity. Psychiatrists were appointed under Section 1027 of the Penal Code. In a trial by jury appellant was found guilty as charged. Leave to file application for probation was granted. Appellant was sentenced to the state prison for the term prescribed by law, sentences to run concurrently. Thereafter an appeal was taken and the judgments were affirmed. 105 Cal. App.2d 701, 233 P.2d 633. Remittitur issued on August 27, 1951 and was filed with the County Clerk on September 4, 1951. On September 4, 1951, appellant filed a 'Notice of Intention to Petition for a Writ of Error Coram Nobis'.

\* \* \* \* \*

"When the matter came on for hearing on September 28, 1951, the Deputy District Attorney pointed out that the judgment of conviction was final and that under Penal Code Section 1265 the trial court had no jurisdiction to entertain a writ of error *coram nobis*; that the application for such writ should be made to the District Court of Appeal. Thereupon the court denied that petition.

"Appellant's counsel made an argument based upon the affidavit of the prosecutrix heretofore set forth, and the court was asked to re-refer the matter to the probation department upon verbal motion. The court was of the opinion that it was not for the probation department to decide facts; that facts should be decided by the proper court. He further observed that there was evidence adduced at the trial which corroborated the girl's testimony. Reconsideration of probation was denied.

"The court also denied appellant's oral request that proceedings be suspended and psychiatrists be appointed to determine whether appellant is a sexual psychopath."

Accompanying the notice was the usual affidavit.

It is contended on appeal that:

"1. The court erred in refusing appellant's motion under the sexual psychopathy provisions of the Welfare and Institutions Code;

"2. That the court erred in refusing permission to re-refer the case to the probation department."

The record reveals that the action of the trial judge in connection with and as a result of defendant's immaterial contentions was valid in every respect. It would serve no useful purpose to detail the arguments. As above noted the appeal is without merit.

Affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 314

**TAORMINA et ux. v. ANTELOPE  
MIN. CORP. et al.**

Civ. 18779.

District Court of Appeal, Second District,  
Division 1, California.

April 8, 1952.

As Amended April 9, 1952.

Action by Vincent Taormina and wife against Antelope Mining Corporation and others to recover sum of money paid by plaintiffs for the purchase of capital stock of named defendant. The Superior Court, Los Angeles County, Roy L. Herndon, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, White, P. J., held that the trial court was warranted in finding that there was an attempted sale of corporate stock in violation of the permit issued by the Commissioner of Corporations.

Judgment affirmed.

**1. Licenses ⇨18½(33)**

Where permit issued by Commissioner of Corporations provided that the owner or persons entitled to shares of corporation should not consummate a sale or transfer of such shares, or any interest therein, or receive any consideration therefor, until written consent of Commissioner had been obtained so to do, and owners of shares sold five per cent of stock in corporation for \$3,500 and afterwards delivered to buyer note of the corporation for \$3,500, containing notation that note was to be secured by stock when authorized by Commissioner, there was an attempted sale of corporate stock in violation of the permit.

**2. Licenses ⇨39.24**

In action by buyers to recover money paid for capital stock of corporation, trial court was warranted in finding that there was an attempted sale of corporate stock in violation of permit issued to corporation by Commissioner of Corporations.

**3. Appeal and Error ⇨1010(1)**

Appellate court may not disturb the conclusions of the trial court where they are founded upon substantial evidence.

**4. Fraud ⇨27**

A person who sells a security impliedly represents that a permit therefor has been secured when one is required by law for such a sale, and if this implied representation is false, it is a negligent misrepresentation which is an actionable fraud.

**5. Fraud ⇨30**

Where action is for damages for fraud, recovery may be had against all persons participating in the fraud, whether they receive a portion of the money paid or not.

**6. Licenses ⇨39.17**

In action between buyer of stock, sold in violation of the Corporate Securities Law, and the corporation, the buyer must be equally culpable with the corporation before he will be held to be in *pari delicto*. Corporations Code, § 25000 et seq.

**7. Licenses ⇨39.17**

In action by buyers to recover money paid by them for capital stock sold by corporation in violation of the Corporate Securities Law, where the trial court found upon substantial evidence that the corporation falsely represented that it had authority to sell the stock and that buyers relied upon such representation, the buyers could not be held to be in *pari delicto*. Corporations Code, § 25000 et seq.

Rex B. Goodcell, Los Angeles, for appellants.

Alfred J. McCourtney, Lancaster, for respondents.

WHITE, Presiding Justice.

Plaintiffs brought an action to recover the sum of \$3,500 paid by them for the purchase of capital stock of the defendant Antelope Mining Corporation. This appeal is from the judgment, entered after trial before the court, against defendant corporation and W. B. Stevens and Frank L. DeWolf, directors thereof.

Plaintiffs alleged that the defendant corporation had been granted a permit by the Commissioner of Corporations to issue

capital stock of the par value of \$20,000, with the provision that the certificates should be held in escrow and not released without the written consent of the Commissioner of Corporations; that on October 4, 1949, plaintiffs and defendants entered into an agreement, a copy being annexed to the complaint, for the sale of five per cent of the capital stock of the corporation to plaintiffs for the sum of \$3,500, which sum the plaintiffs paid; that at the time of making the agreement written consent of the Commissioner of Corporations for such sale had not been obtained and never was obtained; that consequently the agreement was void and the defendants became indebted to plaintiffs in the sum of \$3,500. By a second cause of action it was charged that the defendants conspired to violate the Corporate Securities Law, Corporations Code, § 25000 et seq., and to defraud plaintiffs by falsely representing that they, defendants, had authority to issue stock and enter into the agreement of sale. The defendants' answer consisted of denials. The trial court found the allegations of the complaint to be true and the denials of the answer untrue.

Appellant contends that the findings are not supported by the evidence, but that should this court conclude that the findings of conspiracy are supported by the evidence, then all the parties to the agreement for sale of the stock are *in pari delicto*, and plaintiffs should not recover. Neither of these contentions may be sustained.

The permit issued by the Commissioner of Corporations in 1948, authorizing the issuance of 20,000 shares to W. B. Stevens, R. B. Stevens, M. L. Stevens and Frank L. DeWolf, provided that the certificates evidencing such shares should be deposited with an escrow holder, "and that the owner or persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, or receive any consideration therefor, until the written consent of said Commissioner shall have been obtained so to do." (Emphasis added.)

The undisputed facts are that plaintiffs became interested in the corporation's mining property, near Lancaster, California,

through one Schmidt, in whom plaintiffs had confidence. They visited the mining property and were introduced by Schmidt to defendants W. B. Stevens and DeWolf. On October 4, 1949, after visiting the mine, plaintiffs, Schmidt, Stevens and DeWolf went to the office of an attorney in Lancaster, an attorney whom none of the parties had previously met, and after a conference, the attorney drafted the following agreement:

"This agreement entered into this 4th day of October, 1949 in the town of Lancaster, California by and between the Antelope Mining Corporation, a California corporation, referred to herein as corporation, Percy Schmidt, referred to herein as Schmidt and Vincent Taormina and Yula D. Taormina, husband and wife referred to herein as Taormina, whereby the parties agree as follows:

"Witnesseth

"Whereas, Antelope Mining Corporation is desirous of borrowing money to enable them to continue operations and,

"Whereas, corporation and Schmidt have a presently existing agreement which they desire to change, and,

"Whereas, Taormina is willing to pay the sum of Thirty-Five Hundred Dollars (\$3500.00) under the terms set forth herein,

"Now Therefore, it is agreed as follows:

"1. That said agreement between Schmidt and the corporation entered into on August 4th, 1949 shall be cancelled and in its place Schmidt shall be given  $28\frac{1}{3}\%$  of the total capital stock issued to the corporation.

"2. Taormina shall be given 5% of the capital stock issued to the corporation. Taormina agrees to give to Antelope Mining Corporation as soon as possible but not later than thirty (30) days after date of this agreement, to wit: \$2500.00.

"3. The corporation agrees that they will immediately procure legal counsel to take the necessary steps to effect the transfer of the capital stock

in the proportions herein set forth. It is agreed and understood that there has been issued to the corporation twenty thousand shares (20,000) of stock at a par value of one dollar (\$1.00) per share.

"4. It is agreed that the corporation's Articles and By-Laws shall be amended to require a 66 $\frac{2}{3}$ % majority vote to effect any of the following items:

"A. To pay any salary or salaries to any member of the corporation except for actual labor in connection with the operation of the mine in which event the salary shall not exceed the going salary for such type of work.

"B. Making any capital investment in excess of one thousand dollars (\$1,000.00).

"5. Dividends shall be declared quarterly based on the statement of the corporation closing the books February 1st, 1950 and quarterly thereafter. A minimum of 50% of the net profits for the preceding three months shall be paid out as dividends. This shall be subject to change only by 66 $\frac{2}{3}$ % majority vote.

"6. It is agreed that either Schmidt or Taormina shall be elected to serve on the Board of Directors.

"In Witness Whereof we hereunto set our hands and seals the day and year above first written.

"Antelope Mining Corp.

"By: W. B. Stevens

"Frank L. DeWolf

"Percy Schmidt

"Vincent Taormina

"Yula D. Taormina."

Upon the execution of the agreement plaintiffs paid \$1,000 to defendant corporation, and on October 15, 1949, they paid an additional \$2,500, receiving a receipt signed by defendant Stevens as president of the corporation "for payment in full for five percent of Antelope Mining Corp. stock to be authorized by the Corporation Commissioner." About a week later, according to the testimony of defendant Stevens, he delivered to plaintiff Vincent

Taormina a promissory note of the corporation for \$3,500, containing the notation: "This note to be secured by stock when authorized by the Calif. Corporation Commissioner." Stevens testified that what he "really meant" was that "when the stock was authorized to be transferred, why, he would deliver the note back to us \* \* \* that he would be compensated by having his stock." Mr. Taormina testified that when he was handed the note, he "never accepted it", but sent it to the attorney in Lancaster "to see if it was right for me to accept it at any time, and I never accepted it."

[1-3] Upon the foregoing facts the trial court was warranted in drawing the inference that there was an attempted sale of corporate stock in violation of the plain provisions of the permit issued by the Commissioner of Corporations. Appellants would have us hold that the trial court should have construed the agreement as one whereby plaintiffs loaned the corporation \$3,500 and were to receive in return not only the money loaned but a bonus of 5% of the corporate stock, to be transferred within the escrow. Under well settled rules, this court may not, even were it inclined so to do in this cause, disturb the conclusions of the trial court, as they are founded upon substantial evidence. The agreement above set forth was ambiguous and uncertain. It refers to "borrowing" by the corporation, but does not refer to a "loan" by the Taorminas or for the repayment or evidencing of such a loan. The trial court construed the agreement in the light of the circumstances surrounding its execution and the testimony of the parties to it. In addition to the testimony of plaintiffs to the effect that they were not making a loan but believed they were purchasing stock, and that they were not informed of the inhibitions on such purchase contained in the permit of the Commissioner of Corporations, there is the fact that the promissory note was not delivered to plaintiffs until some weeks after the execution of the agreement and payment of the consideration, and the testimony as above noted of defendant Stevens that he understood that the note was to be re-



turned to the corporation and that all plaintiffs were to receive was the promised stock. Under the evidence, the trial court could well conclude that the execution and delivery of the note constituted a belated attempt to conceal the true nature of the transaction. Further, even assuming appellants' version of the transaction to be true there was a violation of the terms of the permit, for even under this version there was a transfer of an interest in the stock in consideration of a loan to the corporation.

[4, 5] Appellants, in attacking the findings, point out that no demand was made for the return of the money paid, no notice of rescission given, and no tender made of the promissory note received by plaintiffs. These were unnecessary. Plaintiffs' action sounds in tort, for fraud. While it has long been settled that the purchaser of securities issued in violation of the Corporate Securities Law may recover in an action for money had and received on the theory that the sale and the securities are void, *Pollak v. Staunton*, 210 Cal. 656, 662, 293 P. 26; *Smith v. Bach*, 183 Cal. 259, 191 P. 14, it is also the law that a person who sells a security impliedly represents that a permit therefor has been secured when one is required by law for such a sale, and if this implied representation is false, then it is a negligent misrepresentation which is an actionable fraud, *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 525, 86 P.2d 102; and where, as here, the action is for damages for fraud, recovery may be had against all persons participating in the fraud, whether they received a portion of the money paid or not. *Auslen v. Thompson*, 38 Cal.App.2d 204, 212, 213, 101 P.2d 136.

Appellants attack the finding, made pursuant to the allegations of paragraph II of the second cause of action, that defendants knew that it was unlawful for the corporation to issue stock without the consent of the Commissioner of Corporations and conspired to violate the Corporate Securities Act, by pointing to the fact that a permit had been issued. This contention may not be upheld. There existed a permit authorizing sale and issuance of stock

to named persons, the incorporators and promoters. There existed no permit to sell stock to any one else and there was an express prohibition in the permit granted against the sale of any interest in the stock issued to the incorporators or the receipt of any consideration therefor. Whether the transaction is called a sale in violation of the terms of the permit or a sale without a permit, the legal consequences are the same. *Castle v. Acme Ice Cream Co.*, 101 Cal.App. 94, 281 P. 396; *Live Oak Cemetery Ass'n v. Adamson*, 106 Cal. App.Supp. 783, 288 P. 29.

[6, 7] With reference to the contention that the plaintiffs were *in pari delicto* with defendants and therefore may not recover, the rule in this regard is that in actions such as the one with which we are here concerned ordinarily the purchaser of securities will not be held to be *in pari delicto*, because the Corporate Securities Law was enacted primarily for the protection of the investing public. "When the action is between the purchaser and the corporation, the law attaches such great importance to the policy underlying the Blue Sky Law that the purchaser must be equally culpable with the corporation before he will be held to be *in pari delicto*." *Miller v. California Roofing Co.*, 55 Cal.App.2d 136, 144, 130 P.2d 740, 745, and cases cited. Even had the plaintiffs known that the consent of the Commissioner of Corporations would have to be secured before they could receive their stock, they could not be held to be equally culpable with the sellers, but aside from that, the trial court found, upon substantial evidence, that the defendants falsely represented that they had authority to sell the stock, and that plaintiffs relied upon such representation. The purpose of the Corporate Securities Law being to protect the investing public, it is only in such extreme cases as are illustrated by *Miller v. California Roofing Co.*, supra, where the purchaser actively participated in fraudulent representations to the Commissioner of Corporations, that recovery is denied.

No useful purpose would be served by further discussion of appellants' attacks upon the findings. Had appellants desired

more detailed findings they could have proposed them to the trial court, but the record does not show that this was done; and further, it is apparent that had more detailed findings been made they would have been adverse to appellants and would not have supported a judgment in their favor. The record discloses no prejudicial error and no miscarriage of justice. Const. Calif. Art. VI, sec. 4½.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



110 Cal.App.2d 203

In re GIRARD'S ESTATE.

LEWIS v. FRITZ.

Civ. 15105.

District Court of Appeal, First District,  
Division 2, California.

April 1, 1952.

Rehearing Denied May 1, 1952.

Hearing Denied May 29, 1952.

Proceeding by George W. Lewis against Leore G. Fritz, as executrix of the last will and testament of Frank A. Girard, deceased, to recover interest on creditor's claim allowed against deceased's estate. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., ordered payment without interest and rendered decree settling the executrix's final account and distributing the estate, and plaintiff appealed. The District Court of Appeal held that the non-interest bearing debt of decedent did not bear interest at the statutory rate from the date of the allowance and approval of the creditor's claim.

Order and decree affirmed.

#### I. Executors and Administrators ¶267

Non-interest bearing debt of a decedent does not bear interest at the statutory rate from the date of the allowance and approval of the creditor's claim. Probate Code, §§ 713, 730; Gen.Laws, Act 3757; Const. art. 20, § 22

#### 2. Executors and Administrators ¶258

Only after an order for payment is the executor obliged to pay any general claim against the estate, and as to any such claim paid by him prior to such order, he acts at his peril. Probate Code, §§ 951, 952.

Myers & Carter, San Anselmo, for appellant.

Thomas H. Matimore, Ira S. Solomon, San Francisco, for respondent.

DOOLING, Justice.

Appellant presented a creditor's claim to the executrix of the will of Frank A. Girard for money advanced in the sum of \$51,771.49. The claim was allowed and approved by the executrix on March 10, 1950 and by the probate judge on March 14, 1950 for the full amount claimed. It was ordered paid by an order of the probate judge made and entered on October 20, 1950 and the principal sum of \$51,771.49 was paid to appellant on October 24, 1950 pursuant to said order.

Appellant demanded interest at the statutory rate of 7% per annum from the date of the allowance and approval of his claim and his receipt of the principal sum was agreed to be without prejudice to his assertion of this demand. He has appealed from the order for payment and from the later decree settling the executrix' final account and distributing the estate.

An affidavit of Ira S. Solomon contains the averment "That for many years George W. Lewis (appellant) and decedent had assisted each other financially \* \* \* and when either party loaned to the other any sums of money \* \* \* it was distinctly understood, and it was the custom, that neither party would pay to the other party any interest \* \* \*." No demand for interest was made in the creditor's claim presented to the executrix and it is not claimed on appeal that the indebtedness was an interest-bearing one.

[1] The only question presented to us is whether a non-interest-bearing debt of a decedent bears interest at the statutory rate from the date of the allowance and approval of the creditor's claim. We have

concluded that under the existing statutory law it does not.

Appellant relies on Estate of Glenn, 74 Cal. 567, 16 P. 396; Estate of Cummins, 143 Cal. 525, 77 P. 479; and In re Estate of Mallon, 3 Coff.Prob. 125. The basic case is Estate of Glenn, *supra* and the following quotation from the opinion in that case clearly shows the basis of that decision, 74 Cal. 567-568, 16 P. 396:

"Section 1504, Code Civil Proc., which in this respect is substantially the same as section 140 of the old Practice Act, (see Laws 1851, p. 465,) provides that 'a judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim *in the same manner as if it had been allowed by the executor or administrator and a judge.* \* \* \*' This is an express provision that a judgment upon a claim has the same effect as an allowance of the claim. The converse of such a proposition must be true; that is to say, the allowance of a claim has the same effect as a judgment upon the claim. But a judgment upon a claim draws interest. Pico v. Stevens, 18 Cal. 377. Hence an allowed claim must draw interest. This conclusion is in harmony with numerous decisions which hold that for some purposes the allowance of a claim is a judgment."

The right to interest at the statutory rate from the date of the allowance of the claim was thus based by the court upon an express statutory provision which gave the allowance of a claim the same effect as a judgment against the executor or administrator and vice versa. Since then the statutory law has been radically changed.

Section 730 of the Probate Code which superseded section 1504, Code Civ.Proc., quoted in Estate of Glenn, *supra*, now reads in part: "A judgment rendered against an executor or administrator, upon any claim for money \* \* \* when it becomes final, *conclusively establishes the validity of the claim for the amount of the judgment* \* \* \*." (Emphasis ours.)

Sec. 713, Prob.C., now provides: "Every claim allowed by the executor and administrator and approved by the judge shall

be ranked among the acknowledged debts of the estate \* \* \* *but the validity thereof may be contested by any person in interest \* \* \* unless established by a judgment* against the executor or administrator." (Emphasis ours.)

It is no longer true as said in the quotation from Estate of Glenn, *supra*: "This is an express provision that a judgment upon a claim has the same effect as an allowance of the claim." By the present statutory provisions an allowed claim is still contestable by any person in interest. It has no finality or conclusiveness whereas a judgment against an executor or administrator by express statute "conclusively establishes the validity of the claim for the amount of the judgment" and is not contestable by any person in interest. Thus the parity no longer exists between an allowed claim and a judgment, which led the court to conclude in Estate of Glenn, *supra*: "But a judgment upon a claim draws interest. \* \* \* Hence an allowed claim must draw interest."

In Estate of Cummins, *supra*, 143 Cal. at page 527, 77 P. at page 480, another ground was suggested for making an allowed claim bear interest at the statutory rate, the court saying: "If the account was not a 'claim' which needed to be presented and allowed, and did not, therefore, rank as a judgment, still by the presentation and allowance the balance was ascertained, and interest commenced at that time, under section 1917 of the Civil Code." Sec. 1917, Civ.Code, at the time of this decision (1904) provided: "Unless there is an express contract in writing, fixing a different rate, interest is payable \* \* \* on any settlement of account, from the day on which *the balance is ascertained* \* \* \*." (Emphasis ours.) It was to the emphasized language that the court referred in the sentence quoted from the Cummins case.

Sec. 1917, Civ.Code, has been superseded by the Usury Law, Deering's Gen.Laws, Act 3757, and sec. 22, Art. XX of the State Constitution. In neither is the language emphasized found. Whatever logic there may have been in holding that an allowed claim bore interest because it became an "account \* \* \* on which the balance



[was] ascertained" ceased to have force with the repeal of sec. 1917, Civ.Code, in which that language appeared.

Our conclusion is reinforced by *In re Estate of Bell*, 168 Cal. 253, at pages 258-259, 141 P. 1179, at page 1181, wherein the court said: "But it is settled by our decisions that the allowance of a claim against a solvent estate is not equivalent to an ordinary judgment. It is a judgment only in a qualified sense, and does not attain the force and dignity of an absolute judgment until an order of court is made directing the executor or administrator to pay it. Until then it is simply an acknowledged debt of the estate, bearing interest at the contract rate. It is only after such an order is made that it bears interest at the statutory rate."

[2] It may well be added that only after an order for payment, Prob. C. sec. 952, is the executor obliged to pay any general claim against the estate, Prob. C. sec. 951, and as to any such claim paid by him prior to such order he acts at his peril. *In re Estate of Fulmer*, 203 Cal. 693, 698, 265 P. 920, 58 A.L.R. 430.

The order and decree from which the appeals are taken are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.



110 Cal.App.2d 375

**LASSALLETTE v. PARISIAN BAKING  
CO. et al.  
No. 14911.**

District Court of Appeal, First District,  
Division 1, California.  
April 15, 1952.

Suit by Bernard Lassallette against Parisian Baking Company and others for declaratory relief. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., found that, under the by-laws of the named corporation, the book value of each

share of stock was to be determined by adding the par value of all the outstanding shares of stock to the surplus of the corporation, as shown on its financial statement, and dividing the total so obtained by the numbers of shares of stock outstanding, and the plaintiffs appealed from the judgment based upon such finding. The District Court of Appeal, Fred B. Wood, J., held that trial court's interpretation was correct, and that the by-law did not, as contended by plaintiff, require that the book value of each share be determined by taking the market value of the assets of the corporation, deducting its liabilities, and dividing the remainder by the number of shares.

Affirmed.

### Corporations ⇄ 113

Under by-law, book value of each share of stock was to be determined by adding par value of all of outstanding shares of stock to surplus of corporation, as shown on its financial statement, and dividing total so obtained by number of shares of stock outstanding, rather than, as contended, by taking market value of assets of corporation, deducting its liabilities, and dividing remainder by number of shares.

William Petros, San Francisco, for appellant.

W. P. Caubu, San Francisco, for respondent.

FRED B. WOOD, Justice.

The answer to the sole question upon this appeal depends upon the meaning of "book value" as used in a by-law of the defendant corporation.

The by-law requires the holder of any of the corporate shares, desiring to sell them, first to offer them to the corporation "at the net book value of the assets, that is, plant investment, inventories, accounts receivable, cash and other assets, less debts and liabilities and suitable reserves for depreciation or otherwise, plus \$25,000 for the good will of the business. \* \* \*

The trial court found that the "book value of the shares of stock of said company as determined" by the by-law "is that set forth on the books of the Corporation," and that

in accordance with the by-law the "book value of each share of stock of said Corporation is to be determined by adding the par value of all of the outstanding shares of stock to the surplus of the Corporation as shown on its financial statement and dividing the total so obtained by the number of shares of stock outstanding."

Plaintiff has appealed from the judgment which was based upon this finding. He claims that the court's interpretation is against the evidence and against the law. He contends that the by-law requires that the "book value" of each share be determined by taking the "market value of the assets" of the corporation, "deducting its liabilities," and dividing the remainder by the number of shares.

Our reading of the by-law and consideration of the evidence adduced upon the trial convinces us that the trial court's interpretation is correct.

The problem is that of ascertaining the intent of the shareholders when they formulated and adopted this by-law, ascertained by an analysis of the words they wrote into the document and aided by consideration of the significant surrounding circumstances and the construction, if any, which they put upon it before the controversy arose. In conducting this inquiry we must bear in mind the fact that the law does not define "book value" as denoting a particular method of arriving at the value of fixed or other assets of a corporation. It may be market value, cost less depreciation, or other concept of value recognized by sound accounting practice and used by the particular corporation in recording its financial transactions. (See discussion in Ballantine, California Corporation Laws, 1949 edition, p. 185, sec. 137, and authorities cited.)

We start with a reading of the by-law. It contains a definition of a sort. The very words "plant investment \* \* \* less \* \* \* reserves for depreciation \* \* \*" denote valuation of the fixed assets at cost less depreciation, and that is the way the books of this corporation were kept, both before and after the individual parties to this action acquired control. The corporation commenced business about 1906. In

1944 plaintiff and the four individual defendants bought all of the issued shares, 230 in number, each of the five taking 46 shares. Shortly thereafter, they adopted the by-law in question. The December 31, 1949, balance sheet, under "plant investment," shows (1) real estate, \$45,000, which the testimony shows represents cost; (2) building, depreciated cost, \$4,105.40; (3) machinery and equipment, \$15,831.16, autos and trucks, \$18,075.60, office electrical equipment, \$914.97, amounting to \$34,821.73, less \$22,705.37 as a reserve for depreciation, a net value of \$12,116.36; and (4) a resultant entry of "net plant investment," \$61,221.76.

Other assets (cash on hand and in bank, accounts receivable, prepaid insurance, and flour on hand) bring this figure up to \$91,793.88, "total assets." The deduction of liabilities in the form of accrued vacation pay and tax reserves (\$7,740.69), leaves \$84,053.19 allocated to capital and surplus, which were entered on the books as follows: Capital Stock (230 shares, par \$100) \$23,000; surplus at the beginning of the year \$62,825.50, less dividends paid \$20,240, plus 1949 profit \$18,467.69, showing \$61,053.19 as the surplus at the end of the year. The per share book value would, of course, be ascertained by dividing the total amount of capital and surplus by the number of shares, 230.

A certified public accountant, who has been accountant for the corporation since 1941, testified that he carried forward the values he found on the books after checking various records to determine the accuracy of the book entries, continuing with the cost less depreciation method which had been previously adopted and followed. He made no changes in policy, merely some changes in method, such as carrying depreciation of machinery, equipment, autos and trucks in a separate account instead of directly diminishing the cost values of those items. Nothing had been set up for good will. He continued the policy of not doing so. (That policy is reflected by the by-law in question. It calls for the addition of \$25,000 for good will, after ascertaining the book value, in fixing the price of shares for sale to the corpora-

tion.) The accountant further testified that book value is the value set up by a particular company to express the policy and method it uses in stating what its financial and operating activities are; different companies have different policies and methods; there is no one set rule of book values; this company's system is cost less depreciation; it is one of the many systems used by various corporations; under this company's system, deduction of liabilities from the depreciated assets gives the net worth; net worth is made up of capital stock and of surplus less dividends paid, which amount divided by the number of shares gives the book value of each share of stock outstanding.

Plaintiff, ignoring these factors and the plain meaning of the words used in the by-law, insists that "book value" is determined by the "market value" of the assets less the liabilities of the corporation. By this method he values the land and building at \$99,500. He would add \$25,000 for five ovens, which the corporation treats as a part of the building; \$48,000 for eight delivery routes, for which the books carry no entry, the routes being treated as the principal element of the good will of the business. He builds up a valuation in excess of \$200,000 by a method not in accord with the requirements of the by-law. He does not suggest that the corporation's book entries are inaccurate when viewed as the recordation of the cost of the land, the depreciated cost of the building, and the cost less depreciation of the machinery, equipment, autos and trucks. He does differ with the defendants on the question whether the ovens are fixtures or equipment to be separately valued, or a part of the building and as such included in the depreciated cost value of the building. He also directs attention to a few items not included in the inventory valuation, such as sugar on hand and a supply of paper bags. Those are factors which might be significant in an action to determine

the book value of the assets upon a particular date, which this action is not. As correctly stated by plaintiff's counsel during the trial, in this action for declaratory relief the meaning of "book value" as used in the by-law of the issue before the court, not that of ascertaining the value of the corporate shares. We have used specific items and figures entered in the books of account, as reflected in the balance sheet for December 31, 1949, merely as a means of ascertaining the kind of value used by this corporation in recording its financial transactions, incidental to and in aid of the ascertainment of the meaning of "book value" in the by-law under consideration.

In support of his position plaintiff has cited *In re Estate of Felton*, 176 Cal. 663, 169 P. 392, and a number of judicial decisions of other states. They are not helpful. Each turns upon its own peculiar facts or upon the meaning of "value" or "book value" as used in a particular statute. The Felton case involved the construction and application of the state inheritance tax act. The appellant claimed, the respondent conceded, and the court observed that the market value of the shares of a corporation was the statutory measure of value for taxing purposes.

Plaintiff introduced some evidence tending to show he did not understand the meaning of the by-law when he and the other shareholders voted for it and when he appended his signature to it as recorded in the minutes of the meeting. But he does not claim that the text of the by-law was inaccurately recorded, nor does he seek to reform that document or to rescind the action which he and the other shareholders took when they adopted it. For the purpose of this action we must accept the text of the by-law as put in evidence at the trial and incorporated in the record upon this appeal.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



110 Cal.App.2d 411

**NEW ZEALAND INS. CO., Limited, et al.  
v. BROWN.  
Civ. 18845.**

District Court of Appeal, Second District,  
Division 2, California.

April 18, 1952.

Subrogation action by the New Zealand Insurance Company, Ltd., and another, against Ben H. Brown, administrator of the estate of Mary Williams Rosoff, deceased, to recover damages caused by fire to premises insured by plaintiffs and leased by deceased. The Superior Court of Los Angeles County, Irvin Taplin, J., entered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Fox, J., held that evidence made prima facie showing that fire was caused by tenant's negligent smoking in bed.

Judgment reversed.

McComb, J., dissented.

**1. Trial ⇐165**

In passing on motion for nonsuit, trial court must treat as true every piece of evidence which tends to establish plaintiff's case and disregard all contrary evidence, and every reasonable inference in plaintiff's favor must be indulged in.

**2. Negligence ⇐134(2)**

In negligence action to recover fire damages, cause of fire need not be established by direct evidence, but can be established by evidence wholly circumstantial, and cause need not be established with absolute certainty.

**3. Landlord and Tenant ⇐55(3)**

In subrogation action by fire insurer against tenant to recover fire damages to leased premises, evidence made prima facie case showing that fire was caused by tenant's negligent smoking in bed and was sufficient for jury.

FOX, Justice.

Plaintiffs seek to recover from decedent's estate, on the theory of subrogation, the money paid the owner to cover the damages to an apartment caused by fire. From a judgment of nonsuit plaintiffs appeal.

The fire occurred about 2:00 a. m. in a bedroom on the first floor. The apartment was locked, making it necessary for the firemen to force the doors to gain entrance. The only occupant was the decedent, Mary Williams Rosoff, who was 34 years of age and who later passed away from cause unrelated to this fire. The firemen found her on the floor, face down and unconscious, in a hall about three feet from the closed but unlocked door to the bedroom where the fire originated; she was barefooted but had on a nightgown or slip; she was burned on both hips and on both buttocks. In response to a question at the police station as to how she got burned she replied, "By the fire." The door from the hall to the bedroom consisted of three panels, the upper one of which was "almost entirely burned away" permitting flames to come out through that opening. There was no flame in the hallway except that coming through this upper panel of the door.

There were two windows in the bedroom. A bed had been placed diagonally between them. "The bed was almost completely destroyed, only a small portion of the four corner posts and head and tail were left. The fire had burned through the floor and burning material had fallen under the house." The other furniture was "badly charred and blistered from heat."

An examination of the premises disclosed that the insulation of the electrical wiring had been burned externally due to the heat of the fire causing a short circuit which blew two fuses. Neither an electric blanket nor a heating pad was found in the bedroom. In the apartment there were numerous ash trays containing cigarette butts but none were found in the bedroom. Two empty liquor bottles and one full bottle were in the apartment. There is testimony that Mrs. Rosoff was inebriated upon her arrival at the Receiving Hospital.

---

Hindman & Davis and E. Eugene Davis, Jr., all of Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Henry W. Gardett, Deputy Counsel, Los Angeles, for respondent.

[1,2] In passing on a motion for non-suit the court must accept and treat as true every piece of evidence which tends to establish plaintiff's case and disregard all contrary evidence. Also, every reasonable inference must be indulged in plaintiff's favor, and if two reasonable inferences may be drawn from the evidence, one of which is favorable to the case of the plaintiff and the other unfavorable, the inference which is favorable must be accepted and the inference which is unfavorable rejected. *Williamson v. Pacific Greyhound Lines*, 78 Cal.App.2d 482, 485, 177 P.2d 977; *Wulfjen v. Dolton*, 24 Cal.2d 878, 880, 151 P.2d 840; 9 Cal.Jur., sec. 35, p. 551. Direct evidence is not required to establish the cause of a fire. *Kennedy v. Minarets & Western Ry. Co.*, 90 Cal.App. 563, 574, 266 P. 353; *Gailbreath v. Homestead Fire Ins. Co.*, 9 Cir., 185 F.2d 361. In fact, the evidence can be wholly circumstantial. *Jno. L. Witney, Inc. v. Sierra R. Co.*, 123 Cal. App. 430, 435, 11 P.2d 415. Furthermore, it is not necessary to establish the cause with absolute certainty. *Hallawell v. Union Oil Co.*, 36 Cal.App. 672, 681, 173 P. 177; *Gallichotte v. California Mut., etc., Ass'n*, 4 Cal.App.2d 503, 508, 41 P.2d 349.

[3] Based on these principles, the evidence produced by plaintiffs was sufficient to establish a prima facie case. From the evidence that the bed was "almost completely destroyed" and a hole burned through the floor directly underneath it, the inference is reasonable that the fire started in the bed. The fact that the fire occurred at 2:00 a. m., that Mrs. Rosoff was in bedtime attire, that she was burned on her thighs and buttocks, reasonably justifies the inference that she had been in the bed during the early stage of the fire. Respondent points to the fact that Mrs. Rosoff was found in the hall some three feet from the entrance to the bedroom. In this connection it will be remembered she was lying face down and was unconscious. A justifiable inference here is that she attempted to escape from her burning bed but had been overcome with the smoke and collapsed. The trial court emphasized the absence of any testimony

showing her nightclothes were aflame. He appears to have drawn the inference that she could not have been in the bed and received the physical burns she did without getting her nightclothes on fire. However, a consistent inference on this point favorable to plaintiffs' case would be that her nightdress had slipped up to her waist or even higher and consequently did not come in contact with the fire. On this motion the court was under the duty to accept as true the testimony regarding her burns. There is no basis for an inference that she received these burns while collapsed in the hall. The flame was limited to that coming through the upper third of the door. There was no other flame in the hall.

From the fact that there were "numerous ash trays that had cigarette butts in them" and that Mrs. Rosoff was the only person there at that time, and the only adult who lived there, the reasonable inference favorable to the case of plaintiffs would be that she was a cigarette smoker.

Of course it must not be overlooked that the captain of the fire department who was there and inspected the premises for the purpose of determining the cause of the fire, did not find anything wrong with the electric wiring or equipment.

This evidence which, on the motion, the court was required to accept and believe, plus the reasonable inferences to be drawn therefrom in favor of plaintiffs' case, make a prima facie showing that the fire was caused by Mrs. Rosoff's smoking in bed, and her inebriacy lays a foundation for the further inference favorable to plaintiffs that she was negligent in the manner in which she indulged in this dangerous pastime.

In view of the foregoing it becomes unnecessary for us to consider the admissibility in evidence of the opinion of the captain of the fire department as to the cause of the fire.

The judgment is reversed.

MOORE, P. J., concurs.

McCOMB, J., dissents.

110 Cal.App.2d 415

**PEOPLE v. ROBINSON.**

Cr. 2309.

District Court of Appeal,  
Third District, California.

April 18, 1952.

Hearing Denied May 15, 1952.

The defendant was convicted in the Superior Court of Solano County, Harlow V. Greenwood, J., of unlawful possession of marijuana, and he appealed. The District Court of Appeal, Adams, P. J., held that evidence sustained conviction.

Judgment affirmed.

**1. Poisons ☞9**

Evidence sustained conviction for unlawful possession of marijuana. Health and Safety Code, § 11500.

**2. Criminal Law ☞511(1)**

In prosecution for unlawful possession of marijuana, evidence was sufficient to corroborate testimony of co-defendants who were called as witnesses for the prosecution. Health and Safety Code, § 11500; Pen.Code, § 1111.

**3. Criminal Law ☞1186(4)**

Failure of trial court to warn jurors on allowance of a short recess, that they should not discuss the case among themselves or with any one else, was not ground for reversal, where jurors had previously been so warned, prior to recess, and it did not appear that jurors violated the admonition previously given, or that any prejudice to defendant or any miscarriage of justice resulted from failure to repeat the admonition. Const. art. 6, § 4½.

---

Norman Samuelson, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen. by Gail A. Strader, Deputy, for respondent.

ADAMS, Presiding Justice.

Appellant Robinson, Robert Walden and Richard Walden were charged in an information filed in Solano County, with the unlawful possession of marijuana, in violation of section 11500 of the Health and

Safety Code. The two Waldens pleaded guilty. Robinson was convicted by a jury, and now appeals from the judgment which followed.

The contentions of appellant urged as grounds for reversal are that the evidence was insufficient to justify the verdict, that testimony given by his co-defendants, who were called as witnesses for the prosecution, was not corroborated as required by section 1111 of the Penal Code, that the court erred in failing to instruct the jury upon the necessity for such corroboration, and that, at the declaration of a recess, the court failed to admonish the jurors not to talk among themselves or to others about the case.

Appellant admitted that in the evening prior to the arrest of defendants he, Robert Walden and another man went from Vallejo, to San Francisco, and that while they were there he put up \$35 which he said he lent to Walden so that the latter could pay a bill he owed someone; that they returned to Vallejo in the early morning hours, and first went to the home of Richard Walden, where they found no one at home; that they then went to the home of Robert Walden where they found Mr. and Mrs. Richard Walden, and thereafter all returned to the Richard Walden home. Mrs. Richard Walden testified that when they arrived at her home Robinson and Robert Walden went into the kitchen where, at the table, they had a box with "some stuff in it" that looked like tobacco; and on being shown her testimony at the preliminary hearing of defendants, admitted that she had there testified that "they were rolling up cigarettes." Within a few minutes, two deputy sheriffs who had been watching the premises, knocked at the door. They testified that Richard opened the door, then closed it for a few seconds before he finally admitted them. They went directly to the bathroom where they found both Robinson and Robert Walden. From the toilet, which had just been flushed, they fished out nine marijuana cigarettes which were swirling around in the bowl. Robinson and Robert Walden were both standing in the room, Robinson being nearest to the toilet. All three of



the men were then arrested. Mrs. Walden further testified that when the officers arrived she went out the back door of the house; and on cross-examination conceded that she did so because she knew that there was marijuana in the house. It may be further added that one of the deputy sheriffs testified that after the arrest Robinson asserted that he "would take the blame."

[1] The foregoing testimony is entirely independent of that given by the two Waldens, and was sufficient to justify the jury in concluding that the three defendants were in possession of marijuana as charged. See *People v. Herbert*, 59 Cal.App. 158, 159, 210 P. 276; *People v. Le Baron*, 92 Cal.App. 550, 561, 268 P. 651, 269 P. 476; *People v. Hay*, 74 Cal.App. 464, 472, 241 P. 275; *People v. Belli*, 127 Cal.App. 269, 271, 15 P.2d 809; *People v. Sinclair*, 129 Cal.App. 320, 322, 19 P.2d 23; *People v. Bill*, 140 Cal.App. 389, 397, 35 P.2d 645; *People v. Torres*, 5 Cal.App.2d 580, 581, 43 P.2d 374; *People v. Gallagher*, 12 Cal.App. 2d 434, 436, 55 P.2d 889; *People v. Rodrigues*, 25 Cal.App.2d 393, 394, 77 P.2d 503; *People v. Bassett*, 68 Cal.App.2d 241, 246-247, 156 P.2d 457.

[2] As for the claim of appellant that the testimony of Robert and Richard Walden was without corroboration, the testimony above set forth was sufficient for that purpose. See *People v. Griffin*, 98 Cal.App. 2d 1, 219 P.2d 519, Robert Walden, who accompanied Robinson on the trip to San Francisco, testified that he had known appellant about four months; that on the evening of March 31, 1951, he and one Eddie Miranda accompanied appellant from Vallejo to San Francisco and went to the International Settlement; that appellant said he wanted some marijuana, and accosted a man who mentioned \$15 or \$20; that he saw appellant pass money to that person who handed a can to appellant. Appellant in turn handed the can to the witness who put it in the glove compartment of the automobile, which was appellant's car; that thereafter they returned to his brother Richard's home in Vallejo, and he and appellant went into the kitchen and rolled cigarettes from the can; that it was mari-

juana; that then a knock came at the door and he and appellant went to the bathroom; that appellant took the cigarettes with him and threw them into the toilet, then threw the can to the witness, saying, "Here, get rid of this"; that the officers came into the bathroom and one of them got the cigarettes out of the toilet bowl; that he had smoked marijuana before; that he lived at his brother's house and was not employed and lived on an allowance furnished by his mother; that he was a student at Vallejo College; that for a while he and appellant attended the same school; that on the night before March 31, 1941, he, appellant and another went to San Francisco, came home late and appellant stayed at Richard's home, 176 Cobb Street, Vallejo.

Richard Walden testified that at the time in question appellant handed him a marijuana cigarette to smoke; that he had smoked the weed before; that he had smoked just a little when officers came and he then swallowed the cigarette; that appellant had stayed at his house the previous night; that he had known appellant for a couple of months.

As for appellant's argument that the judgment should be reversed for failure of the trial court, on its own motion, to instruct the jury regarding the provisions of section 1111 of the Penal Code, and appellant's reliance upon the decision in *People v. Warren*, 16 Cal.2d 103, 104 P.2d 1024, the Warren case is distinguishable, for in that case the testimony of the accomplice was the only testimony implicating Warren. The case before us is comparable to *People v. Sourisseau*, 62 Cal.App.2d 917, 931-932, 145 P.2d 916 (hearing in the Supreme Court denied), since there, as here, the record contained evidence sufficient to justify appellant's conviction regardless of the testimony of accomplices.

[3] As for the contention that it was reversible error for the trial court to fail to warn the jurors, upon the allowance of a short recess, that they should not discuss the case between themselves nor with anyone else, the record shows that they had previously been so warned. Also it does not appear that they violated the admonition

previously given, or that any prejudice to defendant or any miscarriage of justice resulted from the failure to repeat the admonition on that one occasion. Under the rule laid down in section 4½ of Article VI of the California Constitution, we find this contention to be without merit.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



**PETERSON et al. v. JOHNSON et al.\***

Civ. 18672.

District Court of Appeal, Second District,  
Division 1, California.

April 7, 1952.

Rehearing Denied April 24, 1952.

Hearing Granted June 5, 1952.

Arnold L. Peterson and others sued Russell F. Johnson and others to quiet title to tax deeded property purchased by plaintiffs at auction sale. The Superior Court of Los Angeles County, A. A. Scott, J., rendered judgment for plaintiffs, and Russell F. Johnson and another appealed. The District Court of Appeal, Drapeau, J., held that defendants had a right to show, if they could, irregularities which they asserted were fatal to the tax deed.

Judgment reversed.

**1. Taxation ☞615**

The law in force at the time of a sale of realty to the state for delinquent taxes follows through all proceedings dependent on that sale.

**2. Taxation ☞688**

In action to quiet title to tax deeded property, where tax collector's deed to state was dated October 1, 1937, and deed to purchaser at auction sale was dated February 28, 1945, the proceedings were governed by law in force at time of deed to state, and former owners' right to show irregularities was not affected by 1939 statute making deed from state conclusive evidence of regularity of all prior proceedings

\* Subsequent opinion 249 P.2d 17.

except as against actual fraud. Revenue and Taxation Code, §§ 3711, 4146-4154.

John F. Poole, Los Angeles, for appellants.

Holbrook & Tarr, Los Angeles, by W. Sumner Holbrook, Jr., Los Angeles, for respondents.

DRAPEAU, Justice.

In this action to quiet title there was received in evidence, (a) certified copy of tax collector's deed to the State of California, dated October 1, 1937; and (b) original tax deed issued by the tax collector to plaintiffs, dated February 28, 1945. Then plaintiffs rested.

Judgment was for plaintiffs, and defendants appeal.

Defendants contend: (1) That plaintiffs redeemed for less than its true value the property described in their complaint from a larger parcel which had been sold for taxes, contrary to the provisions of Sections 4146 to 4154 of the Revenue and Taxation Code. (2) That no notice was given to the record owner of the original assessment and levy. (3) That the published delinquent tax list was erroneous. (4) That the interest of defendant Warren Johnson in the property could not have been lawfully divested, because he was in the armed services of the United States, and was protected by the federal Soldiers and Sailors Civil Relief Act, 50 U.S.C.A. Appendix, § 501 et seq.

Objections were sustained to offers of evidence in support of the first three of the foregoing contentions, apparently upon the theory that Section 3711 of the Revenue and Taxation Code applied to the offered proof. This section provides that the deed from the state is conclusive evidence of the regularity of all prior proceedings except as against actual fraud.

[1,2] The curative provisions of section 3711 do not apply here. Plaintiffs' case was *prima facie* only. Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759. The law in force at the time of a sale of realty to the state for delinquent taxes follows

through all proceedings dependent on that sale. *Billings v. Delgado*, 51 Cal.App.2d 489, 125 P.2d 95. It follows then that defendants had a right to show, if they could, irregularities which they assert were fatal to the tax deed.

It is suggested in plaintiffs' brief that defendant Warren Johnson does not have title to the property which will support a judgment quieting title in him, or which will support his defense that the federal Soldiers and Sailors Civil Relief Act applies to him. This issue will have to be presented to the trial court on a retrial of the case.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.



110 Cal.App.2d 349

**NICHOLAS v. NICHOLAS.**

Civ. 18899.

District Court of Appeal, Second District,  
Division 2, California.

April 9, 1952.

Action wherein the plaintiff demanded an order requiring defendant to pay money for support of minor child. The defendant filed cross-complaint. The Superior Court, Los Angeles County, Ranse R. Sischo, J., entered judgment for defendant on his cross-complaint and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain finding that income received from trust created by property settlement agreement between father and mother was sufficient to support the minor child.

Judgment affirmed.

#### 1. Trusts ⇨44(1)

In action brought by mother on behalf of daughter for order requiring father to pay mother for daughter's support, evidence was sufficient to sustain finding that mother and father had intended, by their property

settlement agreement conveying income realty to mother for support of children, to create a trust relationship with the mother as trustee of the realty and the children as beneficiaries until such time as the children were no longer dependent or attained their majorities, upon which event the trust would terminate and legal and beneficial interest would vest in the mother.

#### 2. Trusts ⇨25(1)

It is not necessary that a trust be created by any definite or express language or words of art, and so long as the requisite intent is manifested to create such a fiduciary relationship with respect to a definite res and beneficiary is ascertainable, a valid trust exists.

#### 3. Parent and Child ⇨3(1)

Father may not through mechanics of a contract with the mother avoid his paternal obligation when his child of tender years is in need of support.

#### 4. Parent and Child ⇨3(3)

Where income from trust created by property settlement agreement between father and mother for benefit of parties' minor child was sufficient to support child, the child had no action for support. Code Civ.Proc. § 938.

#### 5. Parent and Child ⇨3(3)

In mother's action on behalf of daughter for order requiring father to pay mother for daughter's support, evidence was sufficient to establish that income from trust created by property settlement contract between mother and father, wherein mother was trustee, for said child for her support and maintenance, was sufficient for support of the daughter.

William G. Bolton and Ernest A. Clausen, Inglewood, for appellants.

Hiram T. Kellogg, Los Angeles, for respondent.

MOORE, Presiding Justice.

In February, 1946, Idella M. Nicholas and her husband, respondent herein, terminated their community interest in certain property and executed a writing to evidence



their agreement. All the community property of substantial value was conveyed to Idella as her own separate estate with the agreement that the income therefrom was sufficient to provide support for the children and that no payments for their support would be required of respondent. Thereafter, Idella supported her children with such income until the time of her filing the complaint herein on behalf of Carolyn whereby she demanded an order requiring respondent to pay Idella \$60 per month for Carolyn's support, and for counsel fees. Respondent filed his cross-complaint for a declaration of the rights and obligations of the parties and for judgment imposing a trust upon such of the real property conveyed to Idella under the property settlement as may remain in her ownership.

Following the trial of the issues raised by pleadings the court made findings that respondent had transferred income property to his wife as agreed; that by the terms of their settlement it was the intention of the parties that income derived from the property was sufficient for the support of their children; that it should be used only for the support of the minor children unless there was an excess of income over the amount necessary for their support; that Idella knew that in consideration of the conveyance of such realty to her she elected to waive any further claim for alimony, support money or attorney fees and that she agreed that she would use the income from the premises for the support of the minor children; the court found also that the property has at all times and now is sufficient to support the minor children including Carolyn but that Idella sold part of the property, purchased an automobile for her own use and thereafter mismanaged the balance, substantially reducing the income. However, the income is still sufficient for the support of Carolyn. It was further determined that the parties intended that the property conveyed to Idella would not be sold until after the children became self-supporting or of lawful age and that it should be held by Idella in trust for the support of Carolyn.

Accordingly, judgment was entered denying plaintiff any relief and establishing a

trust in the realty with Idella as trustee ordered to collect income therefrom and apply it to plaintiff's support until the latter attains majority, is married or becomes self-supporting.

Plaintiff and her mother now appeal from such judgment contending (1) that the evidence is insufficient to support the finding that the income received from the property held by Idella is sufficient for Carolyn's support, and (2) that the court erred in imposing a trust on such property.

The property settlement agreement which is the focal point of this litigation declares, after the usual recitations as to the status of the parties, that husband and wife owned as community property two parcels of realty and that from that day forward such was to be the wife's sole and separate property; that wife should have the custody of the parties' children and "that the income from the real estate is sufficient to provide for the support of the children of the parties and that no payments for their support will be required of Husband."

Testimony of various witnesses, including Mrs. Nicholas, Mrs. Meyer—a married daughter—and one Schooling, attorney who aided in drafting the property settlement agreement, was elicited to establish the circumstances surrounding the preparation and execution of the agreement. From this evidence it was shown that respondent, a carpenter and builder by occupation, had constructed rental units on city lots of the community estate for the very purpose of providing income for the support of the children. This understanding was had, and actual construction accomplished subsequent to the time the parties agreed to separate. Mr. Schooling was consulted as to the drafting of the contract, but the actual terms were those as already agreed upon by the parties. He explained to them, however, that Mr. Nicholas could not by contract be relieved of all liability for the future support of his children. But both husband and wife advised him that the income from the apartments would be adequate for the support of the children and that the purpose of the agreement was to relieve husband from further obligations to them. Because of such arrangement for Idella to keep and

care for the children, she was given the lion's share of the community assets, husband receiving only his tools, a 1938 automobile and an undisclosed amount of cash and bonds.

The evidence disclosed that the real property at the time of transfer to the wife was valued at between \$12,000 and \$17,000; its rental income was approximately \$300 per month.

[1,2] From such evidence it was reasonable and proper that the trial court should find that the parties had actually intended to create a trust relationship with Mrs. Nicholas as trustee of the realty and the children as beneficiaries until such time as they were no longer dependent or attained their majorities, upon which event the trust would terminate and legal and beneficial interest would vest in the wife. It is not necessary that a trust be created by any definite or express language or words of art. So long as the requisite intent is manifested to create such a fiduciary relationship with respect to a definite ~~res~~ and the beneficiary is ascertainable, a valid trust exists. *Miranda v. Miranda*, 81 Cal.App.2d 61, 67, 183 P.2d 61; *Rest. Trusts*, sec. 2. It is true that the property settlement contract recites in one paragraph that the wife is to hold the realty as her own but the language thereafter clearly reflects the intent that the income received would be used for the support of the progeny. The testimony served to clear away all uncertainties and to reveal the true purpose of the contracting parties.

[3,4] Appellants argue that it was error to impose the trust since a father cannot be relieved of his obligation of child support by reason of a contractual agreement with the mother. Such statement is the prevailing concept of a father's duty to his infants, citing *Federal Mutual Liability Insurance Company v. Industrial Accident Commission*, 195 Cal. 283, 233 P. 335, and *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42. He may not through the mechanics of such a contract avoid his paternal obligation when his child of tender years is in need of support. But where, pursuant to an

agreement, means of supporting such child are turned over to the mother, and the latter agrees to maintain the child therefrom, we are not faced with an attempt by the father to evade his legally imposed duties. In the case at bar, respondent by his labors provided means of supporting his children. Unless such means be inadequate to provide the needed support and the parent entitled to custody cannot support the child, there is no cause of action in the child for the judgment here sought. *White v. White*, 83 Cal.App. 356, 357, 256 P. 579.

The child Carolyn is in no position to complain of the imposition of the trust. Its very purpose is to insure her support during minority. One not aggrieved by a judgment has no right of appeal. *Code Civ. Proc.* § 938.

[5] Appellants' second contention in pursuit of a reversal is that the evidence reveals without conflict that the income from the realty is insufficient to support the minor plaintiff. Mrs. Nicholas testified that during the preceding year she received approximately \$1,600 as income from the rentals, but that during this same period her expenditures totaled \$1,657.33. However, as the trial court observed, a sizable portion of these expenses were not properly charged against the income from the trust since they were disbursed to pay Mrs. Nicholas' own utilities, taxes and other expenses. In effect, she applied the trust income to her personal needs. Such application of the income was contrary to the terms of the property settlement agreement inasmuch as the wife therein waived all alimony and support for herself.

Moreover, the evidence established that Mrs. Nicholas had sold one parcel of the property within a year after the agreement was executed netting at least \$2,800. It follows that it cannot be said that the court erred in concluding that the income was sufficient for the support of the ten-year-old child.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

**BEVERLY OIL CO. v. CITY OF LOS ANGELES et al.\***

Civ. 18567.

District Court of Appeal, Second District,  
Division 1, California.

April 7, 1952.

Rehearing Denied April 21, 1952.

Hearing Granted June 5, 1952.

Suit by Beverly Oil Company against city of Los Angeles to determine enforcement of comprehensive zoning ordinance prohibiting further drilling of oil wells. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that comprehensive zoning ordinance could be constitutionally applied to tract located within city upon which seven oil wells were producing oil so as to bar drilling of additional wells thereon and restrict production of such wells.

Judgment affirmed.

**1. Municipal Corporations ⇨600**

There is no constitutional objection whatsoever to any municipal interference with vested rights in property when such interference is at most merely incidental to the legitimate exercise of the police power.

**2. Municipal Corporations ⇨601(1)**

The enactment of a comprehensive zoning ordinance necessarily destroys many vested rights, such as the untrammelled use of property acquired before the enactment of the ordinance, but nevertheless comprehensive zoning is a legitimate exercise of the police power.

**3. Municipal Corporations ⇨601(9)**

A comprehensive zoning ordinance will be held unconstitutional only if it operates unreasonably as to particular property.

**4. Constitutional Law ⇨81**

The essence of the police power is that no individual rights of any nature can prevent its operation, once it is shown that its exercise is proper and that the means of its exercise is reasonable.

\* Subsequent opinion 254 P.2d 865.

**5. Constitutional Law ⇨81**

Pecuniary loss or injury resulting from an exercise of the police power does not render such exercise unconstitutional.

**6. Municipal Corporations ⇨601(9)**

Comprehensive zoning ordinance permitting the continued nonconforming use of land and maintenance thereon of all nonconforming buildings and structures, but expressly providing that no well for production of oil, which was a nonconforming use, should be redrilled or deepened was not violative of the Constitution but was a valid exercise of police power.

**7. Estoppel ⇨62(4)**

A city which had annually levied and collected taxes against property upon which producing oil wells were located was not thereby estopped from enacting a comprehensive zoning ordinance prohibiting the redrilling or deepening of wells which were a nonconforming use.

---

George E. Cryer, R. Alston Jones, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alan G. Campbell, Deputy City Atty., Los Angeles, for respondents.

HANSON, Justice pro tem.

The primary question for decision is whether the "Comprehensive Zoning Ordinance" of the city of Los Angeles may constitutionally be applied to an 11½-acre tract located within the city upon which seven wells are now producing oil so as to bar the drilling of additional wells thereon and what is more, restrict the production to only six of these wells.

In 1908, a predecessor in title of the plaintiff drilled the first of some ten or twelve producing wells upon the property here involved. However, in 1924 only five of these wells were operating and producing when the land was annexed by the city and likewise this was true in 1925 when the city passed its first zoning ordinance prohibiting the drilling of oil wells in the zone in which the property was located.



The operation of the five wells while "non-conforming" was expressly permitted by the terms of the ordinance and was so recognized by the administrative agency.

At the time the plaintiff acquired the property the average daily production of each well operating in the general locality of its wells was only twelve barrels. Originally there were 287 wells in the area, but as production declined in the area, one well after another was abandoned until in 1947 the only wells remaining were those operated by the plaintiff.

It should here be added that in 1945 the plaintiff instituted a suit against the city to have it adjudicated that it was entitled to drill one new additional well in the center of its property. In this plaintiff was successful.

The present Comprehensive Zoning Ordinance, effective June 1, 1946, is in large part but a reenactment and continuation of the previous ordinances. The ordinance permits the continued nonconforming use of the land and the maintenance thereon of all nonconforming buildings and structures. However, the ordinance as it now reads expressly provides that no well for the production of oil, gas or other hydrocarbon substances, which is a nonconforming use, shall be redrilled or deepened.

The city, it should likewise be stated, has granted a variance which apparently permits the plaintiff, if it so desires, to drill on a triangular two-acre plot, within the confines of the 11½-acre tract, as many as four new wells at such angles as will reach any oil deposit underlying the entire 11½-acre tract, provided that for each one of the wells so drilled it abandons a well located outside of such triangular plot.

The property involved herein fronts on the north upon Beverly Boulevard, on the east upon La Cienega Boulevard, on the south upon West Third Street, and on the west upon San Vicente Boulevard. Immediately across these various boulevards or streets which surround the property there are for the most part commercial developments except perhaps on San Vicente where there is a high-grade light in-

dustrial development along with a relatively solid commercial development. Beyond all these streets or boulevards, in every direction, there is a dense residential development. All the streets surrounding the property are heavily traveled over which pass thousands of people each day in busses or passenger automobiles.

There are no oil wells outside of the property for very many miles distant. The seven wells now on the property yield a total of approximately 6,000 barrels per month. Evidently the oil recovered is heavy gravity oil, which for the most part, slowly migrates from underneath other lands and reaches inlets located on plaintiff's land, thus enabling plaintiff to recover the oil through its own wells. What the surface land is worth for uses to which it may be put under the ordinance is not shown.

Shortly stated, the plaintiff contends (1) that the city cannot restrict the number of wells it chooses to drill as (a) the property was developed for oil before it was annexed by the city and (b) prior to the time the first zoning ordinance was enacted; (2) that the wide nonconforming use permitted by the original ordinance may not be restricted so as to take away the vested right to reach any and all oil underlying the property. The appellant's various and detailed references to the state and federal constitutions urged by it in support of these contentions need not here be narrated in detail for reasons that will presently appear.

[1-4] Contrary to the contention of plaintiff, there is no constitutional objection whatsoever to any municipal interference with vested rights in property when such interference is at most merely incidental to the legitimate exercise of the police power. The enactment of a comprehensive zoning ordinance necessarily destroys many vested rights, such as the untrammelled use of property acquired before the enactment of the ordinance, but nevertheless comprehensive zoning has long been established as being a legitimate exercise of the police power. *Euclid v. Ambler Realty Co.*, 1926, 272 U.S. 365, 47 S.Ct. 114, 71

L.Ed. 303. Such an ordinance will be held unconstitutional only if it operates unreasonably as to particular property. The term "vested right," as used by appellant, is of little significance when used in connection with the police power. The very essence of the police power is that no individual rights of any nature can prevent its operation, once it is shown that its exercise is proper and that the means of its exercise is reasonable.

[5] That pecuniary loss or injury resulting from an exercise of the police power does not demonstrate violation of constitutional limitations is strikingly shown by the case of *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 145, 60 L.Ed. 348, affirming *Ex parte Hadacheck*, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, upholding a zoning ordinance of the city of Los Angeles. Hadacheck had erected his brickyard and kiln in an almost uninhabited locality several miles outside the city upon an eight-acre tract of land with soil peculiarly valuable for brickmaking. Subsequently the city boundaries were extended to include the locality and later on a zoning ordinance was enacted which not only zoned the locality as residential but operated retroactively so as to require the removal of the industry. It was shown that the tract was worth \$800,000 for brick-making purposes and only \$60,000 for residential purposes, or any purpose other than brickmaking; that the land was purchased for brickmaking; that the manufacture of brick could not profitably be carried on at a point distant from the clay beds; and that expensive machinery was installed on the premises. Despite the retroactive operation of the ordinance and the great impairment of values the Supreme Court of both California and the United States declared the ordinance valid. In its opinion the Supreme Court of the United States said: "It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested

interest cannot be asserted against it because of conditions once obtaining. *Chicago & A. R. Co. v. Tranbarger*, 238 U.S. 67, 78, 35 S.Ct. 678, 59 L.Ed. 1204, 1211. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus."

[6] The argument so often made that "when property is held by its owner for a particular use, as, for instance, an industrial use, the prohibition of such use is 'confiscatory' because destructive of that use or of the property's value derived from the possibilities of that use, is obviously the same sort of begging of the question and vicious circle as the proposition formerly advanced but now discredited, that the capitalization of the earning capacity of a utility may be applied as the valuation basis in testing the validity of a rate regulation. Surely the individual cannot be permitted to speculate upon the community's not exercising its constitutional powers, and then claim that the community is barred from interfering with the speculation." Bettman on "Constitutionality of Zoning," 37 Harv.L.Rev. 834 at 848.

[7] The further contention made by appellant that just because the city has annually levied and collected taxes against the property—upon an ad valorem basis as to the mineral and surface rights—estops the city "from interfering with the operation of recovering the mineral wealth from said land, either by the exercise of its zoning power or otherwise" is without merit. If this contention should be regarded as meritorious, it would follow that one who derived his income from extortion would be entitled to say to the federal government that if it sought to hold him criminally liable for the extortion, it was estopped to collect income taxes based on

the ill-gotten gains and if on the other hand it sought to collect the tax it was estopped to seek his conviction for extortion. Only fourteen days ago (March 24, 1952) the Supreme Court of the United States in *Rutkin v. U. S.*, 72 S.Ct. 571, made short shrift of this argument. We follow its lead.

As the judgment appears to be correct in every respect, it is affirmed.

WHITE, P. J., and DRAPEAU, J.,  
concur.



110 Cal.App.2d 281

**PEOPLE v. BASS.**

Cr. 4761.

District Court of Appeal, Second District,  
Division 1, California.

April 7, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Philip H. Richards, J., of the crime of possessing marijuana, and he appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment affirmed.

**1. Criminal Law** ⇨1144(13)

On appeal grounded on insufficiency of evidence, evidence had to be viewed in the light most favorable to the prosecution.

**2. Criminal Law** ⇨260(11), 1159(2)

In testing validity of judgment of conviction in criminal case all intendments are in favor of judgment, and verdict of jury or decision of trial judge sitting without jury will not be set aside unless record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support judgment.

**3. Criminal Law** ⇨260(11)

On appeal by defendant who contended that evidence did not reasonably justify

inference of guilt of crime of possessing marijuana, even if it were conceded that inference of innocence might also reasonably be drawn from circumstances, it was for trial judge sitting without jury to choose between these two inferences, and unless evidence obviously did not warrant inference of guilt, District Court of Appeal could not interfere.

**4. Criminal Law** ⇨306

The power of trial court to draw an inference of guilt is not an arbitrary and unbridled one. Code Civ.Proc. §§ 1958, 1960.

**5. Poisons** ⇨9

Evidence sustained conviction for crime of possessing marijuana. Health and Safety Code, § 11500.

Earl C. Broady, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

After trial before the court, a jury having been waived, defendant was found guilty of the crime of violation of section 11500 of the Health and Safety Code of the State of California, a felony, in that on May 31, 1951, he unlawfully had in his possession "flowering tops and leaves of Indian Hemp (*Cannabis sativa*)", commonly referred to as marijuana. He has appealed from the judgment of conviction, urging as his sole ground for reversal, that the evidence adduced was not legally sufficient to establish possession of marijuana by him.

[1] Viewing the evidence, as we are required to do, in the light most favorable to the prosecution, it appears that on May 31, 1951, two police officers arrested defendant at 4127 South Wall Street, in Los Angeles, at which time a key was found in his right trouser pocket. When asked what the key was for defendant replied that he did not know, did not know where it came from, and did not know why he had it. The of-



icers then took defendant to a building, described as a shack, at 630 East 27th Street. The door of the shack was secured by a padlock, which was opened by an officer using the key taken from defendant. The premises contained two rooms. In one was a bed, a dresser, a dressing table and a trunk, and in the other a stove, an empty icebox and cooking utensils. They found no one on the premises. The officers found two small sacks of marijuana in the top dresser drawer and a large bag of marijuana in the trunk. In a wastebasket they found a repair order slip from Renney Motors containing the name of defendant, dated September 18, 1950, and a conditional sales contract with defendant's signature thereon, dated August 19, 1950. When asked about these documents, defendant stated that they had been his, but that he had not been in the shack for ninety days. Defendant told the officers "I smoke marijuana. I smoke all of it I can get because it is good for me, but this is not mine." No clothing belonging to defendant was found in the shack.

The defendant testified that at the time of his arrest he was living at 4127 Wall Street; that he had lived in the shack for a period of eight or nine days some sixty to ninety days before his arrest; that he had been invited to live there by a man named Jack Ward until defendant should find a place to stay. That Ward was a porter who was frequently out of town; when he was in town he would let defendant into the shack and when he was going out of town he would give defendant the key. Defendant stated, "I suppose that is how I come by that key." He last saw Jack Ward during the month of March. He recalled leaving on the premises the documents found in the wastebasket, but did not recall where in the shack he had placed them. He admitted smoking marijuana "a long time ago", but denied telling the officers that he smoked all he could get because it made him feel good.

Mrs. Willie Bogans, a resident of Bakersfield, testified that she owned the property at 630 East 27th Street; that she did not know defendant and did not rent him the

property; she rented it to a Mr. Ward when she found him living there some time in March. Ward paid her two months' rent for March and April. She gave Ward a key, not to the padlock, which was not on the door when she rented the premises, but a key to a lock fitted in the door. She never saw or heard of Ward after he paid the rent and did not receive back the key she gave him.

[2] It is now established law in this state that in testing the validity of a judgment of conviction in a criminal case all intendments are in favor of the judgment, and a verdict of the jury or decision of the trial judge sitting without a jury will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support the judgment. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Gutierrez*, 35 Cal.2d 721, 727, 221 P.2d 22; *People v. Todd*, 91 Cal.App.2d 669, 670, 205 P.2d 453.

Because reviewing courts are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony, our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law.

In conformity with the spirit and intent of the constitutional provision, the legislature has ordained that the triers of facts are the exclusive judges of the credibility of witnesses, Code Civ.Proc., sec. 1847, and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc., sec. 2061.

[3] In the instant case the question presented to us is whether the circumstances here in evidence are such as to reasonably justify the inference of guilt. Even though it be conceded that an inference of innocence might also reasonably be drawn from the circumstances, it was for the trial judge in the case at bar to choose between

these two inferences, and unless the evidence obviously does not reasonably warrant the inference of guilt as adopted by the trial court, we are powerless to interfere.

[4] The power of a trial court to draw an inference of guilt is not of course an arbitrary and unbridled one because section 1958 of the Code of Civil Procedure defines an inference as “\* \* \* a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect”.

Section 1960 of the same code provides that an inference must be founded,

“1. On a fact legally proved; and,

“2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature”.

[5] Viewing the evidence in the light of the foregoing rules we find in the record evidence that when approached by the officers, a key to the padlock on the shack was found in appellant's pocket. Using this key, the officers opened the door to the shack. When asked how the key came into his possession appellant gave an evasive answer to the effect that he did not know how he got the key or where it came from. The only items found in the shack, aside from furnishings, were documents belonging to appellant and the marijuana. From these facts it could reasonably be concluded that while appellant may have resided elsewhere he did use the shack for certain purposes. It is in evidence that the landlady took very little if any interest in this particular structure.

Further strengthening the inferences from these facts are the statements hereinbefore narrated, made to the officers, in which appellant said that he was a user of marijuana and smoked all he could get. At the trial, while denying that he made these statements, appellant admitted that he was familiar with marijuana and that at one time he had smoked it. As to the contention that others might have had access

to the shack the evidence all pointed to appellant as having such access. The absence of clothing or food in the shack might be considered as negating occupancy by the previous tenant, Jack Ward.

Appellant testified that he “supposed” he obtained the key from Jack Ward. However, it was shown in evidence that the key given Jack Ward by the landlady was not to a padlock but to a lock installed in the door.

The evasiveness of appellant's testimony in explaining his possession of this key was also a factor which militated against his contentions.

There were also certain other inconsistencies in appellant's testimony which the trier of fact could take into consideration. When asked when he had lived at the shack appellant answered he had lived there only eight or nine days beginning the latter part of January. At the trial he testified he had not lived there for 60 to 90 days. This latter statement coincides with the landlady's testimony that Ward first commenced living in the shack during the month of March.

In support of his contention that the evidence fails to support the conclusion reached by the trial judge that appellant had “possession” of the narcotics in question, he relies heavily upon the case of *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433. But the facts of the case cited are strikingly dissimilar to the one at bar and can be accordingly distinguished. In the instant case the marijuana was found in a shack, from the appearance and contents of which the court was warranted in assuming was under the control of appellant. Therefore, the finding that appellant had control of the marijuana, or at least joint control with Ward, was reasonable.

Furthermore, in the *Gory* case, *supra*, the court was mainly concerned with the question of claimed error in the refusal to give proper instructions with regard to the constituent elements of the offense.

In the case now engaging our attention, we are satisfied that under the circumstances here present, the court was warranted in drawing the inference that appellant had

possession of and knowledge of the presence of the narcotics in the aforesaid shack as well as the nature of the contraband contained in the shack.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



110 Cal.App.2d 228

**MARTIN v. MARTIN.**

Civ. 18346.

District Court of Appeal, Second District,  
Division 2, California.  
April 2, 1952.

Action by plaintiff against defendant to recover amounts alleged to be due plaintiff under property settlement agreement which also made provision for support of plaintiff and the parties' children. Defendant filed a cross-complaint seeking rescission and cancellation, or in the alternative, reformation of the agreement, and other relief. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Fox, J., held that defendant alleged grounds for equitable relief.

Judgment reversed with directions.

#### **1. Cancellation of Instruments ☞37(6)**

Where defendant alleged that he relied upon his wife and attorney, who was retained to draw a property settlement and support agreement, to prepare an agreement that would be fair, reasonable and just to him, that they knew of trust and confidence he reposed in them, that they advised him not to secure independent counsel and advice in preparation and negotiation of agreement, that in reliance on such advice he did not secure advice of independent counsel, that agreement which he signed imposed on him an unconscionable burden, that he was deceived and misled with respect to material items in settlement of

financial affairs of parties, defendant alleged facts showing a relationship of trust and confidence in plaintiff and the attorney.

#### **2. Fraud ☞17**

Where there exists a relation of trust and confidence, it is duty of one in whom confidence is reposed to make full disclosure of all material facts within his knowledge relating to transaction in question, and any concealment of material facts is a fraud.

#### **3. Cancellation of Instruments ☞37(6)**

Where defendant alleged facts showing a relation of trust and confidence in his wife and attorney who was retained to draw property settlement and support agreement for parties, it was incumbent upon defendant's wife and attorney to reveal to defendant effect of documents which he signed and as defendant alleged they failed to do that but affirmatively and falsely represented to him that documents were in accordance with his intentions and understanding and induced him to rely on their representations to his detriment, such allegations lay a foundation for equitable relief on behalf of defendant. Civ. Code, § 1572.

#### **4. Fraud ☞11(1)**

Where speaker has superior knowledge or means of knowledge and a relation of confidence exists, such that speaker knows hearer relies on his statements as true, speaker's expression of an opinion intended to deceive constitutes remediable fraud.

#### **5. Fraud ☞11(1), 64(1)**

An expression of opinion may amount to fraud where it is accompanied by active misrepresentations or concealment and where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with trier of the facts.

#### **6. Judgment ☞443(1)**

Where equitable relief from a final judgment is sought it is important to determine whether fraud or mistake is intrinsic or extrinsic to issues involved in case in which judgment was entered, since relief will be denied where it is sought to relitigate an issue involved in former proceeding on ground that allegations or proof



of either party was fraudulent or based on mistake, but such relief may be granted if party seeking it was precluded by fraud or mistake of other party from participating in proceeding or from fully presenting his case.

#### 7. Divorce ⇨166

Where defendant alleged a relation of trust and confidence in his wife and attorney, who was retained to prepare property settlement agreement for parties, alleged that as a consequence of misrepresentations made by them he was induced to sign agreement, which placed an unconscionable burden upon him and did not conform to understanding of the parties, and alleged that wife and attorney induced him not to appear in divorce proceeding brought by wife and that pursuant to power of attorney they persuaded him to sign, they arranged for counsel to appear for him who would act for interest of plaintiff and defendant was thus prevented from having his day in court to contest validity and fairness of agreement which was approved by court which granted the divorce, defendant made out a case of extrinsic fraud.

#### 8. Cancellation of Instruments ⇨34(1)

Where defendant alleged that he was induced to sign property settlement and support agreement as result of misrepresentations of his wife and attorney, who was employed to prepare agreement, alleged existence of relation of trust and confidence in them, that agreement placed unconscionable burden on defendant and was not in accordance with his understandings and original intention of parties and that he gave notice of rescission immediately upon being advised of effect of documents which he had signed and particularly with relation to his income tax situation, laches did not appear as a matter of law from face of defendant's pleadings.

FOX, Justice.

Plaintiff and defendant were married in 1940. Four children were issue of this marriage. In February, 1949, they agreed to live separate and apart and went to attorney Leslie to prepare an agreement settling their property rights and making provision for the support of plaintiff and their children. Such agreement was executed by the parties on March 24, 1949. It provided, among other things, for the payment of \$1,000 a month for the support of the wife. In settlement of their property rights the husband agreed to pay her an additional \$1,000 a month plus \$60,000, \$10,000 of which was paid upon the execution of the agreement and the balance of \$50,000 was to be paid at the rate of \$1,000 a year. All these installment payments, however, were to terminate upon either the death or remarriage of the wife. He also agreed to pay \$1,000 a month for the support of the children until the youngest reached the age of 21. This agreement was amended by another which was executed on July 11th. By this amendment the monthly payments to the wife for her support were increased to \$1,435; and the above figure of \$60,000 was increased to \$65,000 with the provision that \$5,000 of that amount was payable August 24th. On that date plaintiff-wife secured a divorce decree in Nevada, in which decree the property settlement agreement of March 24th, as amended by the agreement dated July 11th, was approved "as to its due execution and the fairness of its terms only." In November defendant consulted counsel regarding his income tax position. As a result of the advice received he served notice on the 26th that he rescinded said agreements. He thereafter refused to pay the amounts specified therein. Plaintiff thereupon brought this action to recover the amounts due thereunder. In his answer to plaintiff's amended complaint defendant interposed the defenses of fraud, mistake, undue influence, no consideration, and that the agreement as amended created and imposed upon him an unconscionable, inequitable and oppressive hardship. In an amended cross-complaint defendant sought rescission and cancellation or, in the alter-

Pacht, Tannenbaum & Ross, Clore Warne and Maxwell E. Greenberg, all of Los Angeles, for appellant.

Jacques Leslie and Marvin B. Meyer, Beverly Hills, for respondent.

native, the reformation of said agreement and amendment upon the grounds alleged in his answer. He also included a cause of action for damages for fraud and one for declaratory relief. Demurrers were sustained without leave to amend to the affirmative defenses and to the amended cross-complaint. Motion to strike the answer and for summary judgment was granted. The court awarded plaintiff judgment for \$13,765, which represented the payments due under the terms of the amended agreement, and also awarded \$8,000 to plaintiff as attorney's fees. Defendant appeals from this judgment.

In his answer and amended cross-complaint defendant alleges that he and plaintiff agreed to enter into a written contract settling their property rights and providing for the support of plaintiff and their children; that such agreement would be fair, reasonable and just to each party; that for the purpose of negotiating and preparing such written agreement plaintiff and defendant consulted attorney Jacques Leslie; that the said attorney promised to prepare such an agreement; that for the purpose of negotiating and formulating said agreement defendant disclosed to plaintiff and Leslie "the amount of the income, assets and liabilities of plaintiff and defendant"; that defendant reposed "trust and confidence" in plaintiff and Leslie and relied on them to prepare "an agreement that would be fair, reasonable and just" to him; that he believed they would not deceive, mislead or take unfair advantage of him; that they knew of the trust and confidence he reposed in them, and knew he relied upon them to prepare such an agreement. He further alleges that they advised him "not to procure independent counsel and advice in the preparation and negotiation of said agreement"; that they advised him Leslie would procure an attorney in his office "to sign said agreement in the roll of defendant's attorney for purposes of formality"; that relying upon such advice he did not procure independent counsel to represent him in the negotiation and preparation of said agreement and amendment thereto or to explain and interpret for him the terms and effect of said documents;

that Leslie procured the services of attorney George Pickering to sign said documents "in the roll of defendant's attorney for purposes of formality." Defendant then alleges that by reason of the trust and confidence reposed in plaintiff and Leslie and his consequent belief that they would not act in a manner to deceive, mislead or take unfair advantage of him, he relied upon them and was thereby induced to sign the agreement of March 24th and the amendment of July 11th.

Defendant alleges he intended and understood that any such agreement would provide for payments to plaintiff of "amounts that would be substantially less than one third of defendant's earnings following payment of income taxes by defendant and plaintiff"; that the provisions of such agreement would permit him to decrease the debts and obligations of the community; that any such agreement would be subject to modification by any court of competent jurisdiction depending upon changes in his financial circumstances; that plaintiff would give to him valuable consideration in return for his undertakings in such agreement; that such agreement would be fair, just and reasonable as to plaintiff and defendant and their children; that plaintiff and Leslie were each apprised of defendant's said intentions and understanding. Defendant further alleges that said agreement as amended had the effect of requiring that he "pay to plaintiff sums that would amount to from approximately 50 percent to over 100 percent of defendant's available earnings after paying taxes by plaintiff and defendant"; that plaintiff and Leslie each knew said amended agreement had such effect; that said agreement and amendment were not subject to modification by the court depending on changes in his financial circumstances; that plaintiff and Leslie each knew they were not subject to modification; that in return for defendant's promise to pay certain sums specified in said agreement plaintiff agreed to release all her rights in the community property of the parties; that, however, there was no community property; that as a consequence he received no consideration for his agreement to make said payments;



that plaintiff, Leslie and Pickering each knew there was no community property; that plaintiff and each of said attorneys knew said agreement imposed upon defendant an unconscionable, inequitable and oppressive hardship, and at no time did either of said attorneys explain, interpret or analyze for him said agreement and amendment. Defendant also alleges that he did not know said agreement as amended required him to pay sums which would amount to from approximately 50 percent to more than 100 percent of his available earnings after payment of taxes by him and plaintiff; that if he had known such was the effect of the said documents he would not have signed them; that plaintiff and Leslie knew he was unaware said amended agreement so provided and they also knew that if he had understood said agreement had such effect he would not have signed it; that plaintiff and the two lawyers not only failed to disclose said agreement as amended had that effect, but each of them represented to him said documents were in accordance with his intentions and understanding.

Similar allegations are made to show that these parties deceived and misled defendant with respect to (1) the right to have the contract modified by a court upon a change of his financial situation, (2) the question of whether or not plaintiff and defendant had community property and therefore whether the payments defendant agreed to make on account thereof were without consideration, (3) whether the provisions of the agreement were so burdensome as to prevent him from decreasing the debts of the community, and (4) the fairness of the agreement as amended.

It is further alleged that in the month of July, 1949, proceedings for divorce were instituted against defendant in the state of Nevada; that no summons or copy of the complaint were served upon defendant; that plaintiff and Leslie, with the intention of preventing defendant from appearing in said divorce proceeding and attacking the validity and fairness of said agreement and the amendment thereto, presented to defendant for his signature a power of attorney prepared by them which authorized

certain Nevada attorneys, unknown to defendant, to appear for him in said Nevada divorce proceedings; that plaintiff and Leslie, knowing of the trust and confidence reposed in them by defendant, and with the intent and purpose of inducing defendant to sign said power of attorney, advised defendant they would protect his interests in said divorce proceeding and that there was no necessity for defendant to appear in or defend said action; that relying upon said representations of plaintiff and Leslie defendant signed said power of attorney and was persuaded by them not to appear in said divorce proceedings. It is further alleged on information and belief that plaintiff and Leslie used said power of attorney to employ an attorney, unknown to defendant, to represent defendant in said divorce action; that they colluded with said attorney so employed by them that said attorney would act for the interests of plaintiff in said proceedings and would not contest the validity and fairness of said agreement or amendment, or advise defendant of the invalidity and unfairness of either of said documents; that said attorney purported to represent defendant but in fact acted for the interests of plaintiff in said divorce proceedings; that defendant was thereby fraudulently led to believe he had no grounds to attack the fairness and validity of said agreement as amended, and that he was fraudulently prevented from appearing in said divorce action and attacking the validity and fairness thereof.

[1-3] From the foregoing it will be observed that defendant has alleged facts showing a relationship of trust and confidence in the plaintiff and Leslie. Regardless of the difficulty of proving such an issue, we must on demurrer accept it as a fact. "Where there exists a relation of trust and confidence, it is the duty of the one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts is a fraud." *Daily v. Superior Court*, 4 Cal.App.2d 127, 131, 40 P.2d 936, 938; *Estate of Shay*, 196 Cal. 355, 365, 237 P. 1079; 12 Cal.Jur. 772. It



was therefore incumbent upon plaintiff and Leslie to reveal to defendant the effect of the documents which he signed. This, according to his allegations, they not only failed to do but they affirmatively and falsely represented to him that these documents were in accordance with his intentions and understanding. He clearly alleges they knew these documents did not truly reflect his understanding of the settlement he was making with his wife, yet because of his faith and confidence in her and Leslie they were able to and did induce him to rely on their representations and thus believe the papers were in compliance therewith. It is also clear from his allegations that the misrepresentations were with respect to important items in the settlement of the support and financial affairs of plaintiff and defendant, and that the resultant agreement and amendment which he was fraudulently induced to sign was greatly to his detriment. These allegations lay a foundation for equitable relief on behalf of defendant. Civil Code, sec. 1572; *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 422, 159 P.2d 958; *Seeger v. Odell*, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; *Cohen v. Metropolitan Life Ins. Co.*, 32 Cal.App.2d 337, 348, 89 P.2d 732.

[4, 5] Plaintiff contends that the misrepresentations charged against her and Leslie by defendant cannot constitute grounds for equitable relief because they were mere speculative opinions on matters upon which defendant was the best able to speculate and the only person in complete possession of all the facts. This position is not sound. The income tax problem in contracts for the support of a wife and children and in settling the property rights between a husband and wife, are complex and technical and often a matter of major importance requiring skill and experience in dealing with them. The magnitude of the payments involved in this case would indicate the tax situation was of considerable importance. As a lawyer Leslie has no doubt had wide experience in preparation of support and property settlement agreements, and has found it necessary to familiarize himself with the effect of income tax laws on the various phases of

such agreements. In that respect he was undoubtedly in a position superior to defendant. Under such circumstances his statements take on added significance particularly since defendant alleges a relationship of trust and confidence in him. In this connection it is said, in 37 C.J.S., *Fraud*, § 10, p. 230, that "Where the speaker has superior knowledge or means of knowledge and a relation of confidence exists, such that the speaker knows the hearer relies on his statements as true, the speaker's expression of an opinion intended to deceive constitutes remediable fraud." Actually, the determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made. *Willson v. Municipal Bond Co.*, 7 Cal.2d 144, 150, 59 P.2d 974; *Laraway v. First Nat'l Bk. of La Verne*, 39 Cal.App.2d 718, 730, 104 P.2d 95; *White v. Financial Guarantee Corp.*, 13 Cal.App. 2d 93, 97, 56 P.2d 550. Moreover, as was said in *Zwart v. Landfield*, 93 Cal.App. 328, at page 333, 269 P. 740, at page 742, " \* \* \* the expression of opinion may amount to fraud where it is accompanied by active misrepresentations or concealment, \* \* \*." Furthermore, "The cases also indicate that where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts." *Willson v. Municipal Bond Co.*, supra, 7 Cal.2d at page 151, 59 P.2d 974, 977. It is thus apparent we cannot say as a matter of law that the alleged representations made to defendant by plaintiff and Leslie could not form the basis for equitable relief on the theory of fraud.

Plaintiff argues defendant cannot rescind their support and property settlement agreement since he is unable to restore her to status quo because she has since secured a final decree of divorce. It is not necessary for us to determine on this appeal the relief to which defendant is entitled. We merely hold that under his pleadings defendant is entitled to have the case heard on its merits. The relief, if any, to which

he is entitled will necessarily depend on the evidence and applicable legal and equitable principles. The prayer of defendant's cross-complaint is sufficiently broad to enable the court to grant whatever relief, if any, the facts justify. He seeks not alone a rescission of the agreement and amendment but, in the alternative, a reformation of the contract in line with what he claims he intended and understood its terms would be.

[6] As a basis for defeating defendant's charge that he was induced to sign the agreement and amendment through fraud plaintiff relies on the fact the Nevada court approved the property settlement agreement as amended as to its validity and fairness. It will be recalled, however, that defendant alleges plaintiff and Leslie induced him not to appear in the Nevada divorce case and that, pursuant to a power of attorney which they had persuaded him to sign, they arranged for counsel to appear for him who would act for the interests of plaintiff. According to his allegations, defendant was thus prevented by plaintiff and Leslie from having his day in court to contest the validity and fairness of the agreement. When equitable relief from a final judgment is sought it is important to determine whether the fraud or mistake is intrinsic or extrinsic to the issues involved in the case in which the judgment was entered. The reason for this is stated by the Supreme Court in *Jorgensen v. Jorgensen*, 32 Cal.2d 13, at page 18, 193 P.2d 728, at page 731, as follows: "The public policy underlying the principle of res judicata that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. Thus, equitable relief will be denied where it is sought to relitigate an issue involved in

the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case." (Citing cases.)

[7] Defendant's pleadings make out a case of extrinsic fraud and bring it squarely within the principle stated in *United States v. Throckmorton*, 98 U.S. 61, 65, 25 L.Ed. 93, as follows: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, \* \* \* or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; \* \* \*—these, and similar cases which show that there never has been a real contest at the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing." A recent application of this principle is found in *Wellman v. Security-First Nat'l Bank*, 108 Cal.App.2d 254, 238 P.2d 679.

[8] Plaintiff, however, argues that defendant is not entitled to relief because of laches. There is no support for the application of that principle on the record before us. According to his allegations defendant gave notice of rescission immediately upon being advised of the effect of the documents which he had signed and particularly with relation to his income tax situation. Whether or not he should have sought advice on these matters at an earlier date is a question of fact. Certainly laches do not appear as a matter of law from the face of defendant's pleadings.

The judgment is reversed with directions to overrule the demurrer to defendant's affirmative defenses and to his amended cross-complaint.

MOORE, P. J., and McCOMB, J., concur.

110 Cal.App.2d 273

**PEOPLE v. CUELLAR.****Cr. 4725.**

District Court of Appeal, Second District,  
Division 1, California.

April 7, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of the unlawful possession of narcotics and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained the conviction.

Judgment affirmed.

**1. Criminal Law** ⚡535(2)

In prosecution for unlawful possession of marijuana cigarettes, all that was necessary was to show reasonable probability of unlawful possession of marijuana by a person, and as evidence clearly showed the illegal possession in some one of narcotics in question, it was not necessary to prove defendant's connection with marijuana in order to establish essential elements necessary to prove corpus delicti. Health and Safety Code, § 11500.

**2. Criminal Law** ⚡517(4)

In prosecution for the unlawful possession of marijuana cigarettes, record showed that corpus delicti was proven without recourse to extra-judicial statements of defendant, and therefore, such statements were properly admitted. Health and Safety Code, § 11500.

**3. Criminal Law** ⚡260(11)

An appellate tribunal will not reverse a judgment of conviction on ground that evidence is insufficient to sustain the conviction unless it be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached by trier of facts.

**4. Poisons** ⚡9

Evidence sustained conviction of defendant on charge of unlawful possession of marijuana cigarettes. Health and safety Code, § 11500.

**5. Criminal Law** ⚡566

A conviction may be sustained, though witnesses decline to swear positively, and

testify merely that they believe accused is person whom they saw commit the crime.

**6. Criminal Law** ⚡260(11)

In prosecution for unlawful possession of marijuana cigarettes, fact that 11 year old witness to some extent qualified his testimony as to identification, went to weight of such testimony and was addressed to sound discretion of trial judge.

**7. Criminal Law** ⚡517(1), 532(2)

Before a confession is admissible it must be shown by prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat, but whether confession is of that character is a preliminary question addressed to trial court, and a considerable measure of discretion must be allowed that court in so determining.

**8. Criminal Law** ⚡519(3)

Mere fact that confession was made to police officer or other officer of law while accused was under arrest does not necessarily render it involuntary and inadmissible.

**9. Criminal Law** ⚡260(11)

In prosecution for unlawful possession of marijuana cigarettes, where voluntariness of defendant's confession was disputed, question whether confession was freely and voluntarily made became one of fact for trial court, sitting without a jury, to determine, and that issue having been determined by trial judge on conflicting evidence, and being resolved against defendant, could not be disturbed on appeal. Health and Safety Code, § 11500.

**10. Poisons** ⚡9

In prosecution for unlawful possession of marijuana cigarettes, evidence which substantially supported inference that defendant had had physical control of contraband cigarettes, had not abandoned it and that no other person had had that possession met requirements of statute. Health and Safety Code, § 11500.

---

Gerald Friedman, Los Angeles, for appellant.



Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

This appeal is prosecuted by defendant from a judgment of conviction for violation of section 11500 of the Health and Safety Code rendered against him after trial by the court sitting without a jury.

Since appellant contends that the evidence is insufficient to support his conviction, and also maintains that the *corpus delicti* was not established prior to the admission of his extra-judicial conversations with police officers, it becomes necessary to epitomize the evidence received at the trial.

In that regard the record reflects that on April 29, 1951, Ronald David Griffin, an 11 year old school boy was playing baseball with a young friend at Evergreen playground in the city of Los Angeles. Ronald noticed a person burying a package under the ground and that after placing the package in the ground this person "put a pile of leaves, a little bit of dirt over it". The witness testified he "was not quite positive" that the appellant was that man "but almost". To the witness the package appeared to be "a little bit of white stuff and it looked like money". After the person deposited the package as aforesaid he walked back to a crowd of some thirteen or fourteen boys. Later on Ronald was playing marbles on the playground and he told his friend to "shoot" up to the place where the package was placed, with which request his friend complied. Ronald picked up the package, put it in his pocket and delivered it to the director of the playground. The witness stated that the place where he picked up the package was the same spot at which defendant had placed it and that he was "almost" sure of this fact. The package contained cigarettes wrapped in paper. Between the time that he saw the package deposited and the time that he picked it up, no other person went over to the spot where the package had been deposited. The playground director called the police and delivered the package in question to them. These officers placed defendant under arrest on the Evergreen playground. They

took him to Central Police Station where they engaged him in conversation. According to the testimony of the officers all of defendant's statements were given freely and voluntarily. The officers showed him the cigarettes and asked him if they belonged to him. He admitted they were his and that he hid them under a tree on the playground. He stated that when it started to rain he went back to get them and found that somebody had taken them. The officers asked him where he got the cigarettes and he said that he found the "stuff" in a sack and that he rolled them. He was asked what he intended to do with them and he said his intention was to smoke them, and that he got a "kick" out of them.

The cigarettes were delivered by one of the officers to the property division of the Los Angeles Police Department in an envelope which he sealed with wax in which he imprinted his right thumb print. The package was subsequently opened by a police chemist who analyzed the contents and found them to be nineteen marijuana cigarettes.

Defendant took the stand in his own defense, admitted the conversation with the police officers, but stated that he was struck twice by an officer and that he made the statement only because "I thought I would be hit more and I didn't want to be bruised up any more".

In rebuttal the prosecution introduced the testimony of the arresting officers. Officer Abney denied that either he or any of his fellow officers struck the defendant or made any threats against him, that the only physical contact he had with defendant was to take hold of the latter's arm when he led him away to the police car.

Officer Halloran testified that defendant was in his custody at all times between the time of the arrest and the conversation; that no force was used on defendant and that no one struck him or threatened him.

Appellant's contention that the trial judge erred in receiving into evidence the extra-judicial confession and conversations of the former because the *corpus delicti* had not been established by proof independent of such statements, cannot be sustained.

[1,2] To prove a *prima facie* case of the *corpus delicti* here, all that was necessary was to show a reasonable probability of the unlawful possession of marijuana by a person. To this extent the evidence clearly showed the illegal possession in some one of the narcotic in question. It was not necessary to prove appellant's connection with the marijuana in order to establish the essential elements necessary to prove the *corpus delicti*. It is sufficient if the proof establishing the *corpus delicti* be of a substantial character. A reading of the testimony hereinbefore set forth satisfies us that the *corpus delicti* was proven in this case without recourse to the extra-judicial statements of appellant. Therefore, such statements were properly admitted, *People v. Mehaffey*, 32 Cal.2d 535, 545, 197 P.2d 12; *People v. Leary*, 28 Cal.2d 740, 745, 172 P.2d 41; *People v. Chan Chaun*, 41 Cal. App.2d 586, 589, 107 P.2d 455; *People v. Smith*, 100 Cal.App.2d 162, 165, 223 P.2d 82; *People v. One 1947 Oldsmobile Club Sedan*, 90 Cal.App.2d 848, 204 P.2d 104.

[3,4] With regard to his contention that the evidence is insufficient to sustain the conviction appellant recognizes the established rule that an appellate tribunal will not reverse a judgment of conviction upon the ground herein urged unless it be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the trier of facts, *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. He contends however, that the evidence herein was insufficient to connect him with the narcotics in question. He first assails the testimony of the witness Ronald David Griffin, the 11 year old boy. He asserts that the testimony of this witness was received without in any manner testing his qualifications as a witness. The answer to this contention is found in subdivision 2, section 1880 of the Code of Civil Procedure. And even though this witness had been under ten years of age there can be little if any question from a reading of his direct and cross-examination, that he met all the qualifications of competency required of witnesses under the age of ten years. *People v. One 1947 Oldsmobile Club Sedan*, 90 Cal.App.2d 848, 204 P.2d 104.

[5] Appellant also urges the claimed weakness in the testimony of the boy as to identity of the former. The fact that a witness was not positive does not destroy the value of the identification. It is not necessary that the identification be made in positive terms by any of the witnesses. As was said by our Supreme Court in *People v. Waller*, 14 Cal.2d 693, 700, 96 P.2d 344, 348, quoting with approval from *People v. Wilson*, 76 Cal.App. 688, 700, 245 P. 781: "A conviction may be sustained, though the witnesses decline to swear positively, and testify merely that they believe the accused is the person whom they saw commit the crime. Thus, in *Commonwealth v. Cunningham*, 104 Mass. 545, the witnesses would not swear that the prisoner was the man they saw on the stolen wagon, but that 'he resembled him.' There the court said: 'Upon this question of identity, the evidence offered was all of it competent, and proper for the consideration of the jury. It is impossible to say that it had no tendency to convict the defendant. Its sufficiency was to be estimated and weighed exclusively by them.'"

[6] The fact that the youthful witness to some extent qualified his testimony as to identification, as pointed out by appellant, went to the weight of such testimony and was addressed to the sound discretion of the trial judge. And manifestly, any possible doubt as to the identification of appellant was dissipated by his own admissions to the police officers, following his arrest.

[7,8] In an effort to escape the consequences of his statements to the police officers, appellant relies upon his testimony that he made such statements by reason of physical violence inflicted upon him and his fear that he would be further assaulted by the officers. It is of course, a well settled rule that "before a confession is admissible it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat". *People v. Jones*, 24 Cal.2d 601, 608, 150 P.2d 801. However, as was said by our Supreme Court in *People*

v. Mehafeey, supra, 32 Cal.2d at page 548, 197 P.2d at page 19: "But whether a confession is of that character is a preliminary question addressed to the trial court, People v. Castello, 194 Cal. 595, 599, 229 P. 855; People v. Lisenba, 14 Cal.2d 403, 421, 94 P.2d 569; People v. Triplett, 70 Cal. App.2d 534, 538, 161 P.2d 397, and a considerable measure of discretion must be allowed that court in determining it. People v. Ellis, 33 Cal.App.2d 616, 621, 92 P.2d 431; People v. Sourisseau, 62 Cal.App.2d 917, 930, 145 P.2d 916. The mere fact that the confession was made to a police officer or other officer of the law while the accused was under arrest does not necessarily render it involuntary and inadmissible. People v. Gonzales, 24 Cal.2d 870, 875, 151 P.2d 251; People v. McEvers, 53 Cal.App. 2d 448, 451, 128 P.2d 93."

Manifestly, if the testimony given by appellant stood uncontradicted in the record it would have been error to have admitted in evidence his confession. But appellant's testimony is sharply refuted by those present at the time he made the statements in question. The police officers specifically testified that at no time were any threats or intimidation used in obtaining the confession.

[9] The question whether the confession was freely and voluntarily made became one of fact for the trial court, sitting without a jury, to determine. That issue having been determined by the trial judge on conflicting evidence, and being resolved

against appellant, cannot be disturbed on appeal, People v. Sewell, 95 Cal.App.2d 850, 855, 214 P.2d 113; People v. Port, 91 Cal. App.2d 152, 157, 204 P.2d 651; People v. Mehafeey, supra, 32 Cal.2d at page 545, 197 P.2d 12.

[10] Appellant's contention that the evidence is insufficient because he was not in actual possession of the marijuana at the time of his arrest is futile. The statute does not require actual physical possession at the time of arrest. The evidence herein substantially supports an inference that appellant having had physical control of the contraband cigarettes had not abandoned it and that no other person had had that possession. This meets the requirements of the statute, People v. Johnston, 73 Cal. App.2d 488, 492, 166 P.2d 633; People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86; People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457; People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433.

Assuming as we must, in favor of the decision of the trial judge, the existence of every fact which he could have reasonably deduced from the evidence, the determination is inescapable that such facts are sufficient to support the conclusion arrived at in the court below. We are therefore without authority to interfere.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.





**KLETT v. SECURITY ACCEPTANCE  
CO. et al.**

**No. Sac. 6170.**

Supreme Court of California, in Bank.

April 17, 1952.

Rehearing Denied May 15, 1952.

Action by Harold A. Klett, doing business under the firm name and style of A. A. Furniture Company, and Harold A. Klett, as an individual, against the Security Acceptance Company and others for the recovery of alleged usurious interest arising out of a financing agreement whereby named defendant advanced 90 percent of the value of furniture bought by plaintiff for resale in exchange for instruments executed by plaintiff in favor of named defendant which instruments were labeled trust receipts, and for conversion. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held, *inter alia*, that the instruction to the jury to the effect that the question of interest was not involved if the jury found that the transactions were trust receipt transactions and not loans was not prejudicial to plaintiff in view of the fact that other instructions made it clear that the issue was whether the loans had been usurious.

Affirmed.

Carter, J., dissented.

Prior opinion 223 P.2d 299.

**I. Usury  $\S$ 117, 142(4)**

In action by retailer against finance company for recovery of usurious interest and penalties, evidence sustained jury's implied finding that monthly 1 per cent charge on value of certain merchandise on display was not intended by the parties as interest but was intended to be compensation for arrangement under which retailer, without substantial capital or credit, was enabled to start and carry on a business and to select for purchase, purchase, and display furniture as to which the finance company would advance 90 per cent of the wholesale price. Civ.Code,  $\S$  1912; Const. art. 20,  $\S$  22.

**2. Usury  $\S$ 52**

A scheme which secures to lender a collateral advantage and which is made

for sole purpose of evading usury laws by giving lender a usurious profit on loans is usurious. Civ.Code,  $\S$  1912; Const. art. 20,  $\S$  22.

**3. Usury  $\S$ 117, 142(4)**

In action by retailer against finance company for recovery of usurious interest and penalties, evidence supported implied finding by jury that discount sales to finance company of conditional sales contracts were bona fide sales of property, were without recourse as against retailer, and were transactions made at retailer's request, and were not, as contended by retailer, part of a usurious scheme. Civ. Code,  $\S$  1912; Const. art. 20,  $\S$  22.

**4. Evidence  $\S$ 20(1)**

It is a matter of common knowledge that many retailers customarily discount conditional sales contract and that many finance companies purchase them, and therefore there is no presumption that the market value of such contract is its face value.

**5. Usury  $\S$ 52**

The mere fact that a borrower may have been required to enter into an unprofitable contract as a condition to a loan of money does not itself make the loan usurious and therefore, even if finance company, as a condition to loan of money to retailer, required retailer to sell to finance company conditional sales contracts at less than their reasonable, fair market value, the amount of each discount was not includible with interest charged on loan for purpose of determining whether interest rate was usurious. Civ.Code,  $\S$  1912; Const. art. 20,  $\S$  22.

**6. Appeal and Error  $\S$ 1056(1)**

In action by retailer against finance company for recovery of usurious interest and penalties allegedly arising out of financing arrangement whereby retailer was required to discount with finance company his conditional sales contracts with customers at less than their fair market value, even if it were error to exclude cross-examination of finance company officer as to fair market value of such contracts, such error was not prejudicial, in view of fact that evidence sustained jury's

implied finding that finance company had not required the sale of such contracts as a condition of making the loan. Civ.Code, § 1912; Const. art. 20, § 20.

#### 7. Usury ⇨16

A trust receipt transaction and a usurious loan are not mutually exclusive concepts.

#### 8. Sales ⇨454

"Trust receipts" are a method of securing a debt and not a method of creating a debt.

See publication Words and Phrases, for other judicial constructions and definitions of "Trust Receipts".

#### 9. Appeal and Error ⇨1064(1)

##### Trial ⇨295(5), 296(2)

In action by retailer against finance company for recovery of usurious interest and penalties allegedly arising out of financing arrangement whereby finance company advanced 90 per cent of value of merchandise purchased for sale in exchange for instruments in the nature of trust receipts, retailer was not prejudiced by instruction to effect that trust receipt transactions and loans were exclusive of each other and that question of interest was not involved if jury found that the transactions were trust receipt transactions and not loans, in view of fact that such instruction was conditioned on jury's finding that trust receipt transactions were bona fide and not to conceal or secure any hidden agreements for payment of interest and in view of fact that jury was instructed to consider all instructions as a whole and other instructions made it clear that ultimate issue was whether loans were usurious. Civ.Code, §§ 1912, 3012-3016.16; Const. art. 20, § 22.

#### 10. Usury ⇨53

A lender is not prohibited from charging an extra and reasonable amount for incidental services, expenses or risk additional to the lawful interest, other than for the loan of money, but he may make a reasonable charge for investigating, arranging, negotiating, brokering, making, servicing, collecting and enforcing his obligation, but such items must be confined to specific service or expense incidental to loan in-

curred in such a way as to preclude it from being a device through which additional interest or profit on the loan may be exacted. Civ.Code, § 1912; Const. art. 20, § 22.

#### 11. Usury ⇨53

Legitimate charges for specific items of actual service and expense are not "interest" within usury laws. Civ.Code, § 1912; Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Interest".

#### 12. Appeal and Error ⇨1170(7)

##### Usury ⇨117, 142(4)

In action by retailer against finance company for recovery of usurious interest and penalties allegedly arising out of financing arrangement whereby finance company advanced 90 per cent of value of merchandise bought for resale in exchange for instrument designated as trust receipt, admission of statement of such trust receipts financing which had been filed with Secretary of State pursuant to statute was merely some evidence that finance company intended to lend money to retailer on security of trust receipts, and admission of such statement did not prejudice retailer, in view of fact that he himself had approved the financing arrangement. Civ.Code, § 3016.9; Const. art. 6, § 4½.

#### 13. Sales ⇨481

In action by retailer against finance company, which had financed retailer's flooring plan, for conversion of merchandise which finance company officer took after retailer had defaulted on trust receipts covering some of such furniture, evidence sustained finding that retailer had consented to the taking of the furniture.

#### 14. Sales ⇨454

Where finance company advanced 90 per cent of value of merchandise purchased by retailer for resale under agreement whereby retailer executed in favor of finance company instruments designated as trust receipts covering such merchandise for purposes of security, the transactions were not "conditional contracts of sale" in the usual sense of that term, but they were "flooring contracts" within Personal



Property Broker's Act and therefore were "conditional contracts of sale" within definition of such contracts in such Act. Financial Code, § 22000 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Conditional Contracts of Sale" and "Flooring Contracts".

#### 15. Witnesses ⇨236(1)

In conversion action, it was not error to sustain objection to question asking plaintiff "assuming he did not have a right to remove that furniture, would you have consented to his taking any of the furniture in question?" in view of the fact that the question required plaintiff to speculate on what his action would have been and if he had wished to adduce testimony as to his state of mind he could have testified to it directly rather than speculatively.

#### 16. Appeal and Error ⇨1056(6)

Where jury found against plaintiff on issue of liability in conversion action and did not reach issue of damages, plaintiff could not complain of rejection of evidence offered to prove extent of his damages.

#### 17. Appeal and Error ⇨1170(10)

Fact that jury in action for recovery of usurious interest and penalties and for conversion was out only 25 minutes did not show such miscarriage of justice, as to require upsetting of verdicts for defendant. Const. art. 6, § 4½.

Horace E. Dunning, Sacramento, for appellant.

Wilke & Fleury, H. Nelson French, Sherman C. Wilke and Gordon A. Fleury, Sacramento, for respondents.

SCHAUER, Justice.

Plaintiff appeals from a judgment, entered pursuant to a jury verdict for defendants, in this action for the recovery of usurious interest and penalties and for the conversion of certain furniture. We have concluded that no prejudicial error or miscarriage of justice is shown and that, in accord with the mandate of section 4½ of article VI of the state Constitution, the judgment should be affirmed. Because,

however, there was error in instructing the jury, it is necessary to quote, or to epitomize in some detail, a substantial amount of the evidence to show that the error was not prejudicial.

Some of the testimony of plaintiff, such as that in reference to the circumstances of his meeting Mr. Parker and the events immediately preceding his dealings with defendants, scarcely seems material to either cause of action but since plaintiff evidently thought that these matters were important and the jury heard them from plaintiff's lips, mention of them is made. The jury may have felt that the evidence threw some light on plaintiff's circumstances, his business methods, and the nature of his dealings with defendants.

#### The Usury Cause of Action

Plaintiff, in November, 1945, was a furniture salesman employed by the Standard Furniture Company in Sacramento; he decided that he wished to go into the furniture business on his own account. He had met a Mr. Parker, "the first time the day I came from Stockton to the Sacramento Alcoholics Anonymous Club," and we became friends through our work together, and in that philosophy we follow in Alcoholics Anonymous." Mr. Parker "used to come to the store" where plaintiff was employed; further, according to plaintiff's testimony, Mr. Parker said "he would like to go into the furniture business with me here. This conversation possibly went on for two or three months." Plaintiff and Mr. Parker then, on November 13, 1945, orally agreed to form a partnership and on that date plaintiff left his employment with the Standard Furniture Company. Plaintiff testified, "I told Mr. Parker that I was unable to go into business as far as finances were concerned \* \* \* I said, 'I will consider going in business with you if you will put up the money against my experience \* \* \*' \* \* \* At that time he said he would arrange for twenty five hundred dollars, and not very long after he would have twenty five hundred dollars more. I said, 'It would be useless to go in for less than five thousand dollars at this time.'" On November 29, 1945, Mr. Parker "put up one thousand dollars" and

on December 4, five hundred dollars. Parker advanced no more money. In the meantime, plaintiff testified, he expected a Dr. Leiser to purchase a storeroom and rent it to plaintiff; on the strength of his expectations of getting a location and the capital which Mr. Parker had promised, plaintiff made buying trips to San Francisco and Los Angeles and purchased several thousand dollars worth of furniture; he also purchased a used automobile.

Plaintiff testified, "there wasn't any use in trying to establish a credit. \* \* \* I told the manufacturers we would pay for this merchandise when it was delivered, or before it was delivered \* \* \* I was to notify them for future delivery." After the first \$1,000 was advanced by Parker, plaintiff paid for some of the furniture he had ordered, paid \$150 for a sales tax bond, and paid for the used automobile.

Plaintiff then discovered that Dr. Leiser had not purchased the building which he (plaintiff) had expected Dr. Leiser to purchase and lease to the new partnership, and, having no storeroom, plaintiff caused the furniture he had purchased to be placed in storage with Western Van & Storage Company. He then noticed (about December 2, 1945) that a building near the one which he had expected Dr. Leiser to purchase appeared to be empty; plaintiff contacted the owner, who at first was not interested in plaintiff as a tenant; however, although the owner would not enter into a lease he finally agreed to permit the new partnership to rent the building on a month to month basis on condition, suggested by plaintiff, that the latter "would give his son a position." Upon this agreement plaintiff caused the stored furniture to be moved into the rented building on or about December 4 or 5. Mr. Parker put up the \$500 above mentioned on December 4 and this sum went for "payment of rent and telephone deposits, gas and electricity

deposits, and the general conduct of the business, and repairs. We had to put a floor in our store."

Plaintiff repeatedly asked Mr. Parker for more money but Mr. Parker said it was not available. On December 4, 1945, at plaintiff's request, defendant Kenneth Forrest, vice-president of defendant finance company, met plaintiff at the latter's home. Plaintiff, while an employee of Standard, had seen Mr. Forrest in the Standard store. Concerning their meeting on December 4, plaintiff testified, "I told him \* \* \* that I was having difficulty and that difficulty was in getting enough capital to start this business. And I told him that Raymond Parker and I had agreed to go in business; and I told him it didn't look like I was going to get very far on this new store without some financial assistance.

"I asked him if his company would be interested in any way in helping me finance this business. \* \* \* We discussed furniture contracts, and the sale of furniture. And I told him that if he would help me at this time, in this way of financing or flooring,<sup>1</sup> that I would be able to give him a good deal of our sales contract business.<sup>2</sup> \* \* \* And we dwelled a great deal on the plan we had been using. [?] If he decided to do so, how we would sell our furniture contracts to him and his firm \* \* \* And before he left my home he told me that he would go along with us after knowing the structure that we had at this time to the extent of five thousand dollars; and that I would have to floor, or finance with them only the major pieces of furniture. The smaller items he would not be interested in because it would be hard to keep track of. \* \* \* He said 'I will go along to five thousand dollars worth of flooring or financing.'"

Plaintiff and Kenneth Forrest arranged a meeting on December 5 with Kenneth's father, president of defendant finance com-

1. The term "flooring," as it is used in this case, was explained to the jury in the following instruction (given at plaintiff's request): "Merchandise is 'floored' when it is financed under a trust receipt or similar title retention document, whereby a retail dealer obtains possession of the same from a distributor for exhi-

bition and sale through payment to distributor by a bank or other financing agency."

2. The "sales contract business" referred to by plaintiff is the sale at a discount of conditional sales contracts between plaintiff and his retail customers.

pany, and plaintiff's partner, Parker. At this meeting, plaintiff testified, the elder Mr. Forrest "told me that they would put 90 per cent into these purchases and that we would pay one per cent a month on the flooring, and that this merchandise would be paid off individually from these trust receipts<sup>3</sup> that I signed later as we sold the merchandise and delivered it. \* \* \* If the merchandise was on the floor for a period of thirty days we were to pay him one per cent a month for that privilege of having that, or whatever you want to call it, that flooring; but had the merchandise been sold before that time—for example, if merchandise would come in on the first of the month, and we sold it on the fifth of the month, we were also instructed that we were to pay one per cent at that time."

It is apparent from plaintiff's testimony as above quoted that he was asking for, and received, something more than a mere loan of money or credit for interest. He admitted that he had no credit and that it would be useless for him to try to establish credit. He was asking the defendants to finance his business; to do almost the very thing, short of becoming a partner, which Parker had agreed to do but had failed to do. He was asking defendants, in effect, to purchase for cash from

manufacturers the major items of furniture which were to constitute his stock in trade; to pay 90 per cent of the cost thereof while plaintiff advanced only 10 per cent of such cost; to keep an inventory of each item of furniture so stocked; to permit plaintiff to have possession of such furniture, to display it on his salesroom floor and, ordinarily at least, not to expect to be repaid for his advances or his costs of doing business until and unless the furniture items were sold to retail purchasers; "we were to pay him [defendants] one per cent a month for that privilege of having that, or whatever you want to call it, that flooring."

As indicated above it was agreed that defendant finance company would advance 90 per cent of the wholesale price of furniture selected by plaintiff for purchase, in a total amount not to exceed \$5,000 (later increased to \$7,500), that plaintiff would pay the remaining 10 per cent of the purchase price, and that title would be vested in defendants but possession for purposes of display on the salesroom floor would be in plaintiff. Pursuant to this arrangement plaintiff obtained from defendant finance company a series of loans. On the occasion of each loan plaintiff executed to the finance company a document entitled "trust receipt."<sup>4</sup> These documents evidence a

3. The form of the "trust receipts" is hereinafter quoted in footnote 4.

4. Such documents read in material part as follows: "Trust Receipt \* \* \* [Plaintiff] as Trustee holds in trust for Security Acceptance Co., Entruster, as security for payment of the amount hereinafter set forth on the due date hereinafter specified, and all other obligations of Trustee to Entruster whether heretofore or hereafter incurred, the following personal property: [description] \* \* \* in which personal property a security interest remains in or is hereby transferred to Entruster as security for such payment. Trustee agrees to hold said personal property in trust as the property of Entruster for the purpose of sale or exchange and to deliver same to the Entruster upon demand. Entruster may at any time \* \* \* either before or after the due date repossess said personal property without notice or demand of any kind and for such

purpose Entruster or his representatives may without legal process enter any premises in which said personal property is located. \* \* \*

"\* \* \* The Trustee may \* \* \* sell said personal property for cash or on terms approved in advance by Entruster for not less than the amount due Entruster hereunder \* \* \*; provided, however, that upon such sale all moneys hereby secured shall become immediately due and payable and all of the proceeds and considerations received in such sale shall be forthwith delivered to Entruster as security for payment of said moneys and until so delivered shall be held by the Trustee separate from the funds of the Trustee and as security for such payment.

"In event of the repossession of the said personal property the Entruster may on or after default give notice to the Trustee of intention to sell and may at any time not less than five (5) days after the giving of such notice sell said



security interest of the finance company in furniture which is described therein and which plaintiff, by virtue of the arrangement, put in his store, exhibited, and sold or attempted to sell to retail customers. The finance company made a monthly charge of one per cent of the face amount of each "trust receipt." Also, during the period of the dealings between the parties, plaintiff, pursuant to the previously mentioned oral arrangement with Forrest, sold conditional sales contracts between plaintiff and his retail customers to the finance company, at discounts which amounted to about 17 per cent of the face value of the contracts; the sales of these contracts were without recourse by the finance company against plaintiff.

Plaintiff has discussed at great length the elements of a trust receipt relationship before and after enactment of the California version of the Uniform Trust Receipts Law (Civ.Code, §§ 3012-3016.16) and has argued at great length that the elements of the relationship described in that law were not present in the various "trust receipt" transactions here.<sup>5</sup> Plaintiff's arguments in this regard concern aspects of the trust receipt transactions which would be relevant only if rights of third parties

(e. g., persons with prior liens on the furniture) were involved. Since it is undisputed that the transactions resulted in some sort of security interest in the finance company and since the name of the type of interest is immaterial, it is unnecessary to describe in detail the manner in which these various transactions were handled or to construe with particularity the Uniform Trust Receipts Law in its exact application to each transaction. For convenience of discussion the documents entitled "trust receipts" will be so referred to, but from this reference no implication that we are passing upon the law of trust receipts in relation to possible intervening rights of third persons is to be drawn. Our concern here is not whether the requirements of the Uniform Trust Receipts Law were met in all respects, but whether the jury's verdict that usury was not committed and that defendants did not convert plaintiff's property can properly be sustained.

Plaintiff urges that as a matter of law the one per cent per month charges were interest at a rate in excess of that permitted by section 22 of article XX of the state Constitution.<sup>6</sup> The controlling issue, however, as to this element of the case,

personal property at public or private sale, with or without notice and without any further notice or demand to the Trustee and without having said personal property at the place of sale, and may at any public sale itself become a purchaser. The proceeds of any such sale shall be applied, first, to payment of the expenses thereof; second, to payment of the expense of retaking, keeping and storing said personal property \* \* \*; third, to the satisfaction of the Trustee's indebtedness hereby secured; and, fourth, to the payment of any other obligation owed by Trustee to Entruster. The Trustee shall receive any surplus and shall pay unto Entruster upon demand any deficiency.

"Notice of intention to sell shall be deemed sufficiently given when in writing and either personally served on the Trustee or when deposited in the United States mail postage prepaid addressed to the Trustee's last known business address.

"In the event of default by the Trustee in the payment of any moneys here-

under due on the due date hereof, Entruster may declare all moneys secured immediately due and payable. In event of such default Entruster may at his option and in lieu of sale as hereinabove provided declare a forfeiture of the Trustee's interest in said personal property against cancellation of the then remaining indebtedness in accordance with the provisions of Section 3016.2 of the Civil Code of the State of California.

"No waiver of any existing default shall be deemed to waive any subsequent default and all rights hereunder are cumulative and not alternative."

5. From his opening statement on throughout the trial, except perhaps in connection with his motion for a directed verdict, plaintiff argued that the transactions evidenced by the trust receipt documents were "not trust receipts transactions" but were "mere loans." The error of this position, which was adopted by the trial court, is discussed later.
6. Cal.Const., art. XX, § 22: "The rate of interest upon the loan or forbearance

is whether the monthly charges were exclusively for the forbearance of money or were for other services either wholly or at least in such part as to leave the amount paid as interest, if any, within a legal rate. This presents a question of fact and the evidence on it is conflicting but the issue does not appear to be a close one. Plaintiff's own testimony conflicts within itself; in significant parts, however, it corroborates the testimony of defendant Kenneth Forrest (the only defendant who testified).

[1] Plaintiff in his testimony variously described the charges as "for the privilege of having that \* \* \* flooring" and as "interest." Forrest testified that in their preliminary negotiations "I mentioned the fact to Mr. Klett that I would charge him 1 per cent a month charges on flooring of merchandise." Forrest further testified,

"Q. What was that 1 per cent for, Mr. Forrest? A. The charge of enabling him to have our furniture in his store and other consideration.

"Q. Would that be for, let us say, writing up the trust receipt and handling the invoice and such as that? A. Yes, sir, that would include writing up the trust receipt, the bookkeeper's time, making up a ledger card and putting it in the books and making up the addressograph plate to enable us to send the notice, and the notices themselves and the mail. \* \* \*

"Q. And for the use of that money you made a charge of 1 per cent, is that correct? A. For the privilege of his having my furniture in his store I charged him 1 per cent a month."

Plaintiff himself testified, it will be remembered, that "we were to pay him [Forrest] one per cent a month for that privilege of having that \* \* \* flooring."

of any money \* \* \* shall be seven per cent per annum but it shall be competent for the parties to any loan \* \* \* to contract in writing for a rate of interest not exceeding ten per cent per annum."

Further tending to support the implied finding of the jury that the one per cent charge was intended by the parties not as interest but as compensation for the arrangement under which plaintiff, without substantial capital or credit, was enabled to start and carry on a business and to that end was allowed to select for purchase, purchase, and display the furniture in his store, are plaintiff's references in his testimony to his "ten per cent equity" in the furniture as to which the finance company was advancing 90 per cent of the wholesale price.<sup>7</sup>

[2, 3] Plaintiff further urges that as a matter of law the sales of his conditional sales contracts to the finance company at discounts of about 17 per cent were made under a scheme which secured to the finance company a collateral advantage and which was made for the sole purpose of evading the usury laws by giving the finance company a usurious profit on the loans. Such a scheme is usurious. (*Terry Trading Corp. v. Barsky* (1930), 210 Cal. 428, 432, 292 P. 474.) But there is ample evidence to support the implied finding of the jury that the discount sales of the conditional sales contracts were bona fide sales of property, were without recourse as against plaintiff or his partner, and were transactions made at plaintiff's request, and not part of a usurious scheme. (*Cal. Milana v. Credit Discounting Co.* (1945), 27 Cal.2d 335, 340, 163 P.2d 869, 165 A.L.R. 621.)

[4] In connection with his argument that he was forced to sell his conditional sales contracts unprofitably plaintiff (citing 65 Corp.Jur., p. 101, § 177, and 22 Corp.Jur., p. 104, § 46) says that there is a presumption that the market value of those contracts was their face value. Since it is a matter of common knowledge that many retailers customarily discount such contracts and many finance compa-

7. We also note that plaintiff's original complaint does not seek recovery of usurious interest and penalties, but only seeks damages for conversion. This might be considered as tending to show that his claim that the charges were usurious interest was but an afterthought, prompted by litigation.

nies purchase them, we cannot agree that there is any such presumption.

[5] Plaintiff asserts that even if the evidence does not show as a matter of law that the discounting of the contracts was a device to evade the usury laws, certain rulings of the trial court prevented him from properly presenting the question to the jury as one of fact. He complains of the trial court's refusal to give the following formula instruction (requested by plaintiff): "if you find that the relationship existing between plaintiff and defendants herein was that of borrower and lender, insofar as the transactions occurring between the plaintiff and defendants evidenced by trust receipts are concerned, and you find that said transactions were in fact loans of money,<sup>8</sup> and you further find that as a condition of making such loans the defendants required the plaintiff to sell to said defendants at less than their

reasonable, fair market value time contracts covering the sale of furniture by plaintiff to plaintiff's customers, then you must find that for the purposes of this action the amount under the reasonable, fair market value that each time contract was discounted is to be considered interest." The instruction was properly refused, for "the mere fact that \* \* \* [a borrower] may have been required to enter into an unprofitable contract as a condition to a loan of money would not itself make the loan usurious." (Terry Trading Corp. v. Barsky (1930), supra, 210 Cal. 428, 432, 292 P. 474.) Furthermore, as will appear more in detail from instructions hereinafter quoted, the jury were properly instructed that "all the circumstances [and dealings of the parties] must be inquired into to determine whether \* \* \* there was a usurious charge of interest."

8. Here again, plaintiff suggests the erroneous view that trust receipt transactions and loans are mutually exclusive of each other.

In his opening statement plaintiff's counsel said, "Now, Mr. Klett \* \* \* maintains throughout and has alleged in his complaint, that the transaction as carried on between himself and the defendant here was nothing more nor less than a loan of money. That is going to be one of the principal things that you folks are going to have to be looking for as the evidence develops \* \* \* Now \* \* \* the defendant \* \* \* will claim that the transaction \* \* \* between my client and themselves did not result in a loan of money, but that it was something else.

"We will show that \* \* \* Mr. Klett signed certain instruments \* \* \* entitled 'Trust Receipts' and they were furnished by the defendant \* \* \* We will also show \* \* \* and prove, that these transactions were nothing more nor less than a loan of money, and that the defendant, for that loan of money, charged a rate of interest which we will prove to you is in excess of the amount that was permitted \* \* \* under the laws of this state \* \* \* Now, it is going to be up to you \* \* \* to determine what the transaction was."

Again, in introducing in evidence the documents denominated "trust receipts" plaintiff's counsel insisted on the view that bona fide trust receipt transactions

and loans of money were mutually exclusive of each other. The record shows:

"Mr. Dunning [plaintiff's counsel]: I am introducing the instruments but, I want it understood that I am not introducing the instruments for the purpose of showing that they are trust receipts.

"The Court: You are introducing them but you claim they are not trust receipts? A. I claim they are not trust receipts, yes.

"The Court: All right, you can put them in for that limited purpose.

"Mr. Dunning: In other words, I want it understood I am putting them in for the limited purpose and not for the purpose of establishing that they are trust receipts but for the purpose of showing the amount owing, if any, on December 27, 1946, from the plaintiff to the defendants and for the purpose of showing that the defendants had a security interest in the merchandise which is listed on these instruments entitled 'Trust Receipts'.

"Mr. Bedeau [defendants' counsel]: Aren't they going in for all purposes regardless of whether you call them chattel mortgages or trust receipts?

"The Court: No, he isn't introducing them—I don't understand myself about the security interest—but he wants to limit it for the two purposes and I guess that is all right."

The above quoted statements of position by counsel for plaintiff are referred to infra, 242 P.2d 881, in connection



[6] Plaintiff further complains that he was not allowed to prove the fair market value of the conditional sales contracts because, when he asked Forrest, on cross-examination and with no offer of proof or statement of purpose, whether the 17 per cent discount was "about the prevailing rate of discount," defendants' objection to the question was sustained. If we assume that the question was designed to elicit evidence of the fair market value of conditional sales contracts, and that it was proper on cross-examination of defendant Forrest after plaintiff had rested his case on direct examination, the sustaining of the objection thereto nevertheless could not have prejudiced plaintiff because, as previously stated, the jury impliedly found upon ample evidence and sufficient instructions that defendants did not require the sale of the contracts as a condition of making the loans. In

this connection the jury were told, among other things, that "where different transactions have been entered into and these different transactions are relied upon in making a charge of usury all the circumstances must be inquired into to determine whether or not such collateral agreement or separate agreement was intended to be and was a part of another agreement, and considering the two together there was a usurious charge of interest." (See also further instructions quoted *infra*, 242 P.2d 883.)

[7,8] As hereinabove mentioned, the court apparently accepted the view of the law suggested in plaintiff's opening statement and offer of proof as quoted in footnote 8, *supra*, 242 P.2d 880, and gave instructions which erroneously assume that a "trust receipt" transaction and a usurious loan are mutually exclusive concepts.<sup>9</sup> In fairness to plaintiff it is pointed out

with an instruction given by the court which erroneously adopts the position taken by plaintiff.

9. Such instructions read as follows: "If the transactions between the parties were trust receipt transactions and not loans, then the question of interest is not involved, and under such circumstances there can be no claim of usurious or unlawful interest."

"In determining whether the transactions were loans or whether they were under trust receipts, you must determine what the transactions were by a consideration of all the evidence, and not merely from what the parties or documents appear to be or the parties represent themselves to be.

"It is necessary for you to determine whether the transactions were loans or were trust receipt transactions:

"If you find as follows: The parties, prior to their later transactions, understood and agreed that the defendants were to finance the plaintiff in his business \* \* \*, that \* \* \* said agreement was to be carried out; that in carrying out the same the plaintiff made contact with several manufacturers in Los Angeles, who understood plaintiff was to be financed and that later the parties signed the agreements herein admitted in evidence and captioned 'trust receipts'; that in carrying out their understanding the plaintiff did in all cases but three or four, (in which

three or four cases the money was sent by plaintiff [should read "defendants"] to the manufacturers) proceed to Los Angeles with his truck, or some truck under his control; that he did then order and secure delivery of various articles, from said manufacturers load the same on the trucks; and at the same time secure the invoices to the goods; that the trucks did deliver to his store at Sacramento; that he did at once take the invoices over to the defendants, and did present the same to defendants, and that the parties did then and there sign a document such as admitted in evidence and designated trust receipt; that in that document there was a description and price of articles listed therein; that defendants did immediately give to the plaintiff a check to cover the amount thereof; that it was understood and agreed by the parties that they were, and it was the intent of each, that a trust receipt transaction was contemplated; and if you further find that the goods were placed in plaintiff's store, and that both parties so acted that thereby the goods were 'floored,' and that both recognized that plaintiff was trustee as elsewhere described herein and did not have title thereto to dispose of the same, except under the terms of the trust receipt and that defendants as entrusters had a security interest, and each party understood and agreed that the interest of the plaintiff was that of a trustee, as referred to elsewhere here-

that while he made the opening statement, offer of proof, and request for instruction as shown in footnote 8 and its context, he did not request the instructions quoted in footnote 9; these latter instructions appear to have been formulated and given by the court of its own motion. Trust receipts are "a method of securing a debt and not of creating a debt" (*Commercial Discount Co. v. County of Los Angeles* (1940), 16 Cal.2d 158, 161, 105 P.2d 115); there can be no such thing as a security interest which secures no obligation. If *Oil City Motor Co. v. C. I. T. Corporation*, 10 Cir. (1935), 76 F.2d 589, 104 A.L.R. 240, purports to stand for the proposition that trust receipt transactions cannot be loans within the usury laws, then we cannot agree with it. As we understand the *Oil City* case, however, it is based upon the rule, not applicable here, that (page 591 of 76 F.2d) "A return demanded and received for a bona fide loan or extension of credit as distinguished from a loan of money does not taint the transaction with usury regardless of the amount \* \* \* if the transaction is in good faith and not a mere \* \* \* device to conceal usury."

[9] We pass over the question as to whether plaintiff should be foreclosed, because, it may be argued, he induced the erroneous view, from raising the contention that the giving of the instructions quoted in footnote 9 was error, and we consider the contention on its merits. We recognize that such instructions are clearly erroneous to the extent that they imply that trust receipt transactions and loans are, respectively, inherently and necessarily exclusive each of the other, and to the extent that they advised the jury that "If the transactions \* \* \* were trust receipt transactions and not loans, then the question of interest is not involved"; never-

theless, if all the instructions are read together, in the light of the evidence, it appears that the error could not reasonably, and plaintiff upon whom as appellant the burden rests has not shown that it did, result in a miscarriage of justice. It is obvious that in fact and in law loans were made, else there would have been no obligations for the trust receipts to secure, and it is equally obvious that documents in the form of trust receipts were used to evidence a security interest which, if the transactions were bona fide, was created.

The error in the instructions quoted at length in footnote 9 lies in the statement that "If the transactions \* \* \* were trust receipt transactions and not loans, then the question of interest is not involved, and under such circumstances there can be no claim of usurious or unlawful interest"; in the statement that "In determining whether the transactions were loans or whether they were under trust receipts, you must," etc.; and in the statement that "It is necessary for you to determine whether the transactions were loans or were trust receipt transactions." But in the lengthy substance of the instructions in question, after the opening paragraphs, the court implicitly predicates applicability of such instructions upon the condition "If you find as follows:" and then details facts which must be found if the subject instructions are to be given effect. Such facts all go to the question of good faith and substantially in the use of the trust receipts, not to conceal a device for securing usurious interest, but to evidence a security interest in, and exclusively in, a bona fide flooring transaction in which legitimate charges other than for interest could be made. To this effect such instructions particularly specified as "conditions (which must have been found to exist be-

in, and in the trust agreement; that when plaintiff delivered the invoices to defendants and received a check in payment thereof both he, as trustee and defendants as entrusters intended that a security interest should thereby pass to entrusters and the check so given or money represented thereby was to be applied in payment to the manufacturers as per said bill of goods, and both

parties then and there signed the various documents labeled trust receipts; that there was no understanding or agreement express or implied, other than the above, if you so find the facts to be, then I instruct you that it would be your duty to find that the transactions as between the parties were trust receipt transactions and not loans."

fore the instructions would have been applicable) that it was agreed "that the defendants were to finance the plaintiff in his business" (not merely to loan money for interest to a going concern with established business and credit); that the furniture was actually bought from "several manufacturers in Los Angeles, who understood plaintiff was to be financed"; that the furniture so purchased was placed in plaintiff's store; that plaintiff "did at once take the invoices over to the defendants \* \* \* and that the parties did then and there sign a document \* \* \* designated trust receipt; \* \* \* that defendants did immediately give to the plaintiff a check to cover the amount thereof; that it was understood and agreed by the parties that they were, and it was the intent of each, that a trust receipt transaction was contemplated; and if you further find that the goods were placed in plaintiff's store, and that both parties so acted that thereby the goods were 'floored,' and that both recognized that plaintiff was trustee \* \* \* and did not have title thereto to dispose of the same, except under the terms of the trust receipt and that defendants as entrusters had a security interest, and each party understood and agreed that the interest of the plaintiff was that of a trustee, as referred to \* \* \* in the trust agreement; \* \* \* *that there was no understanding or agreement express or implied, other than the above, if you so find the facts to be, then I instruct you that it would be your duty to find that the transactions as between the parties were trust receipt transactions and not loans.*" (Italics added.) Obviously it was error to give an instruction, standing alone, that if the transactions were trust receipt transactions they were not loans, but it is also obvious that applicability of that instruction was conditioned on the jury's finding that the trust receipt transactions were bona fide and to secure flooring of the furniture and not to conceal or secure any

hidden agreement for the mere payment of interest.

Furthermore, the erroneous statements are to be considered in the light of other instructions given, hereinafter quoted. The jury were told that they must consider the instructions as a whole. So considered, the instructions make it clear that the ultimate issue actually to be decided was not whether the transactions were trust receipts or loans; that it was whether the loans, or the transactions by whatever name they might be called, were or were not usurious. The jury were told what a loan is<sup>10</sup> and under the undisputed evidence, as already indicated, it would seem that they must have found that there were loans here. Trust receipts were partially explained to them, by quotations from the Uniform Trust Receipts Law, in such a manner that, in the light of the evidence, it would seem that they must have found, as likewise already indicated, that there were trust receipts here. Moreover, the jury were told to look to all the circumstances in determining whether there was a usurious charge of interest.

Following are the instructions to this effect which were given at plaintiff's request: "A contract or agreement involving a loan of money may be verbal or in writing, and the promise or obligation to repay or return the money may be secured or unsecured. The form of instrument by which a borrower hypothecates or puts up property to secure the repayment of the money borrowed does not in and of itself change what is in fact a loan of money into something else. Such instrument may be in form a mortgage contract, a pledge contract, *a trust receipt contract* [italics added] or any one of a number of other writings made to secure the obligation, and you are instructed that if from all the circumstances surrounding the transactions occurring between plaintiff and defendants you find that the transactions were in fact loans of money, then any such instrument

10. The following instruction was given:  
"A loan of money is the delivery of a sum of money to another under a contract to return at some future time an equiva-

lent amount with or without an additional sum agreed upon for its use."  
This definition is materially similar to the definition in the Civil Code (§ 1912).



or instruments purporting to transfer an interest in property solely for the purpose of securing repayment of the money borrowed does not change what in fact was a loan of money into some other form of obligation. In other words, once a loan of money is made, any instrument executed or given to secure repayment of that loan of money does not change or destroy the fact that a loan of money was made in the original instance."

"The intent with which the usury is committed is immaterial, for the voluntary taking of more than the legal rate of interest constitutes usury. Therefore the only intent necessary on the part of the lender is the intent to take more interest than the law permits. Usurious intent is implied if excessive interest is intentionally taken, and it is of no consequence that there was no specific intent knowingly to violate the usury law.

"However where different transactions have been entered into and these different transactions are relied upon in making a charge of usury all the circumstances must be inquired into to determine whether or not such collateral agreement, or separate agreement was intended to be and was a part of another agreement, and considering the two together there was a usurious charge of interest. \* \* \* Under such circumstances the question is whether there was an intent to evade the law with regard to usury, and all the circumstances may be considered in the determination of such question. The burden rests upon the one charging usury to establish such charge."

In the light of these instructions it would be attributing to the jury folly, or disregard of the charge to consider the instructions as a whole, to assume that they thought that the lengthy trial was had in order to determine whether the relationship of plaintiff and the finance company was that of borrower and lender or that of trustee and entruster (when it was undisputably both), rather than to determine

whether the loans secured by the trust receipts were usurious. It is clear—or at the very least plaintiff has failed to sustain the burden of showing convincing evidence to the contrary—that the jury rejected plaintiff's contention that the finance company charged usurious interest because it is apparent from plaintiff's testimony as a whole that he first conceived the notion that the transactions were illegal when he decided upon this action as a method of recouping his failing fortunes<sup>11</sup> after he defaulted on a payment due to the finance company.

[10,11] Plaintiff also complains of the giving of the following instruction: "A lender is not prohibited from charging an extra and reasonable amount for incidental services, expenses or risk additional to the lawful interest, other than for the loan of money. He may make a reasonable charge for investigating, arranging, negotiating, brokering, making, servicing, collecting and enforcing his obligation.

"Such items, however, must be confined to specific service or expense incidental to the loan incurred in such a way as to preclude it being a device through which additional interest or profit on the loan may be exacted."

This instruction, given at defendants' request, is a correct statement of the law (In re Fuller (1940), 15 Cal.2d 425, 433, 434, 102 P.2d 321; see Haines v. Commercial Mortgage Co. (1927), 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A.L.R. 725, pointing out that a general charge for "expenses" or "services" not attributal to any particular expense or service may well be but a device to evade the usury law). Plaintiff asserts that the instruction conflicts with the provision of section 22 of article XX of the California Constitution that "No person \* \* \* or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than ten per cent per annum upon any loan or for-

11. A statement covering plaintiff's business during the period from July 7, 1946, to December 27, 1946 (on the latter date, as hereinafter described, defendants took possession of the furniture because of

plaintiff's default in payments), shows "liabilities owing" in the amount of \$21,-829.67; under assets, "cash on hand in bank was a minus \$39.85," and "Mr. Klett's capital was a deficit, \$2,712.26."

bearance of any money \* \* \*." Legitimate charges for specific items of actual service and expense are not, as plaintiff seems to believe, compensation for the loan of money; i. e., such charges are not interest; and the statement in *Carter v. Seaboard Finance Co.* (1949), 33 Cal.2d 564, 579, 203 P.2d 758, that the quoted constitutional provision was intended "to prevent lenders from circumventing the limits on interest \* \* \* by forbidding any charges whereby the borrower is required to pay more than the 10 per cent," does not mean that charges which are not interest become interest by reason of the constitutional amendment.

[12] There was received in evidence, over plaintiff's objection, the statement of trust receipt financing which, under section 3016.9 of the Civil Code, may be filed by an entruster with the secretary of state. The statement was merely some evidence that the finance company intended to lend money to plaintiff on the security of trust receipts. Its admission could not have prejudiced plaintiff. He, himself, proved the fact.

#### The Conversion Cause of Action

On December 16, 1946, after defendants had been financing plaintiff under the "trust receipt" arrangement for about a year, plaintiff issued to defendants his check for the amount due under one of the "trust receipts" which covered furniture which had been sold by plaintiff to a retail cus-

tomers. The check was not honored because there were insufficient funds in plaintiff's bank account. Also at this time plaintiff, in violation of the terms of "trust receipts," had not turned over to defendants the proceeds of sales of certain other furniture which was covered by such "trust receipts." The due dates on the other "trust receipts" covering the furniture in plaintiff's store had passed. After the check was dishonored defendant Forrest made several oral demands that plaintiff make good the check, and that he pay the entire amount due to the finance company (about \$7,030) or surrender possession of the entrusted furniture. Plaintiff stated that he had no money with which to pay the finance company. On December 27, 1946, Forrest, as he had told plaintiff he would do, came to plaintiff's store and took all the furniture which was covered by "trust receipts"; Forrest also took other furniture, not covered by "trust receipts," of a value equal to that of the furniture which plaintiff had improperly sold without delivering the proceeds.

The complaint on which the case was tried alleges that defendants on December 27, 1946, converted, took, and carried away the furniture; that plaintiff thereafter demanded and defendants refused return of such furniture; and, upon information and belief, that defendants subsequently sold the furniture.

[13] The jury, adequately instructed,<sup>12</sup> impliedly found upon sufficient evidence<sup>13</sup>

12. The jury were told that "in a legal sense the word 'consent' means capable, deliberate, free and voluntary assent or agreement to, or concurrence in, some act or purpose, implying physical and mutual power and free action which is unclouded by threats, or duress. It presupposes that the person to be affected has knowledge of his rights. If, therefore, consent is given or obtained by means of unwarranted threats, or is given by a person without full knowledge of his rights, such a consent has no force or effect whatsoever, and the legal effect of consent given under such circumstances is the same as though no consent were given"; that "he who consents to an act is not wronged by it"; and that "If you believe that when the defendants called

upon plaintiff to surrender the merchandise which was then in plaintiff's possession, the plaintiff did not dispute defendants' right to the goods, or set up a claim to them against the defendants, but freely consented thereto, then the defendants committed no conversion."

13. After Forrest had demanded that plaintiff pay the amount due the finance company or surrender the furniture, and plaintiff had told Forrest that he could not pay, Forrest told plaintiff that on the morning of the 27th he (Forrest) would come to plaintiff's store to take the furniture. On that morning plaintiff went to the store with Forrest. Plaintiff told an employe that Forrest "has come for the furniture and is going to take it out of the store and we are going to turn

that plaintiff consented to the taking of the furniture on December 27. Since plaintiff consented to the taking of the furniture, that taking was not a conversion, and the following contentions of plaintiff (together with related contentions concerning the instructions) are without merit: that Forrest improperly took some furniture which plaintiff had already sold to retail purchasers; that plaintiff was not in default (because of a waiver of default) and therefore defendants could not sell the furniture without notice to plaintiff; that because defendants were not licensed under the Personal Property Brokers Act (Stats. 1909, p. 969, as amended; 2 Deering's Gen. Laws, Act 5825(2d) <sup>14</sup>) the loans were void (§ 21) and therefore the sale of the furniture in which the finance company had only a purported security interest amounted to a conversion.

[14] Furthermore, the Personal Property Brokers Act had no application. The act did not apply to "bona fide conditional contracts of sale involving the disposition of personal property, when such forms of sales agreements are not used for the purpose of evading this act" (§ 4, par. (c)), and "As used in this act the term 'conditional contracts of sale' shall include flooring contracts" (§ 3). The security transactions here, although not conditional sales contracts in the usual sense of the term, are "flooring contracts" within the meaning of the act and within the definition of "flooring contracts" accepted by plaintiff; hence they are included within the definition (§ 3 of the act) of conditional contracts of sale. (See plaintiff's instruction quoted supra, footnote 1; *Commercial Credit Co. v. Barney Motor Co.* (1938), 10 Cal.2d 718, 720, 76 P.2d 1181.

it over to him," and directed the employee to turn over to Forrest certain furniture not covered by "trust receipts" in place of furniture which plaintiff had improperly sold without delivering the proceeds of the sales to defendants. At the time Forrest was taking the furniture plaintiff asked Forrest to hold it for him because plaintiff believed he might be able to raise some money; Forrest replied that he would hold it for five days; and plaintiff stated that that was satisfactory.

[15] Plaintiff complains that an objection to the following question addressed to him was sustained: "Now, assuming he [Forrest] did not have a right to remove that furniture, would you have consented to his taking any of the furniture?" Framed as it was, the question required plaintiff to speculate on what his action would have been. If plaintiff wished to adduce testimony as to his state of mind he could have testified to it directly rather than speculatively.

[16] Certain evidence offered by plaintiff to prove the extent of his damages was rejected. Since the jury found against plaintiff on the issue of liability and did not reach the issue of damages, plaintiff cannot now complain of the rejection of the evidence as to extent of damages.

[17] Finally, plaintiff asserts that the jury were out too short a time to have properly deliberated. They retired at 11:10 a. m. and returned twenty-five minutes later with a signed separate verdict on each of the two counts. The jury were polled and, with the exception of one juror as to count 2, the verdicts for defendants were unanimous. We cannot conclude from this circumstance, either standing alone or in the light of the entire record, that there is reasonable ground for concluding that there has been a miscarriage of justice; accordingly the verdicts must be upheld. (Cal.Const., art. VI, § 4 1/2.)

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

Thereafter plaintiff did not communicate with defendants concerning the furniture. Defendants held it for more than five days and then, without notice to plaintiff, sold it for about \$6,500 and applied this sum to the cancellation of plaintiff's debt; about \$530 remained owing from plaintiff to the finance company.

14. Provisions based upon this act are now found in the Financial Code, § 22000, et seq.



CARTER, Justice.

I dissent.

The main issue presented in this case was whether the transaction between plaintiff and defendants was usurious. The transaction was in the form of trust receipts and the court erroneously instructed the jury, as is conceded by the majority opinion, that a trust receipt transaction can never be usurious and if it was found to be such an arrangement in this case, defendants must recover. Yet it is held that there was no prejudice—that the jury was not misled. I think it is clear that the majority opinion itself demonstrates that the jury was misled. The parties and the trial court were confused as to the law on the subject and hence the erroneous instructions were given. How then may it be said the jury was not confused?

Turning to the law involved, it appeared that the trust receipt instruments were between plaintiff-dealer, as trustee, and the company-financier, as entruster, and provided that the trustee "holds in trust" for the entruster, "as security for payment of the amount hereinafter set forth on the due date hereinafter specified," the described furniture, "in which personal property a security interest remains in or is hereby transferred to Entruster as security for such payment. Trustee agrees to hold said personal property in trust as the property of Entruster for the purpose of sale or exchange and to deliver same to the Entruster upon demand. Entruster may at any time examine said personal property and the books and records of the Trustee with reference thereto and may at any time either before or after the due date repossess said personal property without notice or demand of any kind and for such purpose Entruster or his representatives may without legal process enter any premises in which said personal property is located. Entruster may insure said personal property against the hazards of fire and theft while held by the Trustee for not less than the amount secured hereby, and the Trustee agrees to pay the premiums and charges for such insurance to Entruster upon demand and until so paid same shall likewise be secured hereby.

"\* \* \* The Trustee may, however, sell said personal property for cash or on terms approved in advance by Entruster for not less than the amount due Entruster hereunder, including insurance premiums and charges; provided, however, that upon such sale all moneys hereby secured shall become immediately due and payable and all of the proceeds and considerations received in such sale shall be forthwith delivered to Entruster as security for payment of said moneys and until so delivered shall be held by the Trustee separate from the funds of the Trustee and as security for such payment." The articles of furniture are described and an amount named "Amt. Secured" is set opposite each, together with the due date. On repossession of the property by the Entruster it may sell it and apply the proceeds to the expenses of the sale and "to the satisfaction of the Trustee's indebtedness hereby secured; and, fourth, to the payment of any other obligation owed by Trustee to Entruster. The Trustee shall receive any surplus and shall pay into Entruster upon demand any deficiency. \* \* \*

"In the event of default by the Trustee in the payment of any moneys hereunder due on the due date hereof, Entruster may declare all moneys secured immediately due and payable. In event of such default Entruster may at his option and in lieu of sale as hereinabove provided declare a forfeiture of the Trustee's interest in said personal property against cancellation of the then remaining indebtedness in accordance with the provisions of Section 3016.2 of the Civil Code of the State of California."

It is quite clear that the transactions were standard trust receipt arrangements as they are established by the Uniform Trust Receipts Law. Civ.Code, §§ 3012-3016.16. That law defines an entruster as one who has directly or by agent taken a "security interest" in goods under a trust receipt transaction, but does not include a person who owns goods and sells them on conditional sale for profit. Civ.Code, § 3013(3). A "security interest" is a property interest in goods limited "to securing performance of some obligation of the trustee". Id., § 3013(12). A "trustee" is a person "having

or taking" possession of goods under a trust receipt transaction. Id., § 3013(14). "New value," includes new "advances or loans" made, but not extensions or renewals of existing obligations of the trustee. Id., § 3013(7). A trust receipt transaction is any transaction where the entruster and trustee are parties for one of the purposes mentioned in the section, (that is, applicable here, where the possession of the goods by the trustee is for the purpose of selling them, Id., § 3014(1) (3) (a), whereby "(a) The entruster or any third person delivers to the trustee goods \* \* \* in which the entruster (i) prior to the transaction has, or for new value (ii) *by the transaction acquires* or (iii) as the result thereof *is to acquire promptly*, a security interest \* \* \* provided, that the delivery under paragraph (a) \* \* \* either (i) Be against the signing and delivery by the trustee of a writing designating the goods \* \* \* concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster \* \* \*." Id., § 3014(1) (a) (b) (i). The security interest of the entruster may be derived from the trustee or from any other person. Id., § 3014(1). Under the initial oral agreement here, the method by which the transactions were handled, we have at least a situation where the purpose of the arrangement was to enable plaintiff-trustee to have possession of the goods for retail sale; defendant company-entruster acquired its security interest from the plaintiff-trustee; the goods were delivered to the trustee by a third person, the factory-seller and the entruster "by the transaction is to acquire promptly" a security interest. The trust receipts declaring the security interest in the entruster were executed immediately after the trustee obtained possession of the goods from the seller in conformity with a prior oral understanding. The entruster gave new value, that is, the payment of 90% of the cost of the goods. We do not read the uniform law as requiring that title pass to the entruster from the seller-factory, that is, that a tripartite arrangement is required between the seller, retail dealer and financier. As long as it is a part of the same transaction, and the steps are in close proximity,

we have a trust receipt. Here the advancements were made to enable the dealer-trustee to buy from the seller and the advances were to be secured by trust receipts. All according to an oral understanding, and promptly upon delivery of the goods by the seller to the trustee, the advancements were made, the seller was paid, and a trust receipt executed which vested a security interest in the entruster. It is true that a trust receipt under the uniform law is not a negotiable promissory note, for it is not an unconditional promise to pay a sum certain. It is a method of "securing a debt and not creating a debt." Nor is it a chattel mortgage or conditional sale. *Commercial Discount Co. v. County of Los Angeles*, 16 Cal.2d 158, 105 P.2d 115; *Chichester v. Commercial Credit Co.*, 37 Cal.App.2d 439, 99 P.2d 1083. Nevertheless, the transaction is a security transaction. As said in *Commercial Discount Co. v. County of Los Angeles*, supra, 16 Cal.2d 158, 161, 105 P.2d 115, 117, after stating that a trust receipt is a method of securing a "debt" not creating a "debt": "There is nothing in the law which would prevent the execution of a promissory note or notes representing the amounts secured by the trust receipts. It does not appear that the plaintiff took notes from the automobile dealers for that purpose and the case is presented on the theory that the obligations to repay the money loaned rested in parol." In *Chichester v. Commercial Credit Co.*, supra, 37 Cal.App.2d 439, 99 P.2d 1083, the order for cars was placed by the retail dealer with the factory-seller and the financier paid the seller for them and they were shipped, the bills of lading going to the financier who turned them over to the dealer on his signing a trust receipt and he then got possession of them. While that was a tripartite transaction, the court said, 37 Cal.App.2d at page 443, 99 P.2d at page 1085: "Prior to the adoption of the Uniform Trust Receipts Law, the only instance where the security title of a trust receipt holder was permitted to prevail against the claims of creditors of the trustee or against his trustee in bankruptcy, was where the title of the entruster or trust receipt holder was derived from someone other than the trustee. *Arena v. Bank of Italy*,



194 Cal. 195, 228 P. 441; In re James, Inc., supra [2 Cir., 30 F.2d 555]; In re [A.E.] Fountain [Inc.] 2 Cir., 282 F. 816, 25 A.L.R. 319. Where the title of the entruster was derived from the trustee and not from some third person, the transaction was treated as being similar to a chattel mortgage and was held to be void as against creditors of the trustee in the absence of recordation. *Arena v. Bank of Italy*, supra.

"If in the instant case defendant held the title to the automobiles at all times, as was found by the court, deriving such title directly from the Chrysler Corporation, its security interest would be protected under the former law as well as under section 3016.4 of the Civil Code. The evidence discloses with respect to the Chrysler automobiles that although they were shipped by the Chrysler Corporation directly to Reagan, accompanied by invoices made out to Reagan, the bills of lading were made out to, and were sent directly to defendant. The evidence is conflicting as to whether sight drafts were attached to all of such bills of lading, but it appears without controversy that in every instance, whether by paying such drafts, or by other arrangements, defendant paid the full purchase price for such automobiles directly to the Chrysler Corporation. Moreover, defendant paid all of the freight charges. The bills of lading were not delivered to Reagan until after the trust receipts had been signed. Concerning the Plymouth automobiles which were delivered from the Los Angeles office of the Chrysler Corporation, defendant after securing trust receipts from Reagan, ordered the cars to be delivered to Reagan's place of business and paid the purchase price directly to the corporation. There is no evidence whatever tending to prove that Reagan at any time prior to signing the trust receipts, had either title to or possession of any of the automobiles in question. Although the trial court found that defendant was at all times the owner of the automobiles in question, *it was of no consequence whether defendant's title originated with the Chrysler Corporation or with Reagan.*

"Plaintiff places great reliance upon the case of *Arena v. Bank of Italy*, supra, in

support of his contention that a trust receipt which does not comply with the provisions of section 3440 of the Civil Code is void as against creditors of the trustee. That decision, however, is clearly distinguishable upon its facts from the instant case. It must be borne in mind that the *Arena* case was decided long prior to the enactment of the Uniform Trust Receipts Law. In the *Arena* case, one Dellaira having both the title and possession of certain goods, assigned and delivered possession of such goods to the Bank of Italy as security for an indebtedness; thereafter the bank restored the possession of such goods to Dellaira and, at the same time took the trust receipts in question from Dellaira. Obviously, whatever title or interest the bank acquired could only have been derived from Dellaira, the trustee under the trust receipts. The court properly held that under the law which existed at that time, i. e., prior to the enactment of the Uniform Trust Receipts Law, the transaction was to be treated as being in the nature of a chattel mortgage and consequently void as against the trustee's (debtor's) creditors unless properly recorded.

"From the foregoing discussion it appears that under the former law the source of the entruster's title was the controlling factor in determining whether or not a given trust receipt transaction was valid. However, under the existing law, by which the instant case is to be governed, the entruster's security interest will be protected whether his title is derived from the trustee or from a third party. From an examination of section 3014 of the Civil Code, which defines trust receipt transactions, it is apparent that the legislature intended to include within the general provisions of the law all trust receipt transactions without regard to the source of the entruster's title. *That section provides, among other things: 'The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.'*

"The only case which has come to our attention, involving an interpretation of the California Uniform Trust Receipts Law, is In re Boswell, D.C., 20 F.Supp. 748, af-



firmed in 9 Cir., 96 F.2d 239. The facts of that case were similar to those of the Arena case in that the entruster derived its title from the trustee who had both possession and title to the merchandise covered by the trust receipt. Thereafter the trustee became bankrupt and action was brought by the entruster to reclaim the merchandise from the trustee in bankruptcy. It was held that under the sections of the Civil Code comprising the Uniform Trust Receipts Law, such a transaction was valid and enforceable and that the entruster was entitled to reclaim the merchandise in question from the trustee in bankruptcy." In *re Boswell*, D.C., 20 F.Supp. 748, affirmed 9 Cir., 96 F.2d 239, approved in the *Chichester* case, involved a situation where the retail dealer bought the merchandise on open account from the seller-factory and title passed to him and the bank-financier advanced \$800 to pay for it and took notes representing the amount and a trust receipt as security. In *Re Chappell*, D.C., 77 F. Supp. 573, 575, it is said: "In order to constitute a trust receipt transaction under the Oregon Uniform Trust Receipts Law the entruster bank must acquire its security interest prior to or at the same time as delivery is made to the dealer, or delivery must be made under some arrangement whereby the security interest is to be acquired 'promptly' Section 75-102, O.C.L.A. In other words, the delivery of the goods to the dealer must stem from an arrangement between the bank and the dealer for the acquisition of the goods by means of advances from the bank." See, also, *Automobile Banking Corp. v. Weicht*, 160 Pa.Super. 422, 51 A.2d 409; *Peoples Finance & Thrift Co. v. Bowman*, 58 Cal.App.2d 729, 137 P. 2d 729; *Universal Credit Co. v. Citizens State Bank of Petersburg*, 224 Ind. 1, 64 N.E.2d 28, 168 A.L.R. 352; 57 Yale L.J., 761; 5 Fordham L.Rev., 17, 240; 16 Wash. L.Rev., 1, 10; 41 Col.L.Rev., 1134; 3 Univ. of Chicago L.Rev., 26. Plaintiff seeks to distinguish the *Chichester* case on the ground that there was at the time that case arose a subdivision (c) to subdivision (1) of section 3014, which read: "\* \* \* or (c) the entruster gives new value in reliance upon the transfer by the trustee to

such entruster of a security interest in goods or documents in possession of the trustee and the possession of which is retained by the trustee \* \* \*" which subdivision was later eliminated by amendment, Stats.1939, p. 2826, and a special provision was added for the protection of motor vehicle and aircraft dealers, reading: "A trust receipt transaction is also one in which, pursuant to a trust receipt, a motor vehicle dealer or aircraft dealer as trustee obtains new value from an entruster upon the transfer to the latter of a security interest in new or used motor vehicles or aircraft, whether or not such vehicles or aircraft are owned or possessed by the trustee prior or subsequent to the execution of the trust receipt document, and whether or not such vehicles or aircraft are thereafter retained in the trustee's possession.

"All of the provisions of this chapter which are applicable to the trust receipt transactions enumerated in Section 3014 are applicable to the trust receipt transaction specified in this section." Civ.Code, § 3014.5. But the *Chichester* case was not based on said subdivision (c) as seen from the quotation therefrom, *supra*. The transaction here concerned, falls within subdivision (a) of subdivision (1) and the next to last paragraph in subdivision (1). The special provision for motor vehicles and aircraft deals with cases where the dealer has possession of the goods prior to and wholly independent of the trust receipt. There is no relation between his possession and the trust receipt. Here the whole thing was a part of a continuous transaction.

As plaintiff's first cause of action is for allegedly usurious interest, defendants urge that there could be no such interest for the reason that "trust receipts" are not subject to the usury law, Cal.Const., Art. XX, sec. 22; Stats.1919, p. LXXXIII, Gen.Laws, Act 3757, as they are not a loan or forbearance of money. We find nothing in the trust receipts law that exempts such transactions from the usury law. As above seen they are a *sui generis* type of security transaction, somewhat like a chattel mortgage, pledge or conditional sales contract, but different than any of them. The fact remains that the transaction is a method by

which the performance of some financial obligation is *secured*, the same as is true of other security arrangements such as chattel mortgages. Being only the security instrument, like a chattel mortgage, accurately speaking, it is not the *loaning* instrument—or one containing the promise to pay or do some other act. Such features are usually found in promissory notes or collateral promises to perform. In trust receipts the main purpose is to assure the entruster that he will be repaid the money advancements he has made to enable the trustee-dealer to obtain possession of and sell merchandise. He may be in the position of a lender to the dealer-borrower. The obligation or promise for which the trust receipt is given, must be examined to determine whether there has been a loan or forbearance and whether the interest is too high. In *Oil City Motor Co. v. C. I. T. Corporation*, 10 Cir., 76 F.2d 589, the finance company paid the price of the cars to the seller and they were then shipped to the dealer and the latter gave a trust receipt to the company, thus enabling the dealer to obtain the cars with the instruments of title. If that case purports to stand for the proposition that such transactions may never be loans within the usury laws, we cannot agree with it. It is based upon the proposition that a sale or loan of credit is not a loan of money and therefore not within the usury law, a principle which is subject to the qualification that such a device may not be used as a cloak for usury. It has been said: "It is well settled that the usury law is inapplicable to a transaction amounting merely to a loan or sale of credit, and a loan of money, to facilitate which a loan of credit is made, is not rendered usurious by the payment of, or agreement to pay, a sum exacted for the loan of the credit. However, it is difficult to lay down any general rule as to what amounts to a sale of credit as distinguished from a loan. Although the transaction must not be a mere cover for usury, and in the decision of this question the intent of the parties is important, generally speaking, consideration must be given to the particular facts in order to determine whether one of the parties to the transaction is to advance money, or whether the advance is to be made in the first instance by a third party. If, for in-

stance, the transaction is one not contemplating the immediate advance of money by a party thereto, but merely a means of enabling one of the parties to procure funds from a third party, it is properly deemed a sale of credit, as regards the usury statutes, although eventually the party permitting the use of his credit has to advance the money before he is placed in funds or property by the one receiving the credit." 55 Am.Jur., Usury, § 25. The most common and clear instance of its application is where a person guarantees payment by the maker of a promissory note. See 104 A.L.R. 245. Where, however, as a part of the transaction, the lender in fact advances the money to purchase the merchandise for the dealer, with an express or implied promise to repay the money, together with what qualifies as interest under the usury law, there may be a loan of money. See *Osborne v. Fuller*, 92 S.C. 338, 75 S.E. 557, 42 L.R.A., N.S., 1058; *Wood v. Angeles Mesa Land Co.*, 120 Cal.App. 313, 7 P.2d 748. An issue to be determined, therefore, is whether the basic transaction constituted a loan or forbearance within the meaning of the usury law.

The majority opinion says that the case is not a close one; that the instructions permitted the jury to find the transactions were trust receipts and yet loans, for it could find that the trust receipts were bona fide and to secure *flooring* of the furniture and not an agreement for interest, that is, in effect, that if they were *flooring* contracts, there was no usury. Not only is that not true but the majority concedes it is not later in the opinion where it is said: "The security transactions *here*, although not conditional sales contracts in the usual sense of the term, are '*flooring contracts*' within the meaning of the act and within the definition of '*flooring contracts*' accepted by plaintiff." But, obviously, *flooring* contracts are the same as trust receipts. The ultimate holding is therefore that *flooring* contracts—trust receipts—are not subject to the usury laws.

As I have pointed out, the case was a close one. Indeed the evidence is overwhelming that the transactions were *loans* for which *interest* was charged which ex-

ceeded the legal limit. There is evidence from which it may be inferred that the transaction was a loan of money rather than a loan or sale of credit, or any other transaction, such as the actual advance of the money to either plaintiff or the manufacturer, carrying with it an implied promise to repay together with 1% per month. The trust receipt refers to an "indebtedness" for which it stands as security; that a "security interest" is transferred to the entruster-defendant, thus negating a sale of the property. In some of defendants' accounts the 1% item has the letters "Int." after them, indicating *interest*. Defendants are in the lending and financing business, not the retail furniture business. Defendants' explanation of the arrangement with plaintiff is weak and conclusionary, barely sufficient to create a conflict in the evidence. Kenneth Forrest, one of the officials, testified that it was for trust receipts and plaintiff Klett "asked me or rather told me he had been in the furniture business for approximately thirty years; that he understood it very thoroughly; he was forming a partnership with a Mr. Raymond Parker and Mr. Parker was going to put up \$7500.00 and he was going to put up his ability and they were going to start a furniture store on the Davis Highway and Mr. Parker at that time had not put up all his money and he had only put up, if I remember correctly, around \$2000.00 or \$2500.00 and that he would like to find some way to have furniture placed in his store and asked me if I would be able to do his financing for him and I told him it was impossible for me to finance any furniture because it did not have a serial number on it, that if he would like to floor his merchandise such as appliances that I would be glad to do it for him and he told me that I had known him for considerable time and he would be glad to place a serial number on each individual piece of furniture and under those circumstances would I floor merchandise for him and I told him, after some conversation back and forth regarding his experience, I told him I would do it and I told him when I would be able to do it under trust receipts, that I would send the checks direct to the factory on each particular deal and that he would put up 10 per cent and I

would charge him 1 per cent a month and at that time he stated he had some furniture in Sacramento already, I asked him, is it paid for and he said it was and I told him that we would purchase the furniture in Sacramento on trust receipts and pay him 90 per cent of that and charge him 1 per cent of that also. \* \* \* and, about that time, he asked me if I would also handle his contracts and I told him that I would be glad to purchase his contracts but that I would have to buy them non-recourse as we *didn't have a loan license* and it would be necessary that we buy the contracts non-recourse and that our charge for purchasing them was approximately 17 per cent and he said that was perfectly satisfactory, that he would be glad to do business with us on that basis \* \* \* Mr. Klett asked me if I would be able to *finance* about \$5,000 and I told him that we would, in fact, we stipulated at that time we wouldn't go over \$5,000." In regard to the 1% per month charge, Forrest testified:

"Q. What was that 1 per cent for, Mr. Forrest? A. The charge of enabling him to have our furniture in his store and other consideration.

"Q. Would that be for, let us say, writing up the trust receipt and handling the invoice and such as that? A. Yes, sir, that would include writing up the trust receipt, the bookkeeper's time, making up a ledger card and putting it in the books and making up the addressograph plate to enable us to send the notices, and the notices themselves and the mail. \* \* \*

"Q. And for the use of that money you made a charge of 1 per cent, is that correct? A. For the privilege of his having my furniture in his store I charged him 1 per cent a month.

"Q. For the privilege of his having your furniture in his store you charged him 1 per cent a month. A. That is right.

"Q. And is that 1 per cent—considerable of that 1 per cent, as you have testified, went into certain expenses? A. That is right.

"Q. Do you know how much of the 1 per cent went into actual expenses? A. Roughly, I would say about 1/2 of 1 per cent.



"Q. That is about half of it? A. The other half, I would say, was profit."

In other words the deal was to be by trust receipts and was to enable plaintiff to have furniture in his store—to finance him—to loan him money.

It will be noted that frequent references are made to trust receipts. Both parties agreed that instruments called trust receipts were used. A notice that they were engaged in trust receipt transactions was filed with the Secretary of State as required by law. Civ.Code, § 3016.9. The trust receipts, labelled by that name, were introduced into evidence. *With everything pointing to a trust receipt arrangement and nothing to the contrary, the jury was told that if it was a trust receipt deal there was no usury—defendant could not recover.* I fail to see how the jury could escape being misled to the prejudice of plaintiff. The parties and the evidence told them the arrangement was a trust receipt one and then as a clincher the court commanded them to hold for defendants if trust receipts were used. This court said in *Sebrell v. Los Angeles Ry. Corp.*, 31 Cal.2d 813, 817, 192 P.2d 898, 900: "Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury."

I would therefore reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



110 Cal.App.2d 433

**HUGONY v. LA GUARDIA.**

Civ. 18754.

District Court of Appeal, Second District,  
Division 1, California.

April 21, 1952.

Rehearing Denied May 12, 1952.

Hearing Denied June 19, 1952.

Action by Julio Garcia Hugony against John J. La Guardia, also known as John T. LaGuardia, to recover for alleged overcharges of rent. From an adverse judgment in the Superior Court of Los Angeles Coun-

ty, William R. McKay, J., the plaintiff appeals. The District Court of Appeal, Drapeau, J., held that whether service of notice of the proceeding was or was not made on the defendant was a question of fact and that such was required by due process of law.

Judgment affirmed.

#### 1. Landlord and Tenant ⇨200(1½)

##### War and National Defense ⇨221

In action to recover for an overcharge of rent where there was a conflict in testimony whether the landlord ever received a notice of the rent proceeding, whether service of the notice was or was not made was a question of fact. Federal Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.

#### 2. Landlord and Tenant ⇨200(1½)

##### War and National Defense ⇨220

In action to recover for an overcharge of rent where defendant denied ever having received the notice of the rent proceeding, burden was on plaintiff to establish service of the notice where the records of the Rent Control Office showed no notation of service on the notice in file. Federal Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.

#### 3. Constitutional Law ⇨318

Where the Federal Rent Director issued an order decreasing the maximum rent of property, service of notice of the proceeding was required by due process of law upon defendant. Federal Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq.

Newman & Newman, Los Angeles, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

The complaint in this case was for overcharge of rent, based upon the provisions of the federal Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq. Plaintiff demanded trebled damages for rent alleged to have been wrongfully and maliciously collected by defendant, for attorney's fees and costs.

October 15, 1947 plaintiff and defendant entered into a written lease of a seven-room furnished house, with double garage and mechanical refrigerator. The lease was for one year, and the rental was \$300 per month. Plaintiff took immediate possession, paid \$3,600 rental for the year, and vacated the premises at the end of the term.

February 25, 1949 (four months after the tenancy ended), the federal area rent director issued an order decreasing the maximum rent of the property from \$300 to \$95 per month. Whereupon plaintiff brought this action.

So we have another example of surprising results from legislation enacted during the stresses of war and continued in effect too long after cessation of hostilities.

Issues were framed, and the case was tried by the judge of the court. Plaintiff was unable to produce testimony of actual service of the notice. On this issue the trial judge found for defendant, and judgment passed for him.

Section 840.108 of the rent procedural regulations, provides: "\* \* \* the area rent director \* \* \* shall, before taking such action, serve a notice upon the landlord and tenant of the housing accommodations involved, stating the proposed action and the grounds therefor."

On appeal plaintiff argues that the affirmative of his case was established by introducing into evidence the order signed by the area rent director, with the file of the rent control office. In the file was a document entitled, "Notice to landlord of proceedings to determine a maximum rent." Plaintiff asserts that this was sufficient proof of service, because the burden of proof of lack of notice was upon defendant.

[1] Defendant testified that he never received notice of the rent proceeding. The clerk in charge of the records of the

rent control office testified that no notation of service appeared on the notice in the file. It follows, therefore, that at most there was a conflict in the testimony, resolved by the judge whose province it was so to do. Whether service of the notice was or was not made was a question of fact. In *re Spiers*, 32 Cal.App.2d 124, 89 P.2d 456; *Otsuka v. Balangue*, 92 Cal.App.2d 788, 208 P.2d 65.

[2] While some authorities are to the contrary, it has been settled in this state that in such cases as this plaintiff has the burden of proof. *Heesy v. Vaughn*, 31 Cal.2d 701, 192 P.2d 753; *Charach v. Lansing*, 106 Cal.App.2d 735, 236 P.2d 1.

[3] Moreover, service of notice was required by constitutional law. Due process is involved. "Whatever the character of the proceeding by which one is deprived of his property, and whether it takes the property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for notice, and opportunity to be heard, or the proceeding will want the essential ingredient of due process of law." Syllabus from 12 West's California Digest, Constitutional Law, 309(1) and cases therein cited.

Defendant has not filed any brief to aid this Court. Counsel for plaintiff have been eminently fair in their presentation of the facts and the law. While an independent inquiry disclosed them, this Court appreciates the fact that plaintiff's counsel called attention to cases favoring defendant, thereby rendering a service in keeping with the high principles and conduct of the great majority of the members of the California bar.

The judgment is affirmed.

DORAN, J., concurs.

WHITE, P. J., concurs in the judgment.

110-Cal.App.2d 419

**UREN v. TROUP et al.**

**Civ. 4353.**

District Court of Appeal, Fourth District,  
California.

April 18, 1952.

Action by Dolores Uren against Michael S. Troup and others, and E. G. LaJoie, to quiet title to certain realty and for damages for withholding possession. E. G. LaJoie cross-complained to quiet title and for damages for unlawfully withholding conveyance of property. The Superior Court of Fresno County, Milo Popovich, J., entered decree for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence sustained findings that terms of agreement under which defendant E. G. LaJoie claimed as purchaser's assignee were not uncertain and indefinite, that purchase price stated therein was not inadequate, and that agreement was not unfair and oppressive.

Decree modified and affirmed.

**1. Vendor and Purchaser ⇨77**

Where contract entitled Receipt and Agreement for Sale of Real Property, recited that vendor received from vendee the sum of \$200 as deposit and part payment for described property which vendee agreed to purchase for \$950, with balance of purchase price to be paid within five years from date by monthly rentals of \$12 per month until balance of purchase price was paid in full, \$12 payments were to be considered as payments on contract, and not as rental payments. Civ.Code, § 1641.

**2. Vendor and Purchaser ⇨44**

In action to quiet title to realty which defendant claimed pursuant to contract of sale, evidence established that terms of agreement for sale were not uncertain and indefinite, that price named therein was not inadequate, and that agreement was not unfair and oppressive.

**3. Vendor and Purchaser ⇨187**

Where contract for sale of realty provided that time was of essence, but vendor did not, at any time, demand balance due on contract price, did not offer deed of property, and did not declare forfeiture or

give any notice thereof to defendants, but accepted down payment and received subsequent payments by checks, some of which were cashed, vendor had waived right to declare forfeiture for default in intermediate installment, and was required to place purchase in default by demanding performance within reasonable time before forfeiture might be declared.

**4. Appeal and Error ⇨891**

Where vendor sought permission to adduce additional evidence on appeal in quiet title action in which claim of title of purchaser's assignee was contract for sale, and such evidence consisted of letter from assignee to vendor stating that enclosed check was for two payments on property, such letter was insufficient to establish reply thereto by vendor declaring default, but at most created conflict in evidence, and application would be denied. Rules on Appeal, rule 25(b).

**5. Quieting Title ⇨52**

Decree quieting title in purchaser of realty which conditioned delivery of deed upon payment by purchaser of stated sum plus taxes paid, but which contained no condition in event purchaser failed or refused to pay sum, should provide that vendor should have restitution of premises and title quieted in her in event purchaser did not pay sum within 10 days from date judgment became final.

Edwin H. Williams, San Jose, for appellant.

W. A. McGugin, Fresno, for respondent.

GRIFFIN, Justice.

Action to quiet title and for damages for withholding possession of property.

Dolores Uren, hereinafter referred to as plaintiff, brought this action against defendants to quiet title to lot 17 and the East 15 feet of lot 18, in Block 5 of Kleinhurst, in Fresno County, which property had a small dilapidated building on it. Since this appeal was perfected, plaintiff died and an administrator has been substituted in her stead.



In their answer defendants deny generally the allegations of the complaint, set up a contract of sale of the property under which they claim title, and by way of cross-complaint ask that title be quieted in them, and pray for \$500 damages for unlawfully withholding conveyance of the property.

This controversy arises out of a written agreement between the parties for the sale of the property by plaintiff to defendant Michael S. Troup and wife, for \$950. The questioned paragraphs of the agreement read in part as follows:

"Receipt and Agreement for  
Sale of Real Property  
\* \* \* May 25, 1945.

"Received from Michael S. Troup the sum of Two Hundred and  $\frac{0}{100}$  (\$200.-00) Dollars, as a deposit on and part payment for the following described property \* \* \* which property said purchaser agrees to purchase subject to the restrictions \* \* \* for the purchase price of Nine Hundred Fifty and  $\frac{0}{100}$  (950.00) Dollars, the balance of said purchase price to be paid within five years from date hereof, as follows, to wit: at the monthly rental of \$12.00 per month until balance of purchase price is paid in full.

"And It Is Hereby Agreed: First—That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, time being of the essence of this contract, the amount of said deposit shall at the option of the seller, be forfeited as liquidated and agreed damages, or seller may apply said deposit on account of said purchase price and institute suit against the purchaser to compel the specific performance of this contract.

"Second—That said deposit shall remain in the hands of the undersigned broker, \* \* \* until the deed or final contract to said property passes to said purchaser, or this contract is terminated. \* \* \*

"Possession of said premises to be given upon recordation of deed or with-

in ——— days from date of recordation of deed.

"Seventh—That the taxes on said property for the current fiscal year ending June 30 following this date and the rents and interest on assumed indebtedness and Fire Insurance if acceptable to purchaser are to be prorated from date of delivery of deed or contract of sale. \* \* \*

"This agreement is binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto. \* \* \*

"The undersigned hereby approves and agrees to the foregoing contract, and agrees to purchase the above described property on the terms and conditions herein stated and authorizes seller to make conveyance to Michael S. Troup, and Dorothy A. Troup, as joint tenants.

"Michael S. Troup, Purchaser

"Dorothy A. Troup, Purchaser.

"Dated May 25th, 1945. \* \* \*

"I agree to sell the above property on the terms and conditions herein stated. \* \* \*

"(Signed) Dolores Uren,  
Seller."

Defendants' evidence shows that defendant Troup's brother was living on the premises in April, 1945, and was delinquent in rent payments; that about May, 1945, defendant Troup wrote to plaintiff in San Jose and inquired if she would sell the property; that plaintiff came to Fresno; that \$100 was paid on the back rent of the brother; that defendants Troup talked about buying the place rather than paying rent on it and plaintiff orally agreed to sell it at that time for \$950, with \$200 down, and payments of \$12 per month on the balance due; that nothing was said about defendants Troup renting the property; that plaintiff returned to San Jose, and about June 1st defendants Troup received the form of contract above mentioned, already drawn up by plaintiff's agent; that subsequently, it was signed and defendant Troup mailed \$200 to her on June 4th; that payments of \$12 per month were made by check

thereafter for six months, the last payment being made on December 6, 1945. Some of these checks bore the endorsement "payment on house". A check for \$14.17 was mailed to plaintiff on December 6th, as payment for taxes.

Defendants testified that plaintiff never gave them any notice of rescission or notice of default; never tendered a deed; never demanded any payment; that the property was not worth more than \$950 at that time, due to its dilapidated condition; and that accordingly, they considered that they were only buying the lot. Defendant Troup testified that he put a new roof on the building, put in new plumbing, remodeled it generally, and that thereafter he considered its value at \$1,500.

It appears that about 1946, the defendants Troup assigned and relinquished their interest in the contract of sale to defendant E. G. LaJoie and wife, and they took possession of the property, fixed it up, and sold it on a contract of sale to defendant Alexander. LaJoie testified that on January 2, 1946, he sent plaintiff a check for \$24, as payment on the contract and accompanied it with a letter informing her he had purchased the property from the Troups and that he subsequently sent her, bi-monthly, \$24 checks until April, 1950; that she did not reply to his letters and never cashed or returned the checks; that in 1949, when he sent her one of the payments, he asked her to send him a bill for the balance due because he wanted to pay it off and wanted a deed to the property; that in 1950, he told plaintiff's then lawyer the same thing and he agreed to ascertain the balance due, place the matter in escrow and have a deed delivered; that at the trial, in open court, he offered to pay the balance then due on the contract.

Plaintiff stated that when she came to Fresno in May, 1945, she found defendant Troup in her house; that she questioned him about it and that he then offered to pay her rent and fix it up; that later, he wrote about buying it; that she had a friend of hers who worked in a real estate office fix up the papers for her; that she never told this friend to write the contract in the language used and never intended the \$12 to

be applied on the payments but this amount was to be paid by Troup as rent until he paid the amount due on the contract; that the \$200 he paid was not on the purchase price but was for back rent due her; that she had no legal advice and did not have any business experience; that when she received the checks from LaJoie she wrote him a letter and asked him who he was and that he informed her he was the new owner; that she informed him she had not sold the house; that thereafter he continued sending the checks; that she did not cash them but turned them over to her attorney; that she paid the taxes and insurance on the property; and that LaJoie never asked her the amount of the balance due nor did he demand a deed.

The court found generally in favor of defendants and specifically found that plaintiff signed the contract of sale; that the total purchase price of the property was \$950; that she thereby agreed to and did accept \$200 as down payment and agreed to accept \$12 per month as payment on the balance due, without interest; that \$72 was paid thereon by Troup; that LaJoie mailed twenty-four checks to her which totaled \$600; that plaintiff received said checks without objection but did not cash them; that defendants have been in exclusive possession of the property since the contract was signed; that LaJoie did open an escrow with a title company and agreed to pay any balance due but plaintiff refused to tender a deed; that plaintiff never gave defendants any notice of default or that prompt compliance with the terms of the contract was required or that the contract of sale had been breached in any manner. It concluded that LaJoie was the owner in fee simple and entitled to the possession of the property and that plaintiff had no right therein; that there is due plaintiff from LaJoie \$678 on the purchase price, and \$53.-71 for taxes paid by plaintiff; that \$950 was the reasonable value of the property at the time of signing the contract of sale; that payment of said sums be conditioned upon the delivery of the deed by plaintiff transferring her interest in said property to LaJoie, free and clear of encumbrances. Judgment was entered accordingly.

[1] On this appeal it is contended that the court erred in holding that defendants were not obligated to pay plaintiff \$12 per month *as rental* in addition to the amount of the contract price. We see no merit to this contention. The contract, as written, when construed in connection with the evidence bearing thereon, clearly indicates that the \$12 payments were to be considered as payments on the contract and not as rental payments. At least the trial court was justified in so holding. Sec. 1641 Civ. Code; *Taylor v. J. B. Hill Co.*, 31 Cal.2d 373, 189 P.2d 258; *Moss v. Williams*, 84 Cal.App.2d 830, 835, 191 P.2d 804; *Mahanay v. Lynde*, 48 Cal.App.2d 79, 119 P.2d 430.

[2] The second point is that the contract does not constitute a defense to plaintiff's quiet title action since it would not justify a decree for its specific performance, in this: (a) that the terms of the agreement are uncertain and indefinite; (b) that \$950 was an inadequate price; and (c) that the agreement is unfair and oppressive. Based upon substantial evidence, the court properly found against plaintiff on these issues and such findings will not be disturbed on appeal. *Arundel v. Turk*, 16 Cal. App.2d 293, 295, 60 P.2d 486.

Plaintiff's third claim is that since defendants made default in the payments due under the contract, time being of the essence, their rights thereunder were automatically terminated, citing 25 Cal.Jur. p. 607, sec. 113; and *Ross v. Gentry*, 94 Cal. App. 742, 271 P. 1098.

[3] The agreement was dated May 25, 1945. All payments were due after five years from that date, i. e., May 25, 1950. The court found that plaintiff did not, at any time, demand the balance due thereon; she did not offer a deed of the property, and did not declare a forfeiture or give any notice thereof to defendants, and specifically found that defendants, on June 8, 1950, offered to place the balance due in escrow if plaintiff would execute a deed to the property. It was not until the filing of this action on June 13, 1950, that defendants had notice that they were in default in any payments and that the entire balance was due

or that plaintiff claimed title by reason of any alleged forfeiture.

In *Boone v. Templeman*, 158 Cal. 290, 297, 110 P. 947, 950, it was held that:

"\* \* \* Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment."

In *Thein v. Sticha*, 93 Cal.App.2d 295, 300, 209 P.2d 13, 16, it was said:

"\* \* \* 'where both parties to a contract in which time is made the essence thereof, allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default by the other without a tender.' " (Italics ours.) See, also, *Ross v. McDougal*, 31 Cal.App.2d 114, 120, 87 P.2d 709.

Plaintiff refused and still refuses to tender a deed. She did accept the down payment and received subsequent payments by check, some of which were cashed. No notice of default was given and no demand for payment was made. After the right to declare a forfeiture for a particular default has been waived, the vendor must put the purchaser in default by demanding performance within a reasonable time before he may declare a forfeiture. 25 Cal.Jur. p. 618, sec. 119.

Under the evidence and findings and the principle enunciated in the cited authorities, defendants were not automatically placed in default. Plaintiff should not now be permitted to claim a forfeiture without notice, without tendering a deed to the



property without affording defendants a reasonable opportunity to comply.

[4] Since this appeal was perfected plaintiff's administrator made application to this court to allow him to produce additional evidence under Rule 23(b) of the Rules on Appeal.

Plaintiff testified at the trial that she wrote a letter to LaJoie asking him who he was, how he came in possession of the premises, telling him that she had not sold the house, and was not accepting any of his money. LaJoie denied receiving a letter containing all of these statements but he did state that he wrote her that he had purchased the property from the Troups, sent her a check, and that he thereafter received no reply from her.

Plaintiff now offers in evidence a letter from LaJoie dated January 29, 1946, stating that the check she received was for two payments on the house that he bought from Troup. Plaintiff argues that this letter conclusively shows that plaintiff did write to LaJoie and that he did reply thereto; that plaintiff did thereby declare him in default and notified him of this fact; and that since plaintiff's administrator did not discover the existence of this letter until after the death of plaintiff, this court should receive it in evidence and reverse the finding of the court on this issue.

The letter itself does not support plaintiff's argument that default was therein declared nor that defendants were thereby notified of such fact. At most, it would only create a conflict in the evidence in respect to the question as to whether or not plaintiff did in fact write to LaJoie and that LaJoie did in fact answer the letter. The admission of this evidence would not be decisive and would not necessarily compel a contrary finding to that made by the trial court. Accordingly, the application should be denied. *Bassett v. Johnston*, 94 Cal.App.2d 807, 810, 211 P.2d 939.

[5] Lastly, it is argued that the decree fails to protect the rights of plaintiff because it vests the title in LaJoie without requiring him to deposit the balance due on the purchase price. The decree does quiet defendant LaJoie's title to the property,

and provides that plaintiff recover \$678 plus taxes paid, but conditions such payment upon delivery of the deed. It contains no condition in case LaJoie fails or refuses to pay said sum. The decree therefore should be modified by adding thereto: "That plaintiff have restitution of the premises and title quieted in her in the event the defendant E. G. LaJoie does not pay to plaintiff within ten days from the date this judgment becomes final the sum found payable to her." *Bird v. Potter*, 146 Cal. 286, 289, 79 P. 970; *Johnston v. Mulcahy*, 4 Cal.App. 547, 549, 88 P. 491.

The decree is affirmed as modified. Application to allow plaintiff to produce additional evidence denied. Defendants to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.



110 Cal.App.2d 449

PEOPLE v. ETTER.

Cr. 767.

District Court of Appeal, Fourth District,  
California.

April 21, 1952.

Conviction on four counts of information charging burglary and robbery and a prior felony conviction. The Superior Court of San Diego County, John A. Hewicker, J., entered an order denying a motion to set aside judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, J., held that validity of judgment could not be challenged in such proceeding in the nature of *coram nobis* on ground that plea of guilty had not been properly taken or entered.

Order affirmed.

I. Criminal Law ⇨636(9), 997

On motion to vacate judgment of conviction on four felony counts of information on ground that record did not

show entry of plea of guilty and that defendant was not informed of right of appeal at time of sentence, no testimony of defendant could alter record containing clerk's transcript showing proper entry of plea, or finding of court that defendant did enter a plea of guilty to the four charges, and hence trial court was justified in proceeding with motion in absence of defendant and in denying motion. Pen.Code, §§ 859a, 988; Const. art. 1, §§ 8, 13; U.S.C.A. Const.Amend. 14.

## 2. Criminal Law ⚖997

Motion to vacate judgment of conviction on ground that trial court was without jurisdiction in original proceeding in superior court to render judgment against defendant because record did not show entry of plea of guilty was in the nature of a *coram nobis* proceeding.

## 3. Criminal Law ⚖997

Matters which could have been considered on appeal or on a motion for new trial cannot be reviewed by writ of error *coram nobis*.

## 4. Criminal Law ⚖997

One applying for writ of error *coram nobis* to review judgment of conviction on ground that trial court was without jurisdiction in original proceeding to render judgment against him must show that the facts upon which he relies were not known to him and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than time of his motion for the writ.

## 5. Criminal Law ⚖997

Whether judgment of conviction is void because defendant was never arraigneded or because his plea was not properly taken or entered are matters not reviewable in a proceeding for issuance of a writ of error *coram nobis*.

## 6. Criminal Law ⚖997

Whether judgment of conviction was void because defendant was ignorant of his right of appeal and not informed thereof at time of sentence was not reviewable on motion to vacate judgment made more than four years after entry thereof.

Roland C. Etter, in pro. per.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On November 25, 1946, defendant was charged with four felony counts, two of burglary and two of robbery. The information further charged him with a prior felony conviction. The record shows that on December 3, 1946, defendant was duly arraigned in the Superior Court, with his counsel present, presented with a true copy of the information, and that he entered a plea of guilty to the four counts of the information. Probation was denied. Judgment and sentence were pronounced, committing him to the state's prison, sentences to run consecutively on all counts, and concurrently on the prior felony conviction. No motion for a new trial was made nor was any appeal taken. On October 29, 1951, more than four years later, defendant filed a "Notice of Motion to \* \* \* vacate \* \* \* the judgment", and set November 19, 1951, as the date for hearing thereon and asked that an order be made allowing him to be personally present at the hearing. No request was made to the court to appoint counsel to represent him. Defendant, in *propria persona*, filed his points and authorities, accompanied by a transcript of the charges and the reporter's transcript of the preliminary examination, together with his own affidavit setting forth the alleged facts, in which he recites that the trial court was without jurisdiction in the original proceeding in the Superior Court to render judgment against him because he entered no plea to the four felonies charged, either at the preliminary hearing or at the time of arraignment in the Superior Court, and that accordingly the judgment under which he was sentenced was null and void and should be set aside, citing *Price v. Johnston*, 334 U.S. 266, 280, 68 S.Ct. 1049, 92 L.Ed. 1356; Secs. 859a and 988, Penal Code; Art. I, secs. 8 and 13, Constitution of California and Fourteenth Amendment to the Constitution of the United States.

Defendant concedes in his motion that a preliminary hearing was had and that he was held to answer to the Superior Court on the charges. (He claims, however, he entered no plea before the committing magistrate.) He further argues that at the time of his sentence, he was not informed by his counsel that he had a right of appeal, and that he was ignorant of such right.

The court denied defendant's request to be present at the hearing of the motion on the grounds "that the presence and testimony of the defendant will not be material or necessary to the proper presentation of defendant's motion." On November 19, the court heard the motion, predicated on the record prepared by defendant, and the clerk's transcript, all of which, including the reporter's transcript of such proceedings, are now before this court on an appeal from the order denying the motion to set aside the judgment. The clerk's transcript shows, by minute entry of the clerk, that on December 3, 1946, defendant appeared with his counsel; that he was duly arraigned, and "enters a plea of guilty to the four counts of the information" and applies for probation. The commitment recites that "defendant was duly informed by the court of the nature of the charges against him for the crime of burglary, first degree; burglary, second degree; robbery, first degree; robbery, first degree; and a prior felony"; and that he be punished by imprisonment in the state prison, sentences to run consecutively on all counts and concurrently on the prior felony.

No question can here be raised as to whether defendant did or did not enter a plea of guilty before the committing magistrate since the record shows and defendant alleges that he was held to answer to the Superior Court where he was duly arraigned on those four charges.

[1] It should be here noted that defendant does not allege nor claim that in truth or in fact he did not enter a plea of guilty to the four charges on December 3, 1946, but only alleges that the record, on that date, does not show that he did so. We have considered only this question, as pre-

sented. The record itself is opposed to this allegation and from the showing made, no testimony from defendant, had he been present to testify, would have altered the record or the finding of the court that defendant did enter a plea of guilty to the four charges. Under the circumstances, the trial court was justified in proceeding with the motion, in the absence of the defendant, and in denying it. *People v. Coyle*, 88 Cal.App.2d 967, 200 P.2d 546; *People v. Bailey*, 105 Cal.App.2d 150, 153, 232 P.2d 518; *People v. Kirk*, 76 Cal.App.2d 496, 498, 173 P.2d 367.

[2-4] The form of the motion is in the nature of a coram nobis proceeding, although not designated as such. *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13. The rules applicable to such a proceeding are well stated in *People v. Coyle*, *supra*, which holds that a writ of error coram nobis cannot be used to review matters which could be considered on appeal or on a motion for a new trial, and that one who applies for a writ of error coram nobis upon a ground such as the one here presented must show that the facts upon which he relies were not known to him and could not, in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise, he has stated no ground for relief.

[5, 6] In *People v. Thompson*, 94 Cal. App.2d 578, 586, 211 P.2d 1, it was held that whether a judgment of conviction is void because defendant was never arraigned or because his plea was not properly taken or entered, are matters which are not reviewable in a proceeding for the issuance of a writ of error coram nobis. Since defendant was represented by counsel, his argument that he was ignorant of his right of appeal and therefore entitled to the relief prayed for after four years of delay in raising the question, is without merit. *People v. James*, 99 Cal.App.2d 476, 222 P.2d 117; *People v. Scranton*, 50 Cal.App.2d 492, 123 P.2d 132.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,  
concur.



**ELI et al. v. MURPHY et al.\***

No. 14933.

District Court of Appeal, First District,  
Division 1, California.

April 21, 1952.

Hearing Granted June 19, 1952.

James Eli, a minor, by Rosetta Calloway, his guardian ad litem, and others sued Leo J. Murphy and others, including California Motor Transport Co., Ltd., for injuries sustained in a collision between the automobile in which plaintiffs were riding and a truck owned and operated by Murphy and operated at the time of the collision for California Motor Transport Co., Ltd., under a lease agreement. The Superior Court, Santa Clara County, John D. Foley, J., entered an order granting a new trial as to damages alone in the causes of action of two of the plaintiffs, and California Motor Transport Co., Ltd., appealed. The District Court of Appeal, Bray, J., held, *inter alia*, that the Public Utilities Commission's general order permitting a carrier to lease equipment but prohibiting it from leasing a driver did not make it illegal for an independent contractor to haul for a carrier or require that if a carrier dealt with an independent contractor in violation of such order the independent contractor must be considered an employee of the carrier.

Reversed with directions.

**1. Statutes** ⇐236

A statute giving a remedy against a party who otherwise would not be liable must be strictly construed in favor of persons sought to be subjected to its operation.

**2. Negligence** ⇐6

When plaintiff sues under statute setting up alleged standard of care in negligence action, statute will be construed to see if plaintiff is one of class of persons whom statute was intended to protect and whether harm which occurred was of type which it was intended to prevent.

**3. Automobiles** ⇐115

The Public Utilities Commission's general order, permitting carrier to lease equipment but prohibiting it from leasing driver, did not make it illegal for independent contractor to haul for carrier or require that if, in violation of order, such carrier dealt

with independent contractor, latter must be considered in carrier's employ. Public Utilities Code, § 3502.

**4. Automobiles** ⇐115

Under Public Utilities Commission's emergency resolution, permitting carrier to lease both equipment and driver but requiring that operating carrier issue manifest record covering each shipment of goods and requiring driver of leased equipment have copy of such manifest in his possession, failure to comply with requirements relative to manifest record would not mean that thereby independent contractor relationship existing between operating carrier and its subhauler would ipso facto be succeeded by master-servant relationship. Public Utilities Code, § 3502.

Clark & Heafey, Edwin A. Heafey, Oakland, Rankin, Oneal, Luckhardt, Center & Hall, San Jose, Augustin Donovan, Louis B. DeAvila, Oakland, for appellant.

James F. Boccardo, Jean M. Blum, San Jose, for respondents.

BRAY, Justice.

This appeal by defendant California Motor Transport Co., Ltd. a corporation (referred to as C. M. T.), sued as Black and White Co., raises the question as to whether its subhauler, defendant Leo J. Murphy, was an employee or an independent contractor. This question, in turn, depends upon the legal effect of certain orders of the California Public Utilities Commission (hereafter called P. U. C.). The appeal is also from the court's order granting a new trial as to damages alone in the causes of action of James Eli and Alfred L. Jackson, respectively.

Facts.

There is no conflict in the facts. C. M. T. is a corporation licensed by P. U. C. as a highway common carrier. Leo J. Murphy is a permitted carrier under P. U. C. operating with a radial common carrier's license. Murphy owns and operates his own truck. C. M. T. received certain freight from California Motor Express Co., Ltd., to be hauled from Los Angeles to Oakland.

\* Subsequent opinion 248 P.2d 756.

C. M. T. and Murphy entered into a "Lease Agreement" by which Murphy for a sum agreed to transport from Los Angeles to Oakland such merchandise as C. M. T. might designate in a particularly described truck. The agreement provided that Murphy was to keep his truck in good repair and running order, pay all operating expenses, including gas and oil, wages of driver, and all insurance, including workmen's compensation. It further provided that at no time was Murphy to be an employee of C. M. T., and at all times was to be deemed in exclusive control of the truck. Pursuant to the contract Murphy proceeded to haul from Los Angeles to Oakland the freight which C. M. T. had received from the express company. No directions were given to Murphy concerning the trip, except to take the merchandise to Oakland. There were no instructions as to route or speed. Murphy's son, James, was driving the truck. Just south of Gilroy, James ran into the rear of the car in which plaintiffs were riding. They received injuries in this collision for which the jury assessed their damages in the aggregate sum of \$35,500. As no issue is raised as to negligence or adequacy of the verdict, it is unnecessary to go into detail as to either. As to the order granting a limited new trial as to certain plaintiffs on the issue of damages alone, defendant's only attack is as to the question of liability.

#### P. U. C. Orders.

The trial court in passing on the motion for nonsuit and in instructing the jury that C. M. T. as a matter of law was responsible for any negligence of Murphy or his son James, stated, in effect, that except for the legal effect of the P. U. C. orders, the evidence clearly disclosed that, as a matter of law, the relationship of Murphy to C. M. T. was that of independent contractor. However, the court felt that the effect of the P. U. C. orders was to make as a matter of law the relationship that of employee and employer.

In 1940 the commission adopted General Order No. 93-A, which provided, in part: "All passenger stage corporations and highway common carriers shall either own their

passenger stages or motor vehicles or lease such equipment for a specified amount on a trip, term or mileage basis. The leasing of such equipment shall not include the services of a driver or operator. All employment of drivers or operators of leased vehicles shall be by contract or agreement, under which the relationship between the passenger stage corporation or highway common carrier and such driver or operator shall be that of master and servant." This is the order most strongly relied upon by the court. However, on February 2, 1943, the commission adopted Emergency Resolution No. 16, a portion of which reads: "It is hereby ordered that during the existing National emergency and until further order of the Commission, highway common carriers \* \* \* are hereby authorized and permitted to acquire and operate trucks \* \* \* as hereinafter provided, notwithstanding the provisions of Part V of General Order No. 93-A \* \* \*. To perform transportation services \* \* \* carriers, respectively, individually or jointly may acquire equipment as above described, from other such carriers, along with the services of drivers and helpers employed by the latter, by any agreement or contract satisfactory to the negotiating carriers, and without the necessity of placing such drivers and helpers on the payrolls of the carrier \* \* \* subject to the following requirements: \* \* \* The carrier or carriers operating vehicles under the provisions of this order shall issue a manifest record covering each shipment \* \* \* [and] the driver of any such vehicle shall have in his possession a copy of each of such manifest records \* \* \*."

#### Effect of Order 93-A.

[1-3] We start with the premise that without order 93-A the relationship here, so far as the rights of third persons are concerned, would be that of independent contractor. Our first task, then, is to determine the meaning and effect of that order, and whether as to third persons it changes the liability of independent contractors to that of employer-employee. In approaching this question we should have in mind that the intention of the commis-

sion to abrogate the common-law and California rule of liability must be clearly apparent. A statute giving a remedy against a party who otherwise would not be liable must be strictly construed in favor of the persons sought to be subjected to its operation. *Weber v. Pinyan*, 9 Cal.2d 226, 229, 70 P.2d 183, 112 A.L.R. 407. We entertain no doubt of the competency to make such change a condition of the right to a franchise to use the highways as a common carrier. Such action would be the exercise of a legislative, not a judicial, power. Essentially it would be the imposing of conditions for the privilege or franchise of becoming and exercising the functions of a public utility, such privilege embracing the use of the state highways.

We do not think that the order has, or was intended to have, the effect of granting rights not otherwise existing to third persons. What it states is that highway common carriers are prohibited from performing their functions through an independent contractor. The carrier is permitted to lease equipment, but it is prohibited from "leasing" a driver. The order says that the carrier cannot hire an independent contractor, but must operate through employees. But the order does not say what shall happen if it does hire an independent contractor. Certainly the order does not say that if the carrier hires an independent contractor he shall become, ipso facto, an employee. The order does not purport to say that the commission is hereby conferring the right on a third person, if the carrier violates the order, to insist, as a matter of law, that the driver is an employee when, in fact, he is an independent contractor. Order 93-A was intended by the commission to state a regulation imposed upon the carrier. If the carrier violates it, the carrier becomes subject to discipline—perhaps even the loss of its license. But such violation cannot be interpreted to grant the right to third persons to hold the carrier where otherwise it would not have been liable.

The purposes of the order apparently are (1) as pointed out above, to prohibit a highway common carrier from performing its

functions through an independent contractor; (2) the surrounding of a common carrier with suitable regulations and requirements, the better to assure the state and the public that it will perform its functions properly and well; also as a convenient method for the P. U. C. efficiently to exercise its regulatory and supervisory power; (3) the greater assurance it will afford of proper and safe use of the highways through the medium of imposing the indicated element of responsibility upon the company to whom the franchise is granted. It has much more at stake in this regard than would any of the several little independent contractors have.

If this objective was intended to include a concept of liability towards the public for the negligent conduct of each driver employed by the carrier, whether on that particular occasion the driver was directly employed or through an independent contractor, then there should have been something in the order to so state. The rules applicable to statutes apply in this respect. When a plaintiff sues under a statute setting up an alleged standard of care in a negligence action, it is common to construe the statute to see if the plaintiff is one of a class of persons whom the statute was intended to protect, and whether the harm which has occurred is of the type which it was intended to prevent. *Restatement, Torts*, §§ 285, 286; *Prosser on Torts*, p. 264 et seq. Although the language of the general order is broad, in the light of the express purposes of the P. U. C. in this regard, Public Utilities Code, § 3502, which indicates that regulation of rates is the primary consideration, there should be expressed unequivocally that it was intended to benefit specific members of the public before it is so construed. This section was put in to help the P. U. C. regulate for the *general* good of the public.

The situation here is distinguishable from that in *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044, where the court held the company liable for negligence of a driver employed under an independent contract for the reason that the garbage ordinance made it unlawful for



any person other than a contractor with the city or a person in the employ of such contractor to collect garbage within the city, and also there was a contract between the city and this contractor in which it was agreed that any person collecting garbage for the contractor was to be considered an employee of the company. The court held that this situation brought the contractor within the rule, "If, however, an individual or corporation undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority, these liabilities may not be evaded by delegating performance to an independent contractor." 17 Cal.2d at page 604, 110 P.2d at page 1050. Order 93-A did not make it illegal for an independent contractor to haul for the carrier, nor did the carrier agree that if in violation of the order it dealt with an independent contractor the latter would be considered its employee.

Emergency Resolution No. 16.

[4] Assuming that order 93-A did establish a liability as to third persons, resolution No. 16 modified the requirement that as to drivers of equipment leased by the carrier there must be an employer-employee relationship. Resolution No. 16 provides that the carrier is permitted to "acquire and operate" trucks, notwithstanding the provisions of order 93-A. It then states that in doing so, the carrier may acquire equipment from the other types of carriers listed "along with the services of drivers and helpers employed by the latter, by any agreement or contract satisfactory to the negotiating carriers, and without the necessity of placing such drivers and helpers on the payrolls \* \* \*." (Emphasis added.)

The commission thereby states in effect that the restriction of master and servant relationship set forth in order 93-A no longer applies because the highway carrier can now make any agreement it desires as to drivers of leased equipment satisfactory to it and the radial carrier. The resolution requires that the highway carrier "operating" leased vehicles must comply with

certain regulations. The fact that the highway carrier is designated as "operator" and as "operating," in nowise changes the fact that he is operating leased equipment under an agreement satisfactory to him (here one setting up an independent contract relationship) nor does it change the fact that resolution No. 16 completely suspends the operation of the master-servant requirement under the order.

One of the requirements of resolution No. 16 is that the operating carrier shall issue a manifest record covering each shipment of goods and containing certain data, and that the driver of the leased equipment shall have a copy of such manifest in his possession. Murphy did not carry such a manifest at the time of the accident. It is unnecessary to consider whether the documents issued by C. M. T. and carried by Murphy constituted, in effect, a manifest, as claimed by defendant. We see no basis for plaintiff's contention that the failure to comply with resolution No. 16 in that respect would mean that thereby the independent contractor relationship was ipso facto succeeded by the master-servant relationship. There is no such intention expressed in the resolution. Nor can we understand why the failure to carry a manifest would thereby change the rule of liability as to third persons.

Although there was no discussion of P. U. C. rules in the case, the liability question in *Gaskill v. Calaveras Cement Co.*, 102 Cal.App.2d 120, 226 P.2d 633, was quite similar to that in our case. There M. T. S. had a permit to act as a highway contract carrier, as did one Swain. M. T. S. rented to Swain a trailer and semi-trailer under a contract which provided that Swain was to be considered an independent contractor. M. T. S. had a contract with Calaveras Cement Co. to haul cement. M. T. S., after being advised by the cement company, would advise Swain where to pick up the cement and where to deliver it. Swain paid M. T. S. rental on a mileage basis for the use of the equipment. The court held that under this arrangement M. T. S. was an independent contractor and not liable for the negligence of Swain or his driver. The

court there distinguished the situation from that in *Taylor v. Oakland Scavenger Co.*, supra, 17 Cal.2d 594, 110 P.2d 1044, by pointing out that the scavenger company was operating under a franchise from and contract with the city of Oakland which specifically provided that it must assume master and servant liability for the acts of persons engaged by it, while the permits to Swain and M. T. S. provided no such condition.

Neither plaintiffs nor defendants Leo J. Murphy and James D. Murphy appealed from the judgment or from the order granting a new trial on the issue of damages alone. The judgment against C. M. T. and the order granting a new trial on the issue of damages alone as against C. M. T. are reversed, and the trial court is directed to enter judgment against plaintiffs and in favor of defendant C. M. T.

PETERS, P. J., and FRED B. WOOD, J., concur.



110 Cal.App.2d 331

**NELSON v. DEPARTMENT OF  
CORRECTIONS et al.**

Civ. 8024.

District Court of Appeal, Third District,  
California.

April 8, 1952.

Hearing Denied June 5, 1952.

Mandamus proceedings brought by an employee for review of an order of the State Personnel Board dismissing the employee from his civil service position as Prison Canteen Manager of Folsom State Prison. The Superior Court, Sacramento County, Malcolm C. Glenn, J., found that two of the charges against the employee were sustained by the evidence and remanded the matter to the Board for reconsideration of the penalty, and the employee appealed from that portion of the judgment of the trial court which denied the right to an entirely new hearing on the charges preferred against

him. The District Court of Appeal, Schottky, J. Pro. Tem., held that the Board's receipt of incompetent evidence was not a basis for a new hearing before the Board, since the trial court had found that two of the charges against the employee were based upon competent, substantial evidence.

Affirmed.

**1. Mandamus ☞187(9)**

Where, in mandamus proceedings brought to review Personnel Board's order dismissing employee from his civil service position as prison canteen manager, trial court found that certain of charges made were not supported by substantial evidence, employee could not have been prejudiced by Board's improper admission of hearsay evidence bearing on such charges.

**2. Officers ☞72(1)**

In administrative proceedings culminating in dismissal of employee from his civil service position as prison canteen manager, where prison warden testified that employee had admitted that his wife had received purse from certain inmate, it was proper to admit evidence to show that such inmate had had a purse.

**3. Evidence ☞317(1)**

In administrative proceedings culminating in employee's dismissal from civil service position as prison canteen manager, it was error to admit, for purpose of proving charge that employee had knowingly received money from the mother of an inmate, hearsay testimony of inmate concerning conversation he had had with another inmate, who worked at canteen, in which witness allegedly agreed to pay other inmate money for a commissary loan.

**4. Mandamus ☞173, 176**

Where, in mandamus proceedings brought to review order dismissing employee from his civil service position as prison canteen manager, trial court found that two of six charges against employee were based upon substantial competent evidence, administrative board's receipt of incompetent evidence would not be sufficient basis for entirely new hearing, and on contrary trial court properly remanded matter to administrative board for reconsideration of penalty only.

**5. Mandamus** ⇨ 168(4), 172

In mandamus proceeding brought to review administrative order dismissing employee from his civil service position as prison canteen manager, trial court properly applied substantial evidence rule rather than deciding matter according to weight of evidence by exercising independent judgment on facts.

**6. Mandamus** ⇨ 187(9)

Where trial court, in mandamus proceedings brought for review of administrative order, conducted full hearing and had before it transcript of entire proceedings before administrative board, petitioner could not have been prejudiced by trial court's ruling refusing petitioner the right to summarize in his petition the evidence in the administrative board's transcript, even if it be assumed that such ruling was erroneous.

**7. Mandamus** ⇨ 168(2)**Officers** ⇨ 72(1)

In administrative proceedings culminating in Personnel Board's dismissal of employee from his civil service position as prison canteen manager, it was not necessary that Board either hear the charges itself or that the hearing officer to whom the function was delegated should report proposed findings; and the Board's findings of fact having set forth that the Board had carefully considered the evidence submitted at the hearing, it could be presumed that Board had made its order after review of record and consideration of the facts. Const. art. 24, § 2(c); Government Code, §§ 19578, 19582, 19585; Code Civ. Proc. § 1963, subd. 15.

ager of Folsom State Prison, with the following:

1. Failure to cancel Folsom Prison canteen coupons;
2. Knowingly allowing his wife to accept a gift from an inmate of Folsom Prison;
3. Knowingly receiving money from the mother of an inmate of Folsom Prison;
4. Failure to protect, cancel, and account for canteen coupons;
5. Possession of contraband merchandise; and
6. Receiving a purse from an inmate of Folsom Prison for additional canteen privileges.

After proceedings regularly held before the respondent Personnel Board, said Board found said charges to be true and made its order dismissing appellant from his position as said Prison Canteen Manager as of the date of his suspension on January 30, 1948, and ordering that his name be removed from the State civil service employment lists.

Following the denial of his petition for a rehearing appellant filed a petition for a writ of mandate in the Superior Court of Sacramento County for a review of the findings and order of the State Personnel Board. The trial court found that of the charges made, only charges number 2 and number 6 were supported by substantial evidence, and the court found further that:

"\* \* \* in view of the fact that the proceeding before the State Personnel Board was of a disciplinary nature and as this Court has found that only a part of the charges to be true by the State Personnel Board are fully supported by substantial evidence presented before said Board, this Court finds that it should remand the matter to the State Personnel Board with directions to said Board to set aside its decision of August 6, 1948, suspending Petitioner from his position as Prison Canteen Manager and to consider what order should be made in the premises in view of the charges sustained by this Court but without said State Personnel

Benjamin D. Frantz, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Paul M. Joseph, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice pro tem.

Respondent Director of Corrections filed with the State Personnel Board a complaint charging appellant, who held a civil service position as Prison Canteen Man-



Board again trying Petitioner either on the original charges made or upon those herein sustained by this Court."

Judgment was entered accordingly and the State Personnel Board thereafter set aside its decision of August 6, 1948, and upon reconsideration dismissed the appellant from his said position.

Appellant states in his brief that he has appealed from that portion of the judgment of the trial court which denies the right to an entirely new hearing by respondent Personnel Board on the charges preferred against him; from that portion of the judgment which restricts respondent Board to consider a new order based only on the charges sustained by the trial court; and from that portion of the judgment which denies petitioner his requested relief.

[1-3] Appellant first contends that respondent Personnel Board should be required to hold an entirely new hearing because "the admission of inflammatory and patently inadmissible evidence contaminated the entire administrative proceedings." Appellant cites as the first instance of prejudicial evidence the testimony of the mother of an inmate, who was allowed to testify, over the objection of appellant, as to a conversation with her son in which he told her of the receipt of \$85 by appellant as alleged in charge 3. However, as pointed out by respondent, the trial court in the instant mandate proceeding found that Count 3 was not sustained by the evidence, so it cannot be held that appellant was prejudiced by the admission of this testimony.

Appellant next contends that the respondent Board committed prejudicial error in admitting certain evidence relating to charge 2 (knowingly allowing his wife to accept a gift from an inmate). An inmate was permitted to testify that he gave a purse to another inmate by the name of Whitaker, and appellant argues that his motion to strike said testimony should have been granted as this evidence was in no way connected with appellant. However, Warden Heinze testified that appellant admitted to him that his wife received a purse from inmate Whitaker, and it was

certainly proper to admit evidence to show that Whitaker had such a purse.

Appellant next complains of the admission of the testimony of inmate Roland concerning a conversation he had with inmate Whitaker in which he agreed to pay Whitaker some money for a commissary loan. Roland testified that Whitaker demanded the money and Roland wrote his mother for it. This evidence should not have been admitted, but in view of the fact that the trial court expressly found that this evidence was hearsay and did not support the charge made, and that there was no substantial evidence to support charge No. 3, we do not believe it can be held that appellant was prejudiced by this testimony or that the findings of the court that the second and sixth charges were sustained by substantial evidence were affected thereby.

Appellant's final objection to the reception of testimony is that over his objection a prison employee was permitted to testify that he had received a memorandum from a Folsom Prison executive with respect to inmate Whitaker and that this was never connected to appellant. However, the record shows that the objection to the admission of the document was sustained. Even if it had been admitted in evidence it is difficult to understand how appellant could have been prejudiced by it, because it was intended to show that Whitaker worked at the canteen during the period he was on "idle assignment" and this was abundantly shown by other testimony.

[4] Appellant does not argue that there is no substantial evidence to support charges 2 and 6, but contends that there should be an entirely new hearing by respondent Personnel Board on the charges preferred against him. But respondents argue correctly that incompetent evidence is not a basis for a new hearing before the Board, where, as here, the trial court found that two of the charges against appellant were based upon competent, substantial evidence.

The procedure adopted by the trial court, that is, remanding the case for reconsideration, is in accordance with the procedure adopted in *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242, at page 252,

217 P.2d 630, at page 636, 18 A.L.R.2d 593, the court stating: "The board made a single order of license revocation based on its findings and conclusions that both count seven and count nine had been violated. Inasmuch as we hold that the findings do not support the conclusions of unprofessional conduct as to count seven, and since license revocation is in any event a drastic penalty, and, furthermore, in consideration of the fact that we have no means of knowing whether the board itself would have imposed so severe a penalty for violation of count nine alone, we are of the view that the judgment should be reversed with directions to the trial court to set aside the order and send the matter back to the board for reconsideration of the penalty."

[5] Appellant next contends that the trial court erred in applying the substantial evidence rule. It is appellant's view that the trial court should have exercised an independent judgment on the facts, that it should have weighed the evidence, and should have decided the matter according to the weight of the evidence rather than follow the substantial evidence rule, as was done by the court in its ruling upon demurrers, motions to strike and findings of fact.

Appellant cites *Hohreiter v. Garrison*, 81 Cal.App.2d 384, at pages 401-402, 184 P.2d 323, at page 333, revocation of an insurance agent's license by the Insurance Commissioner, the court stating: "We are here involved with an administrative agency exercising statewide jurisdiction. It now seems settled in this state that the superior court in reviewing the actions of such agencies in revoking licenses in a mandamus proceeding must exercise an independent judgment on the facts. [Citing cases.] Thus the ultimate power of decision rests with the trial court. \* \* \*" Also cited is *Moran v. State Board of Medical Examiners*, 32 Cal.2d 301, at page 308, 196 P.2d 20, at page 25, revocation of medical certificate, the court stating: "That the trial court in this case was 'authorized by law to exercise its independent judgment on the evidence' is well established."

Respondent in arguing that the substantial evidence rule is proper in this case states there is no vested right in a civil service position, and therefore the court did not err. *Southern California Jockey Club v. California Horse Racing Board*, 36 Cal.2d 167, 223 P.2d 1, is relied on wherein the court holds that "On petition to the superior court for a writ of mandate to compel the Horse Racing Board to issue a horse racing license, that court should not reweigh the evidence, and its sole function is to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board."

Since the filing of the briefs in the instant appeal the Supreme Court has decided the case of *Boren v. State Personnel Board*, 37 Cal.2d 634, 234 P.2d 981, and we are satisfied that the *Boren* case and the authorities cited therein support the trial court in applying the substantial evidence rule. The Supreme Court, in a unanimous opinion, said, 37 Cal. at page 637, 234 P.2d at page 982:

"Since the enactment of section 1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate 'for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer \* \* \*.' The proceedings of the State Personnel Board in connection with plaintiff's dismissal were clearly of the type envisioned by section 1094.5, see, Gov. Code, § 19570 et seq., and the writ of mandamus will therefor lie to review the Board's decision. Since the jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from the Constitution, Article XXIV, § 3(a); cf. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545, the writ of certiorari is also available to review

the Board's decisions. *O'Brien v. Olson*, 42 Cal.App.2d 449, 453-457, 460, 109 P.2d 8; Code Civ.Proc., §§ 1068, 1074."

In the case of *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545 which was followed and approved in the *Boren* case, the court considered the powers and duties of the Board of Equalization and whether the courts in reviewing the board's actions should render an independent judgment on the facts, or follow the substantial evidence rule. It was there held that the board possessed adjudicating power in respect to liquor control, and therefore the substantial evidence rule was the proper one for a reviewing court to follow. The court, speaking through Chief Justice Gibson, said, 29 Cal.2d at page 131, 173 P.2d at page 548:

"The court reweighed the evidence before the board, made new findings, and ordered revocation of the license without remanding the case to the board. An examination of the Constitution of California shows that the State Board of Equalization, unlike most other agencies of statewide authority (see *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457), has specifically been given quasi judicial, or adjudicating power, that is, the right to make determinations of fact which are not subject to reexamination in a trial de novo in the superior court. Section 22 of article XX provides, in part: 'The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, \* \* \* and shall have the power, *in its discretion, to deny or revoke* any specific liquor license *if it shall determine for good cause* that the granting or continuance of such license would be contrary to public welfare or morals.' (Italics added.) In order to revoke a license the board obviously must examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto. A revocation may be only 'for good cause,' and, accordingly,

the board must afford an opportunity for a full hearing, an essential element of a quasi judicial proceeding. *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13; *Steen v. Board of Civil Service Com'rs*, 26 Cal.2d 716, 160 P.2d 816; cf. *Carroll v. California Horse Racing Bd.*, 16 Cal.2d 164, 105 P.2d 110. This does not mean, of course, that the 'discretion' given to the board is absolute, since it must be exercised in accordance with the law.

"The functions of the board are thus similar in some respects to those of a local administrative tribunal, a decision of which will be sustained if it has committed no error of law and if the evidence, although conflicting, is sufficient to support its findings of fact."

[6] Appellant contends also that the trial court erred in refusing petitioner the right to summarize in his petition the evidence in the Board's transcript, but in view of the fact that the trial court conducted a full hearing and the transcript of the entire proceedings before the Board were before the trial court, appellant could not have been prejudiced by the court's rulings on the pleadings, even if we were to assume that such rulings were erroneous.

[7] Appellant contends that the Board did not proceed in the manner required by law in that its hearing officer did not make any proposed findings, and since no member of the Board heard the evidence, it was incumbent upon the hearing officer to make such report to the Board. It is argued that pursuant to subdivision (c) of section 2 of Article XXIV of the Constitution providing that "dismissals, demotions, suspensions and other punitive action \* \* \* shall be and remain the duty of the board \* \* \*," it is required that the Board itself shall hear charges against a civil service employee, and if it is proper to delegate this function to the hearing officer it is incumbent upon him to make an appropriate report to the Board. There is no merit in this contention, for, as respondent correctly points out, the legisla-



ture had set up a procedure for disciplinary proceedings before the Board, and during the time of these proceedings section 19578 of the Government Code provided: " \* \* the board or its [duly] authorized representative shall \* \* \* hold a hearing. \* \* \*" Section 19582 provided: "The board shall consider carefully the evidence submitted in the hearing and render a decision which in its judgment is just and proper." Section 19585 provided: "Hearings may be held by the board [or any member], or any authorized representative or referee but the decision shall be rendered by the board after careful consideration of the evidence submitted in the hearing." Rule 68 of the board provided: "In cases of charges filed under Section 19574 of the act and of appeals from disciplinary suspensions, the Hearing Officer shall merely hold hearings and make return of the testimony to the Board, but he may be present during the consideration of the case by the Board, and if requested, shall assist and advise the Board."

At page 739 of Gelhorn on Administrative Law, it is said:

"Of course, it is a commonplace that most administrative agencies of importance, such as the Interstate Commerce Commission, the Securities and Exchange Commission, the Federal Communications Commission, the United States Maritime Commission, and the like (and their state counterparts) do not see the witnesses in matters coming before them. Their hearings are ordinarily conducted by trial examiners or other presiding officers, who have no power to find the facts finally and who sometimes are not even called upon to make recommendations to their superiors. Whatever may be the desirability of the procedure, there is no real doubt as to its validity, for administration would come to a virtual standstill if the heads of the governmental agencies were themselves required to preside at every hearing to receive testimony."

The findings of fact of the respondent State Personnel Board set forth that the Board "has carefully considered the evi-

dence submitted at the hearing," and in view of the presumption that "official duty has been regularly performed" Code Civ. Proc., sec. 1963, subd. 15, we may presume that the Board made its order after a review of the record and a consideration of the facts, and there is nothing in the record to dispute such presumption.

No other points raised require discussion.

In view of the foregoing the judgment is affirmed.

VAN DYKE and PEEK, JJ., concur.



**HOLMBERG v. MARSDEN et al.\***

Civ. 14836.

District Court of Appeal, First District,  
Division 2, California.

April 18, 1952.

Rehearings Denied May 17, 1952.

Hearing Granted June 16, 1952.

Action by Norman J. Holmberg against Robert G. Marsden, and others, to recover amount plaintiff subscriber paid on subscription to stock of corporation promoted by defendants. The corporation was incorporated within 90 days after receipt of \$3,000 from subscriber, who subsequently invested additional \$2,000, but corporation did not secure permit authorizing collection of subscription as required by statute. The Superior Court, County of Alameda, O. D. Hamlin, Jr., J., entered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that subscription transaction was void, and subscriber could recover consideration collected by corporation.

Judgment reversed.

**1. Licenses**  $\hookrightarrow$  18 1/2 (27)

Where member of partnership needing more capital proposed to plaintiff that he invest \$4,000 or \$5,000 in one-third stock of new corporate enterprise which was to succeed partnership, and corporation was incorporated within 90 days after receipt of plaintiff's \$3,000 check payable to corpora-

\* Subsequent opinion 248 P.2d 417.

tion, and plaintiff subsequently invested additional \$2,000, defendants were promoters, but plaintiff was preincorporation subscriber entitled to return of his investment under Corporate Securities Act, and was not joint venturer or partner with defendants. Corporations Code, § 25153.

## 2. Corporations ⇐121(5)

In action to recover \$5,000 contributed in money and services by plaintiff for one-third stock interest in corporation, where one of promoters urged plaintiff to make independent investigation prior to investment and plaintiff did so, evidence showed that fraud did not exist.

## 3. Licenses ⇐18½(5)

Irrespective of integrity of organizers or directors of a corporation, the law must be obeyed. Corporations Code, § 25153.

## 4. Licenses ⇐39.9, 39.15, 39.17

Where corporation, having two promoters and subscriber as shareholders, was incorporated within 90 days after subscriber paid \$3,000 on sum he subscribed, but corporation did not obtain permit authorizing collection of amount subscribed as required by statute, subscription transaction was void, and subscriber was not in *pari delicto* with promoters, although he was informed regarding corporate business, and could recover amount paid on subscription. Corporations Code, § 25153.

---

Desmond N. Bonnington, Oakland, for appellant.

James W. Harvey, San Francisco, Dorothy E. Handy, San Francisco, of counsel, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment in favor of defendants for their costs. A new trial was denied.

The action was brought to recover \$5,000 contributed in money and services by appellant for a one-third stock interest in a corporation known as M. & H. Kiln & Lumber, Inc. The first count of the complaint pleaded a violation of the Corporate Securities Act in that the plaintiff's

money was collected before a permit had been secured for the issuance of his stock; the second was based on fraud, and the third was for money had and received. The findings were adverse to plaintiff on all three counts.

The evidence, which is without substantial dispute, shows that in 1948 respondents Robert G. Marsden and Robert W. Marsden, his son, were partners in the lumber business in Emeryville, operating under the name West Coast Export Materials. Newsom & Bechtel, Inc., had a lumber plant there for which the Marsdens were negotiating. More capital was needed, however, and R. W. Marsden, a close friend of plaintiff, telephoned on November 16, 1948 to him at Seattle proposing his participation in the new enterprise not only financially to the extent of \$4,000 or \$5,000, but as an active member of the concern.

Plaintiff, who had lived for years in Seattle, said that he did not have very much to invest and that if he became interested it would not be as a partner (for partnerships often led to dissension) but on "a corporate basis." Marsden replied that that was intended, and that the ownership of the stock would be equal, one-third to each Marsden and one-third to plaintiff. He suggested that plaintiff come down to look over the plant and discuss the whole matter. The telephone conversation was confirmed by a letter written the same night. A few days later plaintiff flew down over the week-end and spent a Sunday with the Marsdens, looking over the plant and discussing the project. He apparently was favorably impressed, and returned to Seattle to wind up his affairs, with an oral commitment to the Marsdens that he would invest \$5,000 and join them on January 1 to take an active part in the business, with a one-third stock interest therein.

The Marsdens had articles drawn up for a corporation called Cal Kiln & Lumber, Inc. and mailed them to plaintiff in Seattle, who signed as an incorporator, the other two being the Marsdens. When he returned them, signed and acknowledged, he sent a cashier's check for \$3,000 dated November 29, payable to Cal Kiln & Lumber, Inc., which was endorsed in that name by R.

G. Marsden and promptly deposited. A payment was then due on a conditional sales contract between Newsom & Bechtel, Inc. and R. G. and R. W. Marsden for the purchase by the latter of a lumber kiln and other equipment. This payment had been delayed, and admittedly plaintiff's \$3,000 was needed, and used, to make it, together with money supplied by the Marsdens.

Meanwhile the articles had been sent to the Secretary of State, who returned them because the name conflicted with that of an existing corporation. A new name was chosen, viz., M. & H. Kiln & Lumber, Inc. (the M. & H. meant Marsden & Holmberg). The new articles were filed on December 23, 1948 in that name and a certificate of incorporation issued. Plaintiff did not sign the new articles, but an employee of the Marsdens was used as the third incorporator for convenience.

Plaintiff arrived in Emeryville as agreed on January 1, 1949, and on the 3rd an organization meeting was held which he attended. The Marsdens and plaintiff were then advised by the secretary of Newsom & Bechtel, Inc. (an accountant who had had several years' experience in the Division of Corporations), that it would be futile to apply at that time for a permit to issue stock since the new corporation had insufficient financial standing to warrant it. It was agreed that the application should be deferred until a satisfactory showing could be made.

R. G. Marsden was president and a director of the corporation and had charge of the office; R. W. Marsden was vice-president and a director and had charge of sales, and plaintiff was a director and secretary-treasurer, with authority to sign checks and promissory notes. During the six months from January to June he kept informed of everything going on in the business by daily discussions with the Marsdens. He worked in the yard and had supervision of several men.

Certain contracts which at the time of the Marsden-Holmberg negotiations were thought to be assured and with promise of good profits, either did not materialize or were not profitable as had been anticipated. In short, the business outlook in the spring

of 1949 was not bright, to say the least. It had been agreed that the Marsdens and plaintiff, all of whom were working actively in the business, would each have a salary or drawing account of \$100 a week. On February 14, 1949 plaintiff made a further payment of \$1,500. It had been agreed earlier that the remaining \$500 on his \$5,000 commitment would be treated as paid off by his foregoing the payment of his \$100 a week salary for 5 weeks.

In May the corporation's liabilities exceeded its assets and plaintiff requested the return of the \$5,000 which was refused because as both Marsdens testified funds were short. This action was filed soon thereafter.

Plaintiff cites § 25153, Corporations Code, enacted in 1949, which was formerly § 33 of the Corporate Securities Act, Act 3814, 2 Deerings Gen.Laws 1944, p. 1418, at pp. 1438-9. At the time of this transaction § 33 was still in effect, but there is no substantial difference between it and the present § 25153. The former section read: "Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic or foreign corporation made prior to the incorporation thereof; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter, and, when incorporated, shall with reasonable diligence apply for and secure from the commission a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; provided, however, that \* \* \* *nothing herein contained shall be construed as permitting the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection; \* \* \**" (Emphasis added.)

There was prompt compliance with the 90-day condition but none with the permit requirement, and appellant contends that respondents violated the law when they collected the \$5,000.

Respondents' position is that they did not offer to sell a "security" to appellant;



that the evidence does not show a debtor-creditor or buyer-seller relationship between the parties, but that, instead, it shows their relationship "was that of co-promoters, joint venturers, or partners, who in good faith associated themselves together for the purpose of acquiring property and organizing and operating a corporation."

[1] The uncontradicted testimony of appellant and the documentary evidence establish a pre-incorporation subscription (see 6A Cal.Jur. pp. 433-441, §§ 249-252) and that evidence at the same time negatives a partnership relation. Take the \$3,000 check for instance, which was made payable to Cal Kiln & Lumber, Inc. Had it been made payable to the Marsdens there might be some room for the claim that it was intended either as a personal loan to them pending incorporation, or a partnership contribution.

That the Marsdens were promoters is beyond question since the son, acting for both of them, solicited appellant's subscription of \$4,000 or \$5,000 for a one-third stock interest in the corporation. Their project at that time urgently needed further capital and appellant supplied it. It was his \$3,000 that held together the nucleus of the corporation's operating property for which the Marsdens had already negotiated. Appellant did nothing to indicate that he was a promoter, or otherwise than a subscriber, between the time he sent his \$3,000 check on November 29 and the organization meeting on January 3. There was no further promotion activity, and no need for any, since it was to be nothing but a three-man corporation.

[2] It may be conceded that all three men acted in good faith. R. W. Marsden from the outset urged appellant to make an independent investigation, and he made it. The court definitely negated the fraud charges, and properly so. The problem presented is not one of good or bad faith but simply one arising from the violation of a clear and positive statutory prohibition.

[3] In California Western Holding Co. v. Merrill, 7 Cal.App.2d 131, 153, 46 P.2d 175, 186, the court said that "under the law actual good faith is of no import, if the

law has not been complied with. *Boss v. Silent Drama Syndicate*, 82 Cal.App. 109, 115, 255 P. 225; *Commercial Bldg. Co. v. Levy*, 108 Cal.App. 54, 56, 290 P. 1048. As said in *Herkner v. Rubin*, 126 Cal.App. 677, 682, 14 P.2d 1043, 1045: 'Irrespective of the integrity of the organizers or directors of a corporation, the law must be obeyed.'

There is too much undisputed evidence of a subscription herein to justify a finding or conclusion that the parties were merely joint venturers or partners. Indeed, there was no such finding.

The \$3,000, followed by the \$1,500, went directly into the working capital of the corporation, and appellant's 5 weeks of labor without compensation was the same as if he had paid in the \$500 and received it back as salary.

[4] The only remaining question is whether the parties were in *pari delicto*. The case of *Randall v. California L. B. Syndicate*, 217 Cal. 594, 20 P.2d 331 and the numerous authorities cited therein make it clear that that rule does not apply in cases such as this. The same cases hold that, the transaction being void, the subscriber may recover the consideration collected by the corporation.

The instant case is not similar to that of *Morris v. Whittier Amusement Co.*, 123 Cal. App. 121, 10 P.2d 1017, cited by respondents, where the parties associated themselves for the purpose of acquiring the property, and *afterward* forming a corporation. It is true that the two Marsdens were already partners, but from their very first contact with appellant nothing was ever contemplated between the trio but a corporation. There was no twilight zone after appellant's participation was solicited.

Respondents cite *Domenigoni v. Imperial L. S. & M. Co.*, 189 Cal. 467, 209 P. 36, but there is no similarity at all between the facts of that case and this. The same may be said with respect to *Menke v. Rand Mining Co.*, 81 Cal.App.2d 169, 183 P.2d 755, also cited by respondents.

The judgment is reversed.

NOURSE, P. J., and JONES, Justice pro tem., concur.

110 Cal.App.2d 362

**ANDERSON v. WAGNON et al.**

Civ. 8020.

District Court of Appeal, Third District,  
California.

April 12, 1952.

Action by Daniel O. Anderson against Harry Spencer Wagon, Mrs. B. H. Clark, Sr., an incompetent person, acting by and through Charles G. Clark and another, as guardians of her estate, and another to recover damages for injuries allegedly caused by negligent operation of an automobile. The Superior Court, Sonoma County, Donald Geary, J., entered judgment for plaintiff, and defendant Clark, acting through the guardians of her estate, appealed. The District Court of Appeal, Schottky, J. pro tem, held that the evidence sustained conclusion that registered owner had impliedly consented to use of automobile by her daughter at whose request it was being operated by first named defendant as daughter's agent at time of accident.

Judgment affirmed.

**1. Appeal and Error** ⇨1010(1)

A judgment may not be reversed upon the ground of insufficiency of the evidence, unless, accepting the full force of the evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it appears that the law precludes such prevailing party from recovering a judgment.

**2. Appeal and Error** ⇨931(1), 989

On appeal from judgment upon the ground of insufficiency of the evidence, the evidence must be construed most strongly against losing party, every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of prevailing party, prevailing party's evidence must ordinarily be accepted as true, and contradictory evidence must be disregarded.

**3. Evidence** ⇨589

Trial court need not give full credence to testimony of defendants having an interest in the result of case, where such testimony contains contradictions, discrepan-

cies and inconsistencies detracting from its credibility.

**4. Automobiles** ⇨242(6)

Implied permission by owner to use automobile within meaning of statute making owner liable for negligent operation with express or implied permission of owner, may be inferred without knowledge of previous use or intended future use. Vehicle Code, § 402.

**5. Automobiles** ⇨244(30)

Evidence sustained conclusion that registered owner of automobile purchased by minor son and kept at owner's auto court had impliedly consented to use of automobile by daughter, who with husband was in possession of auto court, and that at time of accident automobile was being operated by another occupant of auto court at the request and as the agent of owner's daughter and that hence owner was liable under statute for injuries caused by negligent operation of automobile. Vehicle Code, § 402.

---

Palmer & York, Calistoga, for appellant.

DeCastle & Eymann, Santa Rosa, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff brought an action to recover damages for personal injuries sustained on June 21, 1944, as a result of the alleged negligent operation of an automobile operated by defendant Wagon. It was alleged that the automobile was under the control of defendant Marshall, and owned by defendant Clark; and that Marshall was operating the automobile "with the knowledge, consent, permission and authority of defendant Clark."

The cause was tried by the court, sitting without a jury, and the court found (1) that "the defendant Harry Spencer Wagon was driving said automobile under the express direction and control, and for the use and purpose of defendant Florence Marshall"; and (2) that "defendant Harry Spencer Wagon was driving the said automobile with the knowledge, permission, consent and authority, express or implied,

of the defendant Mrs. B. H. Clark, Sr." Judgment was entered in favor of plaintiff in the sum of \$12,500, except that recovery against defendant Clark was limited to \$5,000, the statutory liability limit pursuant to section 402 of the Vehicle Code. Defendant Clark has appealed from the judgment.

The sole question involved in this appeal is appellant Clark's liability under section 402 of the Vehicle Code, which section makes the owner of an automobile liable for its negligent operation by another person with "the permission, express or implied" of the owner. Appellant contends that the evidence is insufficient to support the court's finding that the automobile was being used with her permission at the time of the accident.

[1,2] It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded. With this familiar rule in mind, we shall give a brief summary of the evidence as shown by the record.

Appellant Clark became the owner of an auto court in Calistoga, California, following the death of her husband, January 7, 1943. She did not live at the auto court after her husband's death. Her son, a minor, lived at the court and managed it. In March, 1943, the son purchased the automobile in question. The registration certificate was made out in appellant's

name, following her written application therefor. The appellant provided \$200 for the purchase, and her son added approximately \$50. Regarding her part in the purchase of the automobile, appellant testified: "I gave my youngest son money as a gift and he had always worked for my husband very well; we sent him to school and don't know what wages he had but he always paid out for his expenses and lived at home and he was working for my husband. So having some money and an extra check from the brother Charles Clark, an extra check coming in to help my husband long before he passed away from his brother, so I gave that check to my son Charles to purchase an automobile—Charles Franklin Clark."

Appellant's son entered the army on April 28, 1943. The automobile remained at the auto court. In May, 1943, defendant Marshall, appellant's daughter, moved into the auto court. Appellant testified that this move was made without her knowledge or permission. Appellant further testified: "Q. After you had found them to be in possession of the property did they make any arrangement with you relative to the management of the property or the payment of rentals to you or anything of that sort? A. Well, in case they had rented the cabins I may have told them to give me something but I don't think they were renting them much or whether they had anything but in case they did, I might have asked them."

Defendant Wagnon was living at the auto court at the time of the accident. He testified that defendant Marshall used the automobile all the time, and that he had no recollection of any other car being on the premises; that defendant Marshall replaced the tires; that he drove the car a number of times and that defendant Marshall gave him the keys when he drove it.

Appellant Clark testified that she did not drive; that someone informed her that the car was in her name; that "I think I have probably told my daughter perhaps not to drive it—I might have told her, I don't know. I am not sure whether I did"; that her daughter did not tell her that she was using the car; that she never saw the



daughter use the car; and that she had no reason to believe she was using the car.

Appellant's son testified that his sister, defendant Marshall, asked his permission to use the car and he refused; and that he instructed her to put the car in storage.

During the period the premises were occupied by appellant's daughter, the appellant visited the auto court. She visited at least once a month in 1943 and less frequently in 1944. Her last visit was three or four days prior to the accident.

The highway patrol officer testified that the registration slip showed registration to defendant Marshall. Defendants' Exhibit introduced at page 121, a certified copy of the records of the Motor Vehicle Department, shows the car to have been registered to appellant at the time of the accident.

On the day of the accident, defendant Marshall drove the car to Santa Rosa from the auto court in Calistoga. She was accompanied by defendant Wagon. The accident occurred on the return trip. Wagon was operating the vehicle. According to Wagon, defendant Marshall was intoxicated and asleep.

There was no direct testimony that appellant Clark consented to defendant Marshall's driving the automobile, nor was there any testimony that appellant was present when either defendant Marshall or defendant Wagon was driving it.

In arguing that the evidence is insufficient to show that the automobile was operated with the consent of the owner, appellant asserts that her evidence is not contradicted and that such evidence shows that she did not give her express consent and that she had no knowledge prior to that accident that the automobile was used by her daughter, the defendant Marshall, or by defendant Wagon. We doubt the correctness of this assertion of appellant and believe it is contradicted by the evidence in the record, with the inferences which may reasonably be drawn therefrom. But even if appellant were correct in stating that there was no evidence to show her express consent and knowledge, we agree with respondent's contention

that such facts were peculiarly within the knowledge of defendants, and that implied permission to use an automobile may be found even where the owner and permittee expressly deny that permission was given.

The following language of the court in *Casey v. Fortune*, 78 Cal.App.2d 922, at page 924, 179 P.2d 99, at page 100, is applicable:

"Even though the testimony of the owner and the driver of the automobile was uncontradicted, the trial judge was not required to accept it. Appellant's answers were evasive as to whether she had knowledge, prior to the night of the accident, that Robert had been driving the automobile. While prior knowledge is not a necessary element of implied permission (*Burgess v. Cahill*, 26 Cal.2d 320, 324, 158 P.2d 393, 159 A.L.R. 1304), the evidence was sufficient to support a finding that appellant did have knowledge prior to the accident that Robert had been driving her automobile. Although she said that she 'didn't want' him to drive the automobile and she had told him the reason why she didn't want him to drive it, and although the circumstances with respect to his prior use of the automobile were such that she should have suspected that he had disobeyed her, she did nothing further on the night of the accident to prevent him from using the automobile. On the contrary, she continued to keep the keys where they were easily obtainable by him, 'in plain view, on the buffet where 'We always keep our keys.' The court may have concluded that, under the circumstances, the keeping of the keys in such an accessible place refuted her testimony that he was told not to use the automobile."

[3] And in *Flemmer v. Monckton*, 73 Cal.App.2d 271, at page 275, 166 P.2d 380, at page 382, the court said:

"The facts which warranted the trial court in refusing to give full credence to the testimony of defendants are: (1) That both witnesses had an interest in the result of the case.

Hicks v. Reis, *supra*, 21 Cal.2d [654] at page 659, 134 P.2d [788] at page 790; Blank v. Coffin, *supra*, 20 Cal.2d [457] at page 462, 126 P.2d [868] at page 871. See, also, cases collected in 27 Cal.Jur. 180, § 154; and (2) that there were contradictions, discrepancies and inconsistencies in the testimony of both defendants which could have been deemed to detract from its credibility. Hicks v. Reis, *supra*, 21 Cal.2d at page 659, 134 P.2d [788] at page 790; Blank v. Coffin, *supra*, 20 Cal.2d at page 462, 126 P.2d [868] at page 871.)”

See, also, Bloyd v. Senn, 100 Cal.App.2d 597, 224 P.2d 117.

We believe that the following quotation from the thorough and well-reasoned memorandum opinion of the learned trial judge is fully sustained by the record and the authorities:

“This court is of the opinion that under the foregoing and hereinafter cited authorities the evidence herein must be deemed to establish the implied permission of defendant Clark for defendant Marshall to operate the Plymouth sedan; that the following ‘significant factors’ dictate such a conclusion. (Scheff v. Roberts, 35 [Cal.2d 10, 14-16, 215 P.2d 925]):

“At the time the automobile was purchased the defendant Clark insisted that the same be registered in her name; from March, 1943, to April, 1944, the automobile was used by defendant’s seventeen year old son, Charles F. Clark, without apparent knowledge and total unconcern by defendant Clark of the character of the use of the car by said minor son; upon Charles F. Clark’s induction into the service the automobile was left upon defendant Clark’s premises which were then or immediately thereafter in charge of defendant Marshall and her husband; despite the fact that upon the son’s induction into the service, defendant Clark was warned by other members of her family that the automobile was registered in her name as the owner thereof, no steps were taken by her

to prohibit or restrict the use of the automobile by defendant Marshall or any other person, either by the removal of the ignition key or any other proper and reasonable measures; despite the fact that the automobile was registered in her name and was upon her property, defendant Clark made no effort to ascertain whether the same was being used and visited the premises upon which said automobile was maintained upon only two occasions between April, 1943, and June 21, 1944.”

[4] Appellant contends that to find implied consent either knowledge or past use or reason to believe the vehicle will be operated must be established, and cites Bradford v. Sargent, 135 Cal.App. 324, 329, 27 P.2d 93, 96, where the court stated:

“Express permission would necessarily include prior knowledge of the intended use and an affirmative and active consent to it. An implied consent would indicate a sufferance of use or a passive permission deduced from a failure to object to a known past, present, or intended future use under circumstances where the use should be anticipated. Knowledge of some act or intended act on the part of the user by the owner should be necessary before consent to use should be implied. People v. Conness, 150 Cal. 114, 88 P. 821; Cramer v. Jenkins, 82 Cal.App. 269, 255 P. 877, 256 P. 444; People v. Duncan, 22 Cal.App. 430, 134 P. 797. It is obvious that the burden of proving an express or implied permission rests on the party asserting the protection of the statute.”

But in the later case of Burford v. Huesby, 35 Cal.App.2d 643, at page 647, 96 P. 2d 380, at page 382 (hearing in Supreme Court denied), the court said:

“\* \* \* It may be conceded that there was no evidence to show that express permission had been given with prior knowledge of the intended use at the particular time and place, but as indicated by the above-mentioned authorities, it was not necessary to show such express permission or such

prior knowledge. 'Implied' permission was sufficient and we are of the opinion that the evidence relating to to conduct of the parties and the circumstances existing at the time fully justified a finding that defendant Huesby had implied permission to use said automobile of defendant Juett for the purpose for which he was using it at the time the accident occurred."

And in *Burgess v. Cahill*, 26 Cal.2d 320, at page 323, 158 P.2d 393, at page 394, 159 A.L.R. 1304, the Supreme Court said:

"Prior to the enactment of the imputed liability statute the general rule was that the owner of an automobile who was not present at the time of the negligent act which caused injury to a third person could not be held liable unless it was shown that the person in charge was the agent or servant of the owner and at the time was engaged in his service. *Buelke v. Levenstadt*, 190 Cal. 684, 214 P. 42.

"A reading of the language of the statute and a review of the decisions in this state reveal that the legislative purpose in the enactment of section 1714 $\frac{1}{4}$  of the Civil Code (now section 402 of the Vehicle Code), was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The wording of the statute is clear and indicates that purpose. The statute defines the owner's liability in cases where the principle of *respondet superior* is inapplicable, in order to make the owner liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car. *Souza v. Corti*, 22 Cal.2d 454, 457, 139 P.2d 645, 147 A.L.R. 861, citing *Bay-*

*less v. Mull*, 50 Cal.App.2d 66, 122 P. 2d 608; *Plaumbo v. Ryan*, 213 App. Div. 517, 210 N.Y.S. 225. The legislation was plainly intended to enlarge the liability of the nonculpable owner of a motor vehicle for its operation on a public highway. The foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public.

"In construing the statute earlier cases have seemed to turn on the question of knowledge or information on the part of the owner that the vehicle was being driven by the person with whose negligence he is sought to be charged, before implied permission could be inferred. For example, in *Howland v. Doyle*, 6 Cal.App.2d 311, 44 P.2d 453, 455, it was said: 'A person cannot be said to have permitted that of which he had no knowledge or information,' citing *Bradford v. Sargent*, 135 Cal.App. 324, 332, 27 P.2d 93. But in *Burford v. Huesby*, 35 Cal. App.2d 643, 96 P.2d 380, it was recognized that prior knowledge was not necessary in order that implied permission be inferred, and that knowledge or information of the intended use of the car had reference to the element of 'express' as opposed to 'implied' consent."

[5] In view of the foregoing we are convinced that the record and the law fully support the conclusion of the trial judge that the defendant Marshall operated and used the automobile in question with the implied permission of defendant and appellant Clark, and that upon the morning of the accident defendant Wagnon was operating the said automobile at the request of and as the agent of defendant Marshall.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



110 Cal.App.2d 380

**LAWRIE v. LAWRIE.**

Civ. 18649.

District Court of Appeal, Second District,  
Division 1, California.

April 16, 1952.

Divorce proceeding by wife on ground of extreme cruelty. The husband filed a cross-complaint for divorce on the same ground. The Superior Court of Los Angeles County, Robert Gardner, J., entered judgment awarding plaintiff divorce and home, and husband another parcel of realty. The husband appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained the judgment of divorce and the finding that property involved was in fact community property.

Judgment affirmed.

**1. Divorce ⇨184(10)**

In divorce case, the question whether extreme cruelty exists is to be determined by trial judge, who is vested with great latitude in determining weight and sufficiency of evidence which is presented, and, as he is in best position to judge credibility and determine motives of parties and witnesses, his conclusions will not be disturbed unless evidence is so slight as to indicate an abuse of discretion. Civ.Code, § 94.

**2. Divorce ⇨27(7)**

A course of conduct by which one party to marriage continually indicates dissatisfaction with other party and makes such dissatisfaction known to friends of parties may well cause humiliation, embarrassment and mental anguish to degree constituting extreme cruelty. Civ.Code, § 94.

**3. Divorce ⇨116**

Proof of extreme cruelty may be made by testimony of cruel remarks made by one spouse to the other. Civ.Code, § 94.

**4. Divorce ⇨130**

Evidence sustained judgment of divorce in favor of wife on ground of extreme cruelty. Civ.Code, § 94.

**5. Husband and Wife ⇨264**

In divorce proceeding, where both parcels of land were acquired during marriage and were purchased from husband's earnings, evidence sustained finding that land was held in joint tenancy for convenience only and was in fact community property. Civ.Code, § 94.

Block &amp; Dunbar, Compton, for appellant.

George Arnold Wilde, Compton, for respondent.

DRAPEAU, Justice.

On June 28, 1949, plaintiff filed her action for divorce against defendant on the ground of extreme cruelty. The complaint alleged that the community property included two parcels of realty. The answer denied the cruelty and also the community character of the realty, alleging that it was held in joint tenancy. Defendant filed a cross-complaint for divorce on the ground of extreme cruelty which was denied by plaintiff's answer.

After a lengthy trial, the court found that both parcels of real estate were community property; that defendant had wrongfully inflicted upon plaintiff great and grievous physical and mental suffering and that the allegations of defendant's answer and cross-complaint were untrue.

The interlocutory judgment awarded plaintiff a divorce from defendant and divided the property between them, awarding the home to plaintiff and the other parcel of realty to defendant.

Defendant appeals.

The parties hereto have been married over thirty years; have two married daughters and a minor son. Both husband and wife work; both are highstrung and nervous. Husband is a veteran of World War I and suffers from pernicious anemia. His mother lives in the home.

Plaintiff testified that she and her husband had quarreled all during their married life; that husband was habitually intemperate although he worked steadily; that he drank after working hours "almost con-

tinuously every night \* \* \* he drinks beer in the house and has a bottle of wine in the garage." Also, that on one occasion he knocked her down and threatened to choke her; called her names and swore at her, embarrassed and humiliated her before other people, causing her to become nervous and ill.

With respect to specific acts of cruelty, plaintiff testified that on June 12, 1949, defendant came into her room at 7:30 A.M. "he got in bed with me and his breath smelled of liquor and I asked him if he had been drinking and he said 'No.' \* \* I said 'Your breath smells terrible.' \* \* And he started to get up out of bed and he pulled me back and I made it out and then he threw me on the floor and put his knee in my neck and held me there for a few minutes and then he let me go and then I screamed for my son, and when I did that he put his knee in my chest and said, 'God damn you, I'll choke you to death.' \* \* by that time I was very nervous, so I got up and left the room. \* \* \* I took a bath and I didn't have my dress on and I had washed some stockings the day before and left them in the wash room and I went out there to get the stockings to put on to go to work. He was in the kitchen starting to prepare breakfast \* \* \* when I started to come back into the room he would get on one side to keep me from getting in and I (went) back to the garage \* \* \* And I called my son (to) \* \* come stay in the room until I got dressed and went to work. \* \* \* Then when I turned around \* \* \* my husband was coming out of the door and he had my son's kodak \* \* \* he said 'Damn you, I am going to take your picture to show to your friends and your children how you went outside and the way it looked \* \* ' And there was a hose right there and I picked up this hose with the intention of knocking the kodak out of his hand, and I knocked the kodak out of his hand and also hit him on the hand when I did it."

On June 15, 1949, when plaintiff returned home from work at 9:00 in the evening, she found her husband in an intoxicated condition with red face and glassy eyes, which "frightened me so terribly" that she

went to a friend's house where she stayed all night.

On Sunday, June 5th, plaintiff stayed all night with her daughter and went directly to her work on Monday morning without stopping at her home; that when she arrived her employer asked "Mrs. Lawrie, how is your son?" She replied "What do you mean? \* \* \* and he says 'Your husband was down to the store and says your son was very ill and might have to have an operation.'" That her employer took her home and she went into the house and found that her "son was lying on the davenport". Before she spoke to him "He started to laugh and said 'Mother, why don't you go on back to work? There isn't anything the matter with me.' By that time the Mister had heard me talking to Junior and he came out then and he was so mad he didn't know what to do and he says, 'What in the hell are you doing here? You go back to work where you belong.'"

On one occasion when she attended a theatre with her husband's knowledge, she found the doors to the house locked when she returned home. On another, when a salesman was demonstrating a vacuum cleaner for plaintiff, her husband came into the room and said, "What in hell is going on here. \* \* \* I want you to know that I will not pay any bills that my wife incurs."

During this period, plaintiff was expecting her sister to visit her and she asked defendant to have the house redecorated because it was greatly in need of it. He refused saying, "We like it just like this and we can just continue on living in it like this, and I would like to have your sister come out here and see what a dirty housekeeper you are." Plaintiff and one of her daughters did some painting themselves which defendant said "was a lousy job and I should be ashamed to have anyone see it." Defendant also stated to plaintiff "I am telling you one thing, your sister comes out here, and I'm going to show her just how mean I can get, and I am going to drink and do everything else." The sister did visit plaintiff and during that time defendant did drink a lot.

One of their sons-in-law contracted polio, and defendant said to plaintiff, "Well, it was probably you that carried polio to Bill." Plaintiff testified she took this remark seriously, thought her husband meant it and still thinks so.

The two daughters took the stand and corroborated plaintiff's testimony with respect to defendant's drinking, name-calling, and his attitude in general toward their mother which resulted in the latter becoming very nervous and upset. One daughter testified that in May of 1949, her father asked her to try to persuade plaintiff to sign a note because "all he wanted was \$10,000.00 and his mother and he didn't care about his family."

Defendant either denied or explained away each incident brought out by testimony on behalf of plaintiff.

It is here urged that the judgment was not justified because respondent's evidence showed that she was equally responsible for the family discord, and that the alleged acts of cruelty on the part of appellant did not cause her grievous mental suffering.

[1] In *Keener v. Keener*, 18 Cal.2d 445, 447, 116 P.2d 1, 2, our Supreme Court held: "Section 94 of the Civil Code defines extreme cruelty as 'the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage'. In each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. *Barnes v. Barnes*, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; *MacDonald v. MacDonald*, 155 Cal. 665, 102 P. 927, 25 L.R.A.,N.S., 45; *Avery v. Avery*, 148 Cal. 239, 82 P. 967; *Cline v. Cline*, 4 Cal.App.2d 626, 41 P.2d 588; *Shaw v. Shaw*, 122 Cal.App. 172, 9 P.2d 876; *Davis v. Davis*, 58 Cal.App. 100, 102, 207 P. 923; *Van Camp v. Van Camp*, 53 Cal. App. 17, 22, 199 P. 885. A correct decision must depend upon the sound sense and judgment of the trial court. *Barnes v. Barnes*, supra; *Shaw v. Shaw*, supra. Its

conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. *MacDonald v. MacDonald*, supra; *Davis v. Davis*, supra; *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298.

[2] "A course of conduct by which one party to the marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty."

In *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 74, 187 P.2d 840, 842, it was said: "Conduct that would induce grievous mental suffering sufficient to constitute extreme cruelty depends upon the circumstances of each particular case, and the finding of a trial court based upon any reasonable analysis of the facts and circumstances as reflected by the evidence will not be disturbed on appeal. *La Mar v. La Mar*, 30 Cal.2d [898], 186 P.2d 678; *Barnes v. Barnes*, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298; *Keener v. Keener*, 18 Cal.2d 445, 116 P.2d 1; see, also, *Hansen v. Hansen*, 86 Cal.App. 744, 261 P. 503, and *McFall v. McFall*, 58 Cal.App.2d 208, 136 P.2d 580."

[3] "Proof of extreme mental cruelty may be made by testimony of cruel remarks made by one spouse to the other. *Maloof v. Maloof*, 175 Cal. 571, 166 P. 330." *Stevens v. Stevens*, 92 Cal.App.2d 85, 87, 206 P.2d 418, 419.

[4] It is evident from the authorities cited that the trial judge is vested with great latitude in determining the weight and sufficiency of all evidence presented to him in an action such as this. The parties and the witnesses were before him and he was in the best position to judge their credibility and to determine their motives. The instant action was hotly contested and much of the evidence is in direct conflict. However, there is sufficient evidence, if believed, to support the judgment of divorce in favor of respondent. As a result, this court is powerless to intervene.



[5] Appellant also complains that there was no evidence to support the finding that the two parcels of real property standing in the names of the parties as joint tenants, were in truth community property.

The trial court found that the realty was held in joint tenancy for convenience only, and in fact was community property.

Respondent testified that when the home place was acquired in 1931, she and her husband went to the bank to sign the papers, appellant told her it was not necessary for her to read them, because "It is community property, it is all right. You don't have to read it today." Subsequent thereto, that appellant on several occasions stated that "he wasn't going to have any more community property." With respect to this particular transaction, appellant stated that the bank clerk told him and his wife that if she were buying the property she would take it as joint tenants; that if appellant died "it went to my wife and if she passed away it automatically went to me"; and that he understood right of survivorship to mean "automatically go to the other party without them having to go to court to have the matter adjusted, which would be added expense for poor people."

When the second piece of property was acquired in 1933, respondent testified that appellant's father accompanied them to the bank and told her in the presence of appellant, "Viola, you can take my word for it, it's O.K., it's community property and you go ahead and sign it and it will save time." Appellant made no comment at the time.

When asked what she understood community property to mean, respondent said: "My idea of community property was that everything should be divided equally and if we had two places it should be divided equally", and if her husband died, she would get it. To the question "Did you have any understanding as to whether or not you could dispose of your half without his consent or his joining, respondent replied: "I never even thought to ask that question. That never entered my head that we could do a thing like that."

It is conceded that both parcels were acquired during the marriage relation and were paid for out of the husband's earnings.

We believe this evidence is sufficient to sustain the trial court's finding that the properties were acquired in joint tenancy for convenience, but in truth were community property of the parties.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



**KELLY v. BANK OF AMERICA, NAT.  
TRUST & SAVINGS ASS'N. \***

**Civ. 4367.**

District Court of Appeal, Fourth District,  
California.

April 15, 1952.

Rehearing Granted May 14, 1952.

Action by Everett O. Kelly against Bank of American National Trust and Savings Association, as executor of the last will and testament of Arthur H. Kelly, deceased, to quiet title to certain realty which had allegedly been subject of gift deed from decedent to plaintiff. The Superior Court of Tulare County entered judgment for defendant and order denying plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence established that there had been no intent on part of father at time of handing deed to son, that deed should become presently operative as such and should presently pass title.

Judgment affirmed; appeal from order denying motion for new trial dismissed.

**1. Appeal and Error ⇨110**

An order denying new trial is not appealable.

**2. Evidence ⇨269(2)**

In action to quiet title, brought by plaintiff against executor of estate of his

\* Subsequent opinion 246 P.2d 92.

deceased father, wherein primary issue was whether plaintiff's father, when manually delivering gift deed of realty to plaintiff, had intended that deed should be presently operative, evidence of acts and declarations of plaintiff's father and plaintiff subsequent to execution of gift deed was admissible.

### 3. Evidence ⚡269(2)

When intent is material element of disputed facts, declarations of decedent made after, as well as before, alleged act, which indicate intent with which decedent performed act, are admissible in evidence as exception to hearsay rule, and it is immaterial that such declarations are self-serving.

### 4. Deeds ⚡56(2), 66

The question of delivery or nondelivery of deed is question of fact to be determined from surrounding circumstances of transaction, and in order to constitute valid, effective delivery it must be shown that grantor intended to divest himself of title.

### 5. Deeds ⚡66

Whether requisite intent of grantor to divest himself of title accompanies delivery of deed is question of fact for determination by trial court or jury.

### 6. Appeal and Error ⚡1011(1)

Where finding of trial court that there had been no delivery of gift deed on which plaintiff based quiet title action had been based on analysis of conflicting evidence, such finding would not be disturbed by appellate court.

### 7. Wills ⚡88(4)

Where deed was manually delivered by father to son prior to serious operation by father, if it was intention of father that title to property would pass to son only in event that father did not survive operation, then deed was inoperative as constituting attempt to make testamentary disposition of property without formalities required for execution of will.

### 8. Wills ⚡88(1)

A deed, the purpose of which is intended to be testamentary, cannot be given effect.

### 9. Gifts ⚡49(3)

In action against decedent's estate to quiet title, wherein plaintiff's claim was based upon gift deed from plaintiff's deceased father, and it appeared that deed had been manually delivered to son prior to serious operation on father, but that father had thereafter procured repossession of same, evidence sustained finding that father had not intended to presently pass title to property at time he handed deed to son.

---

McFadzean, Crowe & Mitchell, Visalia, for appellant.

Maddox & Abercrombie and Erling H. Kloster, Visalia, for respondent.

MUSSELL, Justice.

[1] This is an appeal by plaintiff from a judgment and order denying a new trial in an action to quiet title against the executor of the estate of Arthur H. Kelly, the appellant's deceased father. The order is not appealable. In re Estate of Dopkins, 34 Cal. 2d 568, 569, 212 P.2d 886; Fay v. Norquist, 60 Cal.App.2d 218, 219, 140 P.2d 141.

Plaintiff's claim to title is based upon a gift deed to him from his father, Arthur H. Kelly. The deed is dated July 9, 1943, signed and acknowledged by the grantor and was manually delivered to and accepted by plaintiff on said date. The principal defense pleaded by defendant was that the said gift deed was invalid for want of a delivery with the required intent of the grantor to presently part with title. The trial court found for defendant on this issue and entered judgment in favor of the defendant, declaring that the plaintiff has no right, title or interest in said real property adverse to the estate. The principal question for our determination is whether there is any substantial evidence to support the findings and judgment.

#### Facts

A few days prior to July 9, 1943, Arthur H. Kelly called at the offices of an attorney for the purpose of having a gift deed to the property involved herein prepared in favor of his son, Everett O. Kelly. The attorney

instructed him that "He needed to deliver the deed to his son with the intent then and there to pass all his title to the property and that no conditions or secret understandings could be had by him or by his son with respect to the property; that after he had so delivered the deed, his son would be the owner of the property; that he could, if he cared to do so, request his son not to record the deed until after his death without vitiating the effect of the deed, but that his son would not necessarily have to abide by that request." The attorney stated that he did not believe in the execution of such a deed and advised Kelly "not to do it." Having been so advised, Mr. Kelly stated that he wanted to give the property to his son at that time and instructed the attorney to prepare the deed. Thereafter, on July 9, 1943, Mr. Kelly returned to the offices of the attorney with his son, Everett O. Kelly. Mr. Kelly was then instructed, for the second time, in the presence of his son, that it would be necessary for him to deliver the deed after he had executed the same, with the intent then and there to pass title to the property in question to his son; and that when he had so delivered the same, his son would be the owner of the property and that he would have no further interest therein; and that he could not thereafter recall said deed and that he could have no conditions or secret intentions with respect to the same. The attorney called in his secretary and told her to witness the remainder of the transaction. He then handed the deed to Arthur H. Kelly and stated to him: "Here is the deed. You may now do as you wish with it." Arthur Kelly thereupon, holding the deed in his hand, stated to his son, Everett O. Kelly "Here is the deed to the home property which I am giving to you without any strings attached. The only request I want to make is that you do not record the deed until after my death." He then handed the deed to his son, who accepted it, put it in his pocket and after having been advised that gift tax returns would have to be made and that probably a gift tax would have to be paid, Mr. Kelly and his son left the attorney's offices.

Everett O. Kelly testified that "On July 9, 1943, Mr. Mitchell and Miss Francis and

my Dad and myself were present. And Mr. Mitchell handed Dad the deed after he signed it and notarized it and told him he could do as he wished with it. Thereupon Dad handed me the deed and said, 'I want you to have this ranch, Everett. I am giving it to you with no strings attached whatsoever. The only thing that I ask is that you don't record it for a couple of days after my death;'" that he accepted the deed and placed it in his filing cabinet where it remained until December of 1947, when it was delivered to Arthur Kelly, at his request, and by him delivered to the attorney who prepared his will.

In December of 1947, during his last illness, Arthur Kelly requested another attorney to prepare his will and after several conversations with a trust officer of defendant bank and the attorney, Arthur Kelly, on December 15, 1947, executed a will, under the terms of which plaintiff was given certain personal property and all household effects were given to decedent's wife, Winnie Kelly. All remaining property, including the 14 acre ranch now in dispute, was placed in trust with defendant bank as trustee and executor. Winnie Kelly was given the right to live in the house and to receive the income therefrom until she should die or remarry. Plaintiff was given all remaining net income from the estate until he should die. The remainder interests in the trust estate were given to Norman Kelly Kite, a grandson of decedent's wife and certain income and principal from the sale of a lumber yard was to be divided equally and paid to Mrs. Kelly and plaintiff, with remainder to said grandson.

During the conversations had with Arthur Kelly prior to the execution of his will he was questioned as to the title of the ranch property. He mentioned the 1943 gift deed and stated it had no value; that it was in his possession, and that there would never be any trouble over it; that "He anticipated a rather severe operation and that he made the deed with the understanding that if he did not survive, it was to be used; if not, why it wasn't to be used." Arthur Kelly, being unable to find the deed among his papers, stated that he knew who had it and that he would get it back. He



asked plaintiff if he had the deed and upon ascertaining that it was in plaintiff's possession, requested plaintiff to "bring it down" so that he could check it over. Upon receiving the deed, Arthur Kelly handed it to his attorney, saying "Here it is. You can destroy it."

At the time the gift deed in question was executed Arthur Kelly was in poor health. He expected to have a severe operation and did not think that he would survive it. A few months later, an operation was performed, removing one of his kidneys, after which his health improved for a time and he was able to do some work on his ranch. In 1947 he was again very ill and died from cancer within a month or two after executing his will.

Arthur Kelly and his wife were living on the ranch property involved herein at the time of the execution of the gift deed and continued to live there until the time of his death, exercising all of the usual rights and duties of ownership in connection with his property. Insurance on the buildings was carried only in decedent's name, the premiums were paid by him and the plaintiff was not named as insured or beneficiary in the policy of insurance. Decedent borrowed money from a local bank on three occasions to finance the operation of the property and gave written financial statements to the bank showing that he claimed to be the sole owner thereof. He paid all expenses of operating the property, kept all income from it, and in his income tax return reported all the income, claimed all deductible expenses of ranch operation and took credit for all allowable depreciation on the property. Plaintiff did not occupy the ranch property after the execution of the gift deed other than to assist his father with the crops on a few occasions for which he received \$50 expense money in 1947. He took no income from the property, paid no gift or other taxes on it, and did not otherwise exercise rights of ownership over it. He did not record the gift deed and in obtaining bank loans, did not claim ownership in the disputed property in financial statements which he furnished to the bank. Other financial statements were introduced in evidence showing that in 1945 he stated

that he owned no real property and in 1947 his only real property was at Badger, California.

Mrs. Arthur Kelly, who had married the decedent in 1937, worked on the ranch and also took employment in local stores during her husband's ill health. A joint bank account was established, and a bank loan on the property was paid from it in 1947. The property was improved through the efforts of Mrs. Kelly and the decedent. During his last illness, at decedent's request, his wife transferred \$4,000 from their joint account into an account in decedent's name alone so that ranch expenses could be paid and the executor would have funds to operate it after decedent's expected death.

Decedent did not inform his wife that he had made any transfer of the property in 1943 and the plaintiff at no time told her that he had any claim to the property until after decedent's death.

It was shown that the decedent was an experienced, capable and intelligent business man who knew his own mind and was strong of will; that he had been in the lumber business for several years and had served as secretary of a service club and ditch company.

The trial court found, among other things, that Arthur H. Kelly, on July 9, 1943, signed, acknowledged and manually handed to plaintiff the gift deed, but that he did not deliver it for the purpose of conveying the property to plaintiff or with the intent of then passing any title or interest therein to him; that plaintiff did not accept conveyance of the property, as alleged in plaintiff's complaint, except that he did accept the manual tradition of said deed; that plaintiff returned the deed to Arthur Kelly without restriction or qualification; that plaintiff has never owned or been in possession or seized of all or any part of said real property or any interest therein under or by reason of said purported gift deed; that the said deed was and is invalid and of no force or effect; that plaintiff never asserted any right, title, claim or interest in or to said property under said purported gift deed until more than four months after the death of said Arthur H. Kelly; that at the time of the purported delivery of the

deed it was the mutual intent, understanding and agreement of said Arthur H. Kelly and plaintiff that said deed did not pass title to the property therein described to the grantee therein at the time or by reason of the purported delivery thereof; that plaintiff surrendered said deed to Arthur H. Kelly prior to his death and that said property was thereafter disposed of by the last will and testament of the decedent.

[2, 3]. The evidence of acts and declarations of Arthur Kelly and his son, subsequent to the execution of the gift deed, was admitted over strenuous objection of counsel for plaintiff and it is contended that such evidence was inadmissible since there was a plain and unequivocal delivery of the deed accompanied by a clear and unmistakable expression on the part of the grantor to presently pass title to the property to plaintiff. However, where, as here, the issue is whether the grantor intended that the deed should be presently operative, such testimony is admissible. *Huth v. Katz*, 30 Cal.2d 605, 608, 184 P.2d 521. As was said in *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530, 531:

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; *Donahue v. Sweeney*, 171 Cal. 388, 153 P. 708; *De Cou v. Howell*, 190 Cal. 741, 214 P. 444; see [*McBaine, Admissibility in California of Declarations of Physical or Mental Condition.*] 19 Cal.L.Rev. 231, 251."

The quoted language was stated to be a succinct statement of the rule in *Hansen v.*

*Bear Film Company, Inc.*, 28 Cal.2d 154, 174, 168 P.2d 946.

In *Huth v. Katz*, supra [30 Cal.2d 605, 184 P.2d 522], the plaintiff sought to establish a delivery of an unrecorded gift deed and an assignment of a promissory note secured by a deed of trust. The plaintiff had for several years gone to decedent's home twice a week to clean his house and to do his washing and ironing. About a year before his death decedent told her that he intended to transfer his property to her and that Mr. Webb (a real estate broker) would "draw up the papers for it." On or about June 29, 1943, plaintiff went with decedent to Webb's office, where Webb handed the deed and assignment to decedent, who in turn handed them to plaintiff, saying "They are all yours, Kid, they belong to you now." Webb testified that the decedent had called at his office and requested him to prepare the necessary papers to transfer the property to plaintiff. Webb prepared the deed and assignment and a few days later the papers were signed and acknowledged by decedent in the presence of a notary public. When decedent informed Webb that he desired to make the transfer, Webb told him that "there must be delivery" and after the papers were signed, decedent said to Webb "I want delivery." The papers were left with Webb at his office and a few days later decedent returned with plaintiff. The decedent then gave the deed and assignment to plaintiff and said "Now it is all yours." Plaintiff took the deed and assignment home but later decided that it was unsafe to keep the documents there and put them in decedent's safety deposit box, where they were found after his death. The decedent continued to live on the property after the execution of these documents until his death and collected the rentals therefrom and had the principal and interest of the promissory note credited to his account. The court affirmed a judgment for the defendant and held that a valid delivery of a deed depends upon whether the grantor intended that it should be presently operative; that a manual transfer is not conclusive evidence of such intention; that when the question at issue is whether or not there

has been a valid delivery, the possession of the deed by the grantor and his exercise of dominion and control of the property after manual transfer of the deed are facts which may be considered in determining whether he intended presently to pass title; that the fact that the deed and assignment were found in decedent's safety deposit box to which he alone had access, and the further facts that decedent continued to live on the property, collect the rentals and have the principal and interest of the note credited to his account were matters which the trial court could consider in determining whether decedent intended the deed and assignment to operate as a present transfer of the property described therein.

[4-6] The question of delivery or non-delivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction and to constitute a valid, effective delivery, it must be shown that the grantor intended to divest himself of title. *Miller v. Jansen*, 21 Cal.2d 473, 477, 132 P.2d 801; *Williams v. Kidd*, 170 Cal. 631, 638, 639, 151 P. 1. The act of the delivery of the deed must be accompanied with the intent that it shall become presently operative as such and presently pass title. *Fay v. Norquist*, supra, 60 Cal.App.2d 223, 140 P.2d 141; *Williams v. Kidd*, supra, 170 Cal. 638, 639, 151 P. 1. Whether or not the requisite intent exists is a question of fact for the trial court or jury. *Counter v. Counter*, 104 Cal.App.2d 786, 789, 232 P.2d 551. Where, as here, the trial court's finding that no delivery of the deed had taken place was based upon an analysis of conflicting evidence it will not be disturbed on appeal. *Donahue v. Sweeney*, 171 Cal. 388, 391, 153 P. 708; *Counter v. Counter*, supra, 104 Cal.App.2d 791, 232 P.2d 551.

[7-9] The evidence shows that the decedent was advised by his attorney that to make a gift deed effective it was necessary that there be no conditional delivery. When the deed had been signed and acknowledged, Arthur H. Kelly handed it to his son, saying "Here is the deed to the

home property which I am giving to you without any strings attached. The only request I want to make is that you do not record the deed until after my death." While the fact that such a request was made would not necessarily affect the validity of the deed, *Stewart v. Silva*, 192 Cal. 405, 410, 221 P. 191, it is a strong circumstance indicating the intent of the grantor at the time, when considered with the decedent's later statement that he anticipated a rather severe operation and that he made the deed with the understanding that it was to be used only if he did not survive such operation. These statements, with the evidence showing that the decedent was then in poor health and did have such an operation, together with the evidence of his subsequent acts and declarations support a reasonable inference that he did not intend to presently pass title to the property at the time the deed was handed to his son. In this connection it may be observed that the record does not show that the question of possession of the property after the execution of the deed was discussed at this time. If it was the intention of Arthur H. Kelly that the title to the property would pass to his son only in the event that the grantor did not survive his operation, then the deed is entirely inoperative as constituting an attempt to make a testamentary disposition of the property. This may only be done by a will executed as required by law. A deed, the purpose of which is intended to be testamentary, cannot be given effect. *Williams v. Kidd*, supra, 170 Cal. 637, 638, 151 P. 1; *Cox v. Schnerr*, 172 Cal. 371, 381, 156 P. 509.

Considering the entire record before us under the familiar rule stated in *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557, we cannot here set aside the findings of the trial court.

The judgment is affirmed and the attempted appeal from the order denying a motion for a new trial is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.



**WESTERN SURGICAL SUPPLY CO., Limited, v. AFFLECK et al. members of California State Board of Pharmacy.**  
Civ. 7941.

District Court of Appeal, Third District,  
California.

April 16, 1952.

Rehearing Denied May 9, 1952.

Hearing Denied June 11, 1952.

Proceeding for a writ of mandate to restrain members of the State Board of Pharmacy from enforcing certain alleged orders and regulations of the Board. The District Court of Appeal held that proceeding brought by the board in various municipal courts for alleged violations of certain sections of the Health and Safety Code and the Business and Professions Code by petitioner were not for judicial enforcement of administrative regulation or orders of the board, but for enforcement of the statutory penal provisions so as to preclude issuance of writ.

Peremptory writ denied and alternative writ discharged.

Prior opinion, 240 P.2d 656.

#### 1. Mandamus ⇨69, 70

Mandate is a proper writ to test the validity of regulations, orders or proceedings of an administrative board which has been asserted against one seeking the writ.

#### 2. Mandamus ⇨69

Where there had been no proceeding before Board of Pharmacy charging petitioner with violation of any of the board's orders and where there had not been a proceeding before the Board of Pharmacy charging violation of the provision of the Health and Safety Code and the Business and Professions Code, mandamus was not a proper proceeding to test validity of certain orders and regulations of Board of Pharmacy.

#### 3. Criminal Law ⇨210

Penal code section providing for commencement of prosecution for misdemeanor by complaint under oath, does not restrict making of complaint to any certain person or official, but it may be made by any person having knowledge of facts constituting offense charged. Pen.Code, § 1426.

242 P.2d—59

Cal.Rep. 241-242 P.2d—53

#### 4. Mandamus ⇨73(1)

Until Pharmacy board has acted against petitioner, that is, conducting a hearing and rendered its decision, there is nothing to review by writ of mandate. Code Civ. Proc. § 1094.5.

#### 5. Criminal Law ⇨31

##### Estoppel ⇨62(1)

A board or official has no power to waive or consent to violation of penal provisions in Health and Safety Code or in Business and Professions Code.

#### 6. Estoppel ⇨62(2)

The statement of Board of Pharmacy's failure to inform surgical supply company, at meeting with wholesale drug dealers that law required company to sell dangerous drugs and other supplies used by physicians, dentists, etc., only through registered pharmacists, did not estop state from bringing proceedings against company in municipal courts for violation of such requirement, as state agencies or officials cannot waive penal laws of state. Business and Professions Code, §§ 4030, 4161, 4231-4233; Health and Safety Code, §§ 20755, 29020, 29023.

#### 7. Mandamus ⇨172

Whether wholesale surgical supply company violated statutes by selling dangerous drugs and poisons to professional class through others than professional pharmacists, and whether such statutes are unconstitutional could not be considered by District Court of Appeal in proceeding for writ of mandate to restrain criminal proceedings in municipal courts. Business and Professions Code, §§ 4030, 4161, 4231-4233; Health and Safety Code §§ 20755, 29020, 29023.

#### 8. Prohibition ⇨9

Generally, question whether acts constitute violation of statute must be raised on trial of issues and cannot be raised by prohibition.

#### 9. Prohibition ⇨10(1)

Where normal remedies are inadequate, constitutionality of statute or ordinance may be tested by prohibition on ground that invalidity of legislation goes to court's jurisdiction to try case.

**10. Prohibition** ⇐10(1)

Where prohibition is proper to test validity of statute, trial court must appear to have passed on its own jurisdiction.

**11. Courts** ⇐39

A court has jurisdiction to determine its own jurisdiction, where basic issue in any case before court is its power to act.

**12. Prohibition** ⇐17

A trial court's jurisdiction must be challenged in that court by demurrer, motion, plea, or other objection of some kind, so that court may preliminarily decide whether it has jurisdiction to proceed, before remedy of prohibition is available.

**13. Prohibition** ⇐27

A higher court cannot prohibit lower court from acting under invalid statute, unless a party shows that lower tribunal, after first determining that it has jurisdiction is proceeding to exercise it.

---

Sheppard, Mullin, Richter & Balthis, Los Angeles, Mull & Pierce, Sacramento, for appellant.

Carl W. Wynkoop, Deputy Atty. Gen., for respondents.

**PER CURIAM.**

This is a petition for a writ of mandate to restrain respondents as members of the State Board of Pharmacy from enforcing certain regulations and orders against the petitioner. We granted the alternative writ, and appointed a referee. Findings were made by the referee which we adopt. This court issued its decision on February 8, 1952, 240 P.2d 656. A rehearing was granted on March 7, 1952. The matter is again before us for decision.

The petitioner is a corporation whose central office is in Los Angeles with branch offices situated in Pasadena, Long Beach, San Bernardino, San Diego, Sacramento and San Francisco. It is engaged in the business of wholesale distribution of certain drugs defined as dangerous drugs in the Health and Safety Code, and other supplies and equipment used by physicians, surgeons, dentists, hospitals, chiroprodists,

veterinarians, laboratories and chiropractors.

Between June 9 and July 11, 1950, which was prior to the petition for a writ of mandate, the respondent Board acting through its inspectors caused thirty-three criminal complaints to be filed in various municipal courts charging petitioner with misdemeanor violations of sections 20755, 29020 and 29023 of the Health and Safety Code and sections 4030, 4161, 4231, 4232 and 4233 of the Business and Professions Code. The acts charged were:

1. That petitioner sold a drug classified as a dangerous drug to a person or persons who were registered pharmacists without a prescription;

2. That it had, without acting through an employee who was a registered pharmacist, sold iodoform gauze, sterile water, zinc oxide ointment, tannic acid ointment, soda bicarbonate to a person who was a registered pharmacist without a prescription.

3. That it had sold schedule "A" poisons without registering the sale thereof.

4. That it had in its possession certain hypnotic drugs incorrectly labeled.

5. That it had sold to a person who is a registered pharmacist a hypodermic needle, without recording the sale.

The criminal proceedings are now pending in the various courts.

During the period the criminal complaints were filed, the employees of respondent Board served notice of violation of the Health and Safety Code and the Business and Professions Code on petitioner. These notices charged violations of the same sections as were charged in the criminal complaints. The Board did not take any action regarding these notices of violations.

The orders and regulations which petitioner seeks to restrain the respondent Board from enforcing are set forth in the petition. Paragraph VII alleges that on October 3, 1949, the respondent Board "concluded" that every wholesaler must have a registered pharmacist on duty at all times, and that every manufacturer who

manufacturers drugs, with the exception of those items enumerated in Sections 4032 and 4044, Business and Professions Code, must have a pharmacist in charge. The petition also alleges that the Board has adopted orders that no person other than a registered pharmacist can furnish or sell iodoform gauze, sterile water, zinc oxide ointment, tannic acid ointment, and soda bicarbonate except on prescription by a physician; that the Board had adopted an order requiring wholesale dealers to register the sale of all poisons enumerated in Schedule "A" of Section 20703 of the Health and Safety Code; and that the Board has adopted an order requiring wholesalers to maintain a record of the sales of hypodermic needles or hypodermic syringes. It is alleged that the Board in order to carry out the above orders instructed its inspectors to collect evidence and to file the criminal complaints as previously noted.

The petition alleges that the orders are null and void in that no notice was given of their proposed adoption as required by Section 11423 of the Government Code, or otherwise; that copies of the orders or regulations were not filed with the Secretary of State as required by Section 11380 of the Government Code; and that it is not unlawful for wholesalers to do the things prohibited by the Board's orders.

[1-3] The first question presented is whether the action of the respondent Board is subject to review in a mandate proceeding. We think not. Mandate is a proper writ to test the validity of regulations, orders or proceedings of an administrative Board which have been asserted against one seeking the writ. The petition before us does not present that situation. The Board is not enforcing its order or regulations against petitioner. There has been no proceeding before the Board charging petitioner with violation of any of the Board's orders, and neither has there been a proceeding before the Board charging a violation of the provisions of the Health and Safety Code and the Business and Professions Code. Until the Board has acted against petitioner, that is, conducting a

hearing and rendered its decision, there is nothing to review. C.C.P. § 1094.5; 2 Cal.Jur.2d 297; 42 Am.Jur. 574. Such is the factual situation before us.

[4] Pertinent to the subject now under discussion is the question of whether the Board's action in directing its employees to sign the various criminal complaints constitutes the enforcement of "orders and regulations" of the State Board of Pharmacy. This appears to be the theory of petitioner. The statement of the question contains the obvious answer. The criminal complaints charge misdemeanor violations of statutes adopted by the legislature. Under former Section 1426 of the Penal Code, the prosecution of misdemeanor cases is commenced by a complaint under oath. The section does not restrict the making of a complaint to any certain person or individual; it may be by any one having knowledge of the offense charged. The Pharmacy Board, or its members, or its employees are not charged with the prosecution and judicial determination of the criminal proceedings pending in the municipal courts. The ultimate outcome of these proceedings rests with the prosecuting attorneys and the courts wherein the charges are pending.

[5,6] Petitioner contends that the action of the Board in causing the criminal complaints to be filed is illegal and immoral and that the Board is estopped by its conduct from giving effect to such a construction of the Pharmacy Law. In support of this contention petitioner refers to various conferences at which wholesale dealers and members of respondent Board were present and that at such meetings the Board or its members or employees did not inform petitioner that the law required it to sell only through registered pharmacists, and the Board by its conduct sanctioned the method of petitioner's operations. Petitioner relies upon *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. It was there held that the filing of a claim against a county or other governmental agency is a condition precedent to a cause of action, but that the time requirement of the claim statute



is procedural and may be excused by estoppel.

Petitioner's contention on estoppel amounts to an assertion that state agencies or state officials may waive the penal laws of this state. We find nothing in the Farrell case, *supra*, or other cases cited by petitioner which would support this contention. The Penal provisions contained in the Health and Safety Code and the Business and Professions Code were enacted by the legislature, and it is beyond the power of any Board or official to waive or consent to a violation of such provisions. In *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal.App.2d 321, 126 P.2d 165, the appellant insurance company contended that the Insurance Commissioner was estopped to take over the company because the Commissioner and his predecessors in office knew of the practices of the company in previous years and had failed to take action against it. The court stated 52 Cal. App.2d at page 326, 126 P.2d at page 168:

"To state the contention is to state its impossibility. To govern themselves, the people act through their instrumentality which we call the State of California. The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before. *State ex rel. Fishbeek [Fishbach] v. Glove [Globe] Casket & Undertaking Company* 82 Wash. 124, 143 P. 878, L.R.A.1915B, 976; *Department of Insurance v. Church Members R. Ass'n*, 217 Ind. 58, 26 N.E.2d 51, 52, 128 A.L.R. 635; *Mullan v. State*, 114 Cal. 578, 587, 46 P. 670, 34 L.R.A. 262." See also *Magruder v. City of Redwood*, 203 Cal. 665, 675, 265 P. 806; *Fleming v. Miller*, D.C., 47 F.Supp. 1004, 1008.

The petitioner contends that a proper construction of the Pharmacy Act, the

Dangerous Drug Act, and the Poison Act, does not require wholesalers to have a registered pharmacist when selling to the professional classes. It is also contended that the various acts as construed by the respondent Board are unconstitutional for numerous reasons.

[7-13] Whether petitioner has violated the various acts, or whether those acts are unconstitutional, are questions beyond the scope of this proceeding. Since it is our conclusion that the Pharmacy Board did not enforce its orders or regulations against petitioner, a determination as to the validity of the statutes involved would amount to an unwarranted interference with the criminal proceedings now pending in the municipal courts. Our conclusion would be the same if we consider the petition one for prohibition rather than mandate. As a general rule, the question of whether petitioner's acts constitute a violation of the statutes must be raised upon the trial of the issues. *Walsh v. Railroad Commission*, 16 Cal.2d 691, 694, 107 P.2d 611. Where normal remedies are inadequate "The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case." *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 462, 171 P.2d 8, 10. Such proceedings in prohibition are directed against the court attempting to act under the invalid statute. In the proceeding before us, the municipal courts are not parties. Where prohibition is proper to test the validity of a statute, it must appear that the trial court has passed upon its own jurisdiction. In *Rescue Army v. Municipal Court*, *supra*, the record showed that the petitioner had been tried twice for violation of a statute and the case had been set for trial a third time. Under those facts it sufficiently appeared that the trial court had passed upon its own jurisdiction. The court stated 28 Cal.2d at page 464, 171 P.2d at page 11:

"A court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the

first instance. It is necessary, therefore, to challenge the jurisdiction of the trial court *in that court*, by demurrer, motion, plea or other objection of some kind, so that *that court* may preliminarily decide the question whether it has jurisdiction to proceed. And unless a party can show that a lower tribunal, *after first determining that it has jurisdiction, is proceeding to exercise it*, there is nothing for a higher court to prohibit. This obvious principle is one of the cornerstones of our system of lower and higher tribunals."

In view of the foregoing we conclude that the peremptory writ should be and it is hereby denied, and that the alternative writ heretofore issued is discharged.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



110 Cal.App.2d 444

LEE v. HACKNEY et al.

Civ. 4378.

District Court of Appeal, Fourth District,  
California.

April 21, 1952.

Ethel Lee brought action against Edna Alice Hackney and another for injuries sustained as result of intersectional automobile collision. The Superior Court of Kern County, Norman F. Main, J., entered a judgment on a verdict returned in favor of defendant, and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to authorize instruction on contributory negligence.

Judgment affirmed.

#### I. Automobiles ⇨245(80)

In action for injuries sustained as result of intersectional automobile collision, questions of whether plaintiff looked and saw defendants' automobile approaching at speed of 35 miles an hour or whether she looked at all or whether she failed to look again in direction of defendants' automobile before crossing intersection, were for jury under proper instructions.

#### 2. Automobiles ⇨246(58)

In action for damages resulting from intersectional automobile collision, evidence was sufficient to authorize giving instruction on contributory negligence.

#### 3. Trial ⇨90

Where plaintiff objected after question was answered and no motion was made to strike answer for purpose of objection, there was no basis upon which error could be predicated.

#### 4. Appeal and Error ⇨207

Where, in automobile collision case, defendants in argument to jury allegedly referred to defendants' financial condition, but no objection was made by plaintiff who instead replied to closing argument and went outside record to indicate to jury that question of ability of defendants to respond to damages does not make any difference, there was no prejudicial misconduct which plaintiff could raise for first time on appeal.

James Vizzard, West, Vizzard, Howden & Baker, Morris Chain, all of Bakersfield, for appellant.

Robert E. King and Mack & Bianco, all of Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiff brought this action against defendants for injuries sustained as a result of an automobile accident at the intersection of Nineteenth and A Streets in the City of Bakersfield. Plaintiff, accompanied by a guest, was driving her son's Plymouth sedan northerly on A Street, in the daytime, on September 19, 1949. Defendant Edna A. Hackney was proceeding alone westerly on Nineteenth Street in her husband's 1938 Chevrolet car. Both streets are approximately 54 feet wide. Large trees are growing in the parkway at the four corners of the intersection. No center lines are marked in the streets and no boulevard stop signs are involved. A 15-mile speed zone is indicated.

Counsel for defendants, at all times, have conceded negligence on the part of defendants, and rely entirely on the claimed con-

tributary negligence of plaintiff, as pleaded, to bar a recovery. The jury returned a verdict in favor of defendants. Plaintiff appealed and now claims: (1) That there was no evidence of contributory negligence; and (2) Accordingly, the trial court committed prejudicial error in giving an instruction on that subject.

A brief résumé of plaintiff's testimony bearing on this question shows that when she was about 15 feet from the intersection she was driving at about 15 miles per hour; that she then looked to her left on Nineteenth Street and saw no cars approaching; that when she was about to enter the intersection she looked to her right easterly on Nineteenth Street and saw a car half a block away, approaching this same intersection; that she could not judge its speed; that she shifted into second gear at the time; that she then looked to her left again, shifted into high gear, and as her car passed over the center of Nineteenth Street, in the intersection, she looked to her right again and saw the Hackney car about 50 feet from the intersection; that she immediately turned her car to her left to avoid a collision but was unsuccessful; that the left front portion of the Hackney car struck the right front portion of plaintiff's car; that she and her passenger were thrown from her car, which went on and came to a stop at the corner after running into a tree; and that she was severely injured.

Her passenger, Mrs. Childers, related about the same story. She placed the Hackney car at a point east on Nineteenth Street about 150 feet from their car when plaintiff's car was near the intersection. She testified that defendants' car was traveling at about 35 miles per hour at the time; that she saw it again about 100 feet from the intersection when plaintiff entered the intersection; that the next time she saw it plaintiff's car was crossing the center of Nineteenth Street and the Hackney car was then 20 to 25 feet away, traveling about 35 miles per hour; that Mrs. Hackney was looking to her right, or northerly on A Street; that she never said anything to Mrs. Lee about what she saw; that she screamed and the cars hit in the manner

previously described at a point about five feet north of the center of Nineteenth Street.

It appears that in a deposition she previously stated that the Hackney car was about two car lengths away from the intersection when the Lee car entered the intersection. At the trial she testified that she knew Mrs. Lee changed into second gear in crossing the intersection because "she always does".

Mrs. Hackney (aged 62) testified that as she approached the intersection she glanced in the direction in which plaintiff's car was coming and did not see it; that she glanced to the north and saw no cars coming from that direction so she started across the intersection; that as she again glanced to her left she saw the grill and bumper of a car striking the left side of her car about where the running board meets the left front door; and that she could not estimate her speed or the speed of plaintiff's car.

Defendant's car was being followed by a traffic officer, who estimated its speed at a previous crossing at 35 miles per hour and gave Mrs. Hackney a traffic ticket. Tire markings on the pavement indicated tire burns leading from the point of the impact southerly for a distance of about 10 feet, which markings were presumably made by plaintiff's car. No tire burns were indicated as having been made by defendants' car, which traveled considerable distance after the collision.

[1] The questioned facts as to whether plaintiff looked and saw defendants' car approaching at a speed of 35 miles per hour or whether she looked at all or whether she failed to look again in the direction of defendants' car before crossing the intersection were facts for the jury to determine under proper instructions.

In *Salsberry v. Smith*, 85 Cal.App.2d 122, 126, 192 P.2d 73, 75, this court said:

"Whether, under the circumstances, plaintiff looked in the direction from which danger would be reasonably apprehended, and as often and as carefully as would a person of ordinary prudence under like circumstances, were factual questions for the jury. An im-



plied finding of the jury on that question will not be disturbed on appeal where there is, as here, substantial evidence or reasonable inferences to support it." (Citing cases.) See, also, *Hamlet v. Hook*, 106 Cal.App.2d 791, 236 P.2d 196.

A like question was presented in *Matsumoto v. Renner*, 90 Cal.App.2d 406, 202 P.2d 1051, where the father of a girl who was riding as a guest in a car driven by another brought an action against a truck driver for the death of the girl. There the question of defendant's negligence was established. Defendant alleged contributory negligence on the part of the guest who was sitting to the right of the driver of the car in the front seat. She was looking straight ahead and said nothing and gave no warning sign to the driver of that car that a truck was proceeding ahead of them which had light trouble and with which the car collided. The jury there found in favor of the defendant. The contention was that there was no evidence of contributory negligence on the part of the guest and that it was therefore error to give an instruction based on that claim. This court held that where the issue of negligence and contributory negligence was the theory of the case and was raised by the pleadings and where there was evidence supporting such theory, defendants were entitled to such an instruction.

It clearly appears, in the instant case, that defendant admitted her negligence and relied mainly upon the question of the contributory negligence of the plaintiff to defeat plaintiff's cause of action. This defense was not only pleaded but counsel for defendant so stated to the jury. Counsel for the plaintiff also stated to it that he expected to prove that defendant "did not look, and if she had looked she would have seen what was there"; that she violated the right of way rule and accordingly was guilty of negligence; and also argued that plaintiff was not guilty of contributory negligence. Counsel for defendant made the same charge against plaintiff and claimed that such contributory negligence was a proximate cause of plaintiff's injuries although it may not have been the sole cause.

Counsel for plaintiff, in discussing an instruction on contributory negligence, told the jury that the court was "duty bound to give you that instruction, on contributory negligence, because these defendants have raised it in their answer."

[2] It cannot be said, as a matter of law, that plaintiff was free from contributory negligence. Under the evidence and the circumstances related, no prejudicial error appears in giving the instruction on contributory negligence. *Perry v. Angelus Hospital Ass'n*, 172 Cal. 311, 156 P. 449; *Hoffman v. Southern Pacific Company*, 84 Cal.App. 337, 258 P. 397.

The remaining contention is that counsel for defendants was guilty of prejudicial misconduct in referring to defendants' financial condition in his argument to the jury, after the court erroneously admitted evidence bearing on that subject, citing *Zafferis v. Bradley*, 28 Cal.App.2d 188, 190, 82 P.2d 70, and *Ensign v. Southern Pacific Co.*, 193 Cal. 311, 321, 223 P. 953.

Counsel for defendants asked the question of Mrs. Hackney as to whether or not she and her husband owned a "little ranch out here west of town", and she replied "Yes"; and if either were employed, and the answer was "No." In his argument to the jury he remarked: "It is not a case where the defendants are Standard Oil Company or Pacific Gas and Electric Company or any other people, except just some people that live out here on a ranch west of town and have accumulated a little and are here defendants. They have a little of what they made, but not very much. They are driving a 1938 car, involved in the accident, just plain working people which I know."

[3] In the first place, the only question which counsel objected to was whether or not defendants were employed. This objection came in after the question was answered and no motion was made to strike it for the purpose of objection. No error thus appears in the action of the trial court in this respect. *Estate of Hess*, 183 Cal. 589, 599, 192 P. 35; *Kruzic v. Sanders*, 68 Cal.App.2d 315, 316, 156 P.2d 486.

[4] No objection was made, at the time, to the argument of counsel above quoted. Had counsel moved the court to strike it or had he called its attention to the claimed misconduct at the time, no doubt the court would have intervened. Counsel for plaintiff proceeded to reply to this argument in his closing statement to the jury, and in doing so went outside the record to indicate to the jury that the question of ability of the defendants to respond in damages "does not make any difference". No prejudicial misconduct thus appears which counsel for plaintiff may now raise for the first time on appeal. *Aydlott v. Key System Transit Co.*, 104 Cal.App. 621, 628, 286 P. 456.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,  
concur.



**STAFFORD v. REALTY BOND  
SERVICE CORP. et al. \***

**REALTY BOND SERVICE CORP.  
v. STAFFORD et al.**

**Civ. 18342, 18343.**

District Court of Appeal, Second District,  
Division 1, California.

April 10, 1952.

Rehearing Denied April 21, 1952.

Hearing Granted June 5, 1952.

Action by Guy N. Stafford against the Realty Bond Service Corporation and others to quiet title. The Realty Bond Service Corporation brought suit against Guy N. Stafford and others for partition of the land. The Superior Court of Los Angeles County, Philbrick McCoy, J., in the quiet title action, entered judgment adverse to Stafford, and in the partition action, entered judgment in favor of the corporation, and Stafford appealed. The two cases were submitted on appeal on a single set of briefs. The District Court of Appeal, Hanson, J. pro tem., held that the corporation's lien under certificates of sale by city for delinquent street assessment was extinguished on Jan-

uary 1, 1947, by statute, and lien could not be enforced in the quiet title action or in the partition action.

Judgments reversed.

**Municipal Corporations** Ⓒ519(5)

Lien of defendant who took no steps until 1949 to convert into deed lien under 1930 certificates of sale by city for delinquent street assessment was ipso facto extinguished on January 1, 1947, by statute, and was not revived by statutes enacted after institution of quiet title action by plaintiff who had title derived from state's 1933 deed for delinquent 1927 property taxes, and could not be enforced in that action or in defendant's partition action against plaintiff. Streets and Highways Code, § 4340 et seq.; Civ. Code, § 2911; Code Civ. Proc. §§ 801.1 et seq., 801.11.

Guy N. Stafford, in pro. per.

John F. Bender and Gizella M. Allen,  
Los Angeles, for respondent.

HANSON, Justice pro tem.

The primary question for decision is whether the lien of a certificate of sale of a city lot sold for a delinquent assessment in 1930 was or was not extinguished on January 1, 1947, by reason of Civil Code, sec. 2911.

The regular property taxes levied against the lot in 1927 became delinquent and as a consequence the property was sold to the State and deed therefor was duly executed in 1933. In February, 1930, the City, proceeding under the Street Opening Act of 1903 (now codified as Chapter 14, Division 6, Part 1 of the Streets and Highways Code), levied an assessment against the lot. The assessment not being paid the City sold the property on December 15, 1930, and issued the appropriate certificate of sale. On October 13, 1944, the State conveyed by deed its tax title to one Lorna Stafford, who in turn by grant deed conveyed the property on May 9, 1946, to the appellant Stafford. Respondent as the holder of the certificate of title mentioned took no steps to convert into a deed the lien it possessed upon the property until 1949 when

\* Subsequent opinion 249 P.2d 241.

it procured a deed on June 20, 1949, from the Board of Public Works based on the certificate. However, prior to that time, i. e., on April 20, 1949, the appellant as plaintiff instituted an action to quiet his title naming respondent as defendant. On June 30, 1949, respondent as plaintiff instituted a separate suit against appellant as defendant in which it alleged that appellant and respondent were cotenants of the lot and prayed a partition thereof.

The trial court entered judgments in each case for the respondent as prayed by it. The two cases are, however, submitted to us on a single set of briefs.

In 1945 the legislature amended Civil Code, sec. 2911, so as to provide (with an exception not here material) that "any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished \* \* \* on January 1, 1947 \* \* \*. The presumptions mentioned \* \* \* shall be conclusive in favor of a bona fide purchaser for value of said property after such dates."

In *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982, 987, the court said: "Within the meaning of the 1945 amendment to section 2911 of the Civil Code, a 'bona fide purchaser is one who takes in good faith and for value and in reliance upon the presumptions afforded by [that] section'. *Rombotis v. Fink*, supra, 89 Cal.App.2d 378, 392, 201 P.2d 588, 596. 'A purchaser for value is presumed *prima facie* to be an innocent purchaser in good faith.' *Fly v. Cline*, 49 Cal.App. 414, 423, 193 P. 615, 619. It is evident from the record that defendants were purchasers for value. Plaintiff argues that the title report disclosed that plaintiff's bond had been issued and was unpaid of record. But the fact that defendants had actual or constructive notice of the recorded status of plaintiff's bond does not establish that they were not bona fide purchasers within the meaning of the 1945 amendment to section 2911. To so construe that section would make the concluding sentence thereof inoperative—"The presumptions mentioned in this paragraph shall be conclusive in favor of a

bona fide purchaser for value of said property after such dates"—and completely frustrate the purpose of the Legislature in enacting the 1945 legislation to remedy a widespread, serious economic condition in land titles throughout the state. See *Rombotis v. Fink*, supra, 89 Cal.App.2d 378, 390, 201 P.2d 588."

In 1948, Presiding Justice White, speaking for the court in *Rombotis v. Fink*, 89 Cal.App.2d 378, 384, 201 P.2d 588, 591 said: "These enactments reflect a clear purpose to provide a definite statute of limitations as to *all* liens arising under special assessments. They constitute a 'revision of the entire subject', \* \* \*. It is plain from its comprehensive enactments that the Legislature *intended to and did provide a definite statute of limitations and a definite period of time* upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have been extinguished; \* \* \*." (Emphasis added.)

Code of Civil Procedure sections 801.1 and 801.11, contrary to the contention of respondent, are not applicable to the facts of this case because these sections did not become law until October 1, 1949—several months after respondent instituted its action for partition. Hence, the controlling statute is Civil Code, sec. 2911. By that section the lien of respondent was *ipso facto* extinguished on January 1, 1947. Accordingly, it was not revived in favor of respondent by the enactment of Section 801.1 et seq. of the Code of Civil Procedure, as those sections were not in effect, as stated, when the action was instituted. Whether those sections of the statute may constitutionally be applied as to rights vested by Civil Code, sec. 2911, between January 1, 1947, and October 1, 1949, we are not called upon to determine and so express no opinion on the point.

The final contention by respondent that the case before us is controlled by the rule announced in *Elbert, Ltd., v. Nolan*, 32 Cal.2d 610, 197 P.2d 537, is without merit. As was said by the court in *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982, "the rule of *Elbert, Ltd., v. Nolan* is not controlling



In cases involving facts arising subsequently to the limitation date of January 1, 1947. Accordingly, where the 1945 legislation applies, it will operate to prevent the bondholder from enforcing his lien in any manner, whether the remedy pursued be an action for partition or foreclosure. To hold otherwise, and thus permit the bondholder's lien to be enforced through one remedy but not the other, would manifestly frustrate the purpose of the 1945 legislation which was designed to preclude in any manner the enforcement of stale claims outstanding against property after the expiration of a reasonable time."

The judgments are reversed.

WHITE, P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 359

**WEST COAST SAW MILLS, Inc. v. WEIS.**

Civ. 18496.

District Court of Appeal, Second District,  
Division 2, California.

April 10, 1952.

Hearing Granted June 5, 1952.

West Coast Saw Mills, Inc., a California corporation, brought action to recover purchase price on eleven carloads of lumber sold and delivered to George F. Weis, also known as Geo. F. Weis, doing business as Lumber Buyers Exchange. Defendant filed counterclaim and cross complaint alleging overpayment in freight charges on lumber shipped to him under the contract. The Superior Court, Los Angeles County, Frank G. Swain, J., rendered judgment for plaintiff, and against defendant on his counterclaim and cross complaint, and defendant appealed. The District Court of Appeal, Fox, J., held that where defendant had agreed to pay the Portland-Los Angeles freight rate as part of the purchase price, buyer could not recover difference between such rate and rate from point of shipment.

Judgment affirmed.

### 1. Sales ⇐391(2)

Where buyer agreed to pay Portland-Los Angeles freight rate for lumber actually shipped from point within California as part of purchase price, buyer could not recover difference between Portland rate and rate from point of shipment on theory that he had overpaid freight charges. Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq.; Gen. Laws, Act 6386, § 23(b).

### 2. Appeal and Error ⇐907(3)

Where appeal is on the judgment roll alone, it must be presumed that the evidence supports the findings.

Leo M. Rosecrans and Marcus Muskat, Los Angeles, for appellant.

Burr & Smith, Los Angeles, for respondent.

FOX, Justice.

This is an action to recover the purchase price of eleven carloads of lumber sold and delivered by plaintiff to defendant pursuant to a written contract. Defendant filed a counterclaim and cross-complaint in which he seeks to recover from plaintiff the sum of \$77,438.01, which he alleges he overpaid in freight charges on a total of 410 cars of lumber shipped to him under the contract. From a judgment in favor of plaintiff and against defendant on his counterclaim and cross-complaint, defendant appeals.

There is no dispute as to the facts. Plaintiff and defendant entered into a written contract whereby defendant agreed to purchase from plaintiff a total of ten million board feet of lumber. No price was specified in the contract but it was agreed that "the prices for Douglas Fir lumber shall be the prevailing market prices F. O. B. cars Los Angeles, California, at time of shipment, said prevailing prices being in line with selling prices of other producers of well manufactured Douglas Fir lumber f. o. b. cars Los Angeles, it being agreed between buyer and seller that Crow's Pacific Coast Lumber Digest is a recognized source of information on Douglas Fir lumber prices. Presently the pre-

vailing market prices of surfaced Douglas Fir lumber are recognized as being the present established O. P. A. ceiling prices as published in the Sixth Edition of Crow's Handy Reference covering Second Revised MPR-26 with all adjustments and revisions, up to and including May 31, 1946, copy of which both buyer and seller have."

The lumber was shipped to defendant from South Fork, California, and upon delivery he paid to the carrier the freight charge from South Fork to Los Angeles. Thereafter defendant was billed at an agreed price f. o. b. mill, to which was added the freight rate from Portland, Oregon, to Los Angeles, and the amount of the freight previously paid by defendant, being the rate from South Fork to Los Angeles, was shown as a credit.

Defendant contends the findings of fact are not supported by the admitted facts in the pleadings and that they do not support the conclusions of law nor the judgment. In his brief he states: "The record on this appeal presents but one point for decision, that is, whether plaintiff can exact from defendant an excessive freight, that was never paid to the carrier and which is actually nothing more than a bonus and rebate exacted and collected under the guise that such differential in the freight rate charged and the rate paid to the carrier was, in fact, a part of the purchase price."

Plaintiff admitted defendant's allegation that it charged and collected from defendant the Portland, Oregon, freight rate to Los Angeles, and that he actually paid the domestic freight rate for shipment, and by way of affirmative defense alleged that the "parties agreed that the defendant \* \* \* would pay to plaintiff \* \* \* the difference between the Portland, Oregon, freight rate and the freight rate from the point of shipment of said lumber to Los Angeles, California, as part of the purchase price of said lumber." These allegations the court found were true.

The court also found that "subsequent to the execution of the contract referred to and beginning with the first delivery of lumber by West Coast Saw Mills, Inc., to George F. Weis and in pursuance of said contract, the said parties agreed that George

F. Weis should and would pay to West Coast Saw Mills, Inc., the Portland, Oregon, freight rate to Los Angeles, California, as part of the purchase price of said lumber; that said purchase price was in conformity with the prevailing market price at Los Angeles, California, that settlement of the prices to be paid for the shipments of said lumber was, in fact, made by the said parties from time to time in accordance with said later agreement; that, accordingly, all accounts between West Coast Saw Mills, Inc., and George F. Weis with respect to the shipment and sale and purchase of said lumber were settled from time to time by them on such basis." The court further found that plaintiff "did not charge to or collect from George F. Weis and he did not pay any false or excessive freight on any of said ten million board feet of lumber; that West Coast Saw Mills, Inc. did not charge to or collect from George F. Weis and he did not pay any more than the prevailing market prices at the time for the respective shipments for lumber sold and shipped by it to him" and that defendant was not overcharged for any such lumber.

[1,2] Much of defendant's brief is devoted to arguing that the regulations of the Administrator of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq., were illegal in that they permitted freight rebates and that such rebates are prohibited by Act 6386, section 23(b), Deering General Laws, and are against public policy. Such arguments are without merit since the court specifically found that (1) defendant did not pay any false or excessive freight rate; (2) defendant agreed to pay the freight rate between Portland and Los Angeles as part of the purchase price, and (3) defendant did not pay more than the prevailing market prices and was not overcharged. Since this appeal is upon the judgment-roll alone, it must be presumed that the evidence supports the findings. *Tarvin v. Davey*, 56 Cal.App.2d 846, 850, 133 P.2d 844; *Geneusz v. Harrington*, 218 Cal. 760, 762, 25 P.2d 4.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

**WHALEN v. RUIZ et al.**

Civ. 7921.

District Court of Appeal, Third District,  
California.

April 23, 1952.

Hearing Granted May 26, 1952.

Action by Thomas S. Whalen against Al Ruiz, and others, for injuries sustained when bus in which he was riding plunged through guard rail of bridge operated and policed by railroad. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgment adverse to Whalen, and Whalen appealed. The District Court of Appeals, Schottky, J. pro tem., 242 P.2d 78, reversed judgment. On petition for rehearing, the District Court of Appeal, Third District, held that record was devoid of any evidence that railroad had been relieved by supplemental agreement with state from its obligation to maintain safe bridge.

Petition denied.

**1. Automobiles ☞290**

Where railroad had agreed by contract with counties to keep and repair, operate and police certain overhead bridge, upper deck of which was constructed for automobile traffic, supplemental agreement with state, by which state agreed that during time such overhead structure was being used for detour purposes, it would maintain structure and approaches at its expense, and would assume entire cost of required additional policing, merely shifted duty of maintenance of safe bridge from railroad to state during period of detour, and railroad was not relieved from obligations under original agreement after completion of other construction necessitating detour.

**2. Contracts ☞170(1)**

The construction given to an ambiguous contract by acts and conduct of parties with knowledge of its terms before any controversy has arisen as to its meaning is entitled to great weight by court when construing contract in controversy which has arisen under contract.

**3. Automobiles ☞306(1)**

In action for injuries sustained by passenger when bus being driven at ex-

cessive rate of speed plunged through improperly constructed guardrail of bridge repaired, operated and policed by defendant railroad, wherein railroad contended that it had been relieved by supplemental agreement with state of obligation in respect to maintenance of safe bridge, record was devoid of any evidence which would justify finding that railroad was ever relieved from its obligation to maintain safe bridge.

Mull & Pierce, Sacramento, for appellant.

Devlin, Devlin & Diepenbrock, Sacramento, for respondent.

**PER CURIAM.**

[1] Respondents in their petition for a rehearing urge that this court has refused to recognize or accept the evidence of the intention of the parties as shown by their practical construction and performance under the contract. Respondents state that this court failed to mention the supplemental agreement of March 23, 1934, between the counties, the railroad company, and the State of California. By said supplemental agreement certain changes in the overhead structure of the bridge were made at state expense to facilitate its use as a detour during construction of the "M" Street bridge. Under this agreement maintenance of the roadway of the overhead structure and approaches thereto was agreed to be performed temporarily at state expense during the period of the construction of the "M" Street bridge, it being stated that

"State shall, during the time said overhead structure and approaches are being used for detour purposes, maintain the roadway of said overhead structure and approaches at its expense, and in the event conditions due to increased traffic require additional policing to properly maintain and safeguard traffic during the period of detour State shall assume the entire cost thereof."

It is apparent that the supplemental agreement merely shifted the duty of the



maintenance of a safe bridge from respondent to the State. After the completion of the "M" Street bridge the respondents were in no way relieved from their obligations and duties under the original agreement.

[2, 3] While, as this court held in *Thermalito Irrigation District v. California Water Service Co.*, 108 Cal.App.2d 329, 239 P.2d 109, the construction given to an ambiguous contract by the acts and conduct of the parties with knowledge of its terms before any controversy has arisen as to its meaning is entitled to great weight, there is nothing in the record that would justify, much less compel, a finding that respondents were ever relieved from their obligation to maintain a safe bridge.

The opinion heretofore filed is hereby modified by adding after the word "reversed" at the end of the last paragraph the following: "with directions to the trial court to enter judgment in favor of appellant and against respondents for the amount of damages found by the trial court to have been sustained by appellant."

The petition for rehearing is denied.



**SUNSET MILLING & GRAIN CO.  
v. ANDERSON. \***

**Civ. 4271.**

District Court of Appeal, Fourth District,  
California.

April 17, 1952.

Rehearing Denied May 14, 1952.

Hearing Granted June 11, 1952.

Action by the Sunset Milling & Grain Company against O. E. Anderson, doing business as Anderson Feed Store, to recover on certain notes delivered by defendant to plaintiff. Defendant moved for judgment of nonsuit at conclusion of plaintiff's case and plaintiff then moved to reopen case to present further testimony. The Superior Court, San Diego County, C. M. Monroe, J., denied plaintiff's motion and granted a judgment

\* Subsequent opinion 249 P.2d 24.

of nonsuit, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where an instrument signed by plaintiff's representative and introduced by defendant, stated that defendant would not be responsible for the notes in question, but the instrument did not purport to have been made by plaintiff, plaintiff's admission that the instrument was genuine and duly executed did not bar plaintiff from reopening the case and showing that the instrument was not authorized by the plaintiff and was without consideration.

Reversed.

**1. Trial ⇐165**

The purpose and effect of a motion for nonsuit are those of a demurrer to the evidence and therefore trial court must assume the truth of and accord full credit to all relevant evidence favorable to plaintiff, and if there is any evidence tending to sustain plaintiff's action, or if the evidence is conflicting, a nonsuit should be denied without passing upon the sufficiency of the evidence.

**2. Bills and Notes ⇐493(1)**

Where evidence shows that notes sued upon were executed and delivered to plaintiff, it will be presumed that they were given for a sufficient consideration, unless such fact is controverted by other evidence. Code Civ.Proc. § 1963, subd. 21.

**3. Pleading ⇐291(2)**

Failure of plaintiff to file an affidavit denying due execution and genuineness of an instrument annexed to answer merely means that plaintiff admits the due execution and genuineness of the instrument, and that the instrument was finally delivered and that it was not spurious. Code Civ.Proc. § 448.

**4. Trial ⇐69**

Where an instrument, signed by plaintiff's agent and introduced by defendant in action on notes given plaintiff, stated that defendant would not be responsible for notes sued on, but instrument did not purport to have been made by plaintiff, admission by plaintiff that instrument was genuine and duly executed did not bar plaintiff, on defendant's motion for nonsuit after plaintiff rested his case, from reopening the

case and showing that the instrument was not authorized by the plaintiff and was without consideration.

---

Forster & Gemmill, Los Angeles, Stickney & Stickney and Edward Strop, San Diego, for appellant.

Charles B. DeLong, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff commenced this action to recover judgment on a series of nine promissory notes, dated from August 1, 1949 to October 28, 1949, inclusive, executed and delivered by defendant O. E. Anderson to plaintiff. In his answer to the complaint, defendant admitted the execution and delivery of the notes; alleged that they were made without consideration; that prior to and on August 1, 1949, one Ralph Bangenter was the field representative of plaintiff and one C. Trevor Sawday was the salesman and representative of plaintiff in San Diego county. He further alleged that on or about August 1, 1949, the said representatives stated to the defendant that one Milton Morgan had been operating a feed business in San Diego county which he was then selling out; that one Charles Brust had been buying plaintiff's feed through said Milton Morgan; that Morgan had taken promissory notes of Brust; that Morgan had given them, with duplicate notes of his own to Sunset Milling and Grain Company for the said feed; that the promissory notes given and to be given by Brust were and would be secured by a chattel mortgage upon chickens which Brust was raising; that as a bookkeeping procedure the Sunset Milling and Grain Company would desire a promissory note from defendant personally, to be sent with each promissory note that was taken from Brust, but that defendant would not be personally responsible for any of the bills or notes of Brust or for his own notes in a like amount. It was further alleged that on August 1, 1949, the said Trevor Sawday did, on behalf of plaintiff and as its agent, make, execute and deliver to defendant an instrument, in writing, as follows:

"August 1, 1949.

"To Whom It May Concern:

"I, C. Trevor Sawday, am an official representative of Sunset Milling and Grain Co., 1498 East 4th St., Los Angeles, Calif.

"I have informed O. E. Anderson, owner of the Anderson Feed Store at 455 National Ave., Chula Vista, Calif., that he will in no way be responsible for the collection of the feed bills incurred by C. J. Brust, Valencia St., Spring Valley, and that all shipments of feed are covered by a chattel mortgage made out in favor of Morgan's Feed Store, Lemon Grove, Calif., and the Sunset Milling and Grain Co. The Sunset Milling and Grain Co. will accept all notes and issue a credit for the amount of the note to the Anderson Feed Store without any financial responsibility to the Anderson Feed Store.

"Signed:

"C. Trevor Sawday

"Representative of Sunset  
Milling and Grain Co.,

"1498 East 4th St.,

"Los Angeles, Calif."

Defendant further alleged that the representation of Bangenter and Sawday that the promissory notes of Brust were and would be secured by a chattel mortgage was wholly false and untrue and that there was, in fact, no security for said promissory notes; that the defendant, believing and relying upon said representation, sold feed manufactured by plaintiff to said Brust, taking his promissory notes therefor and did send said notes with defendant's promissory notes of equal amount to the plaintiff; that each of the promissory notes set forth in the complaint is a duplicate of a promissory note executed by Brust and representing a sale of plaintiff's feed to him; that on or about June 7, 1950, plaintiff filed an action against Brust on the promissory notes given by him and recovered a judgment against him in said action.

No affidavit denying the genuineness and due execution of the foregoing quoted instrument was filed by the plaintiff.

The cause was tried before a court sitting without a jury. The promissory notes were admitted in evidence and proof was adduced on the part of the plaintiff that they had not been paid, although payment had been demanded. Plaintiff rested, whereupon defendant moved for judgment of nonsuit. Plaintiff then moved to reopen the case to present further testimony and in connection therewith made a formal offer of proof of the following facts: That Sawday had no authority to act for plaintiff in a financial transaction and had no authority to bind plaintiff by the writing set up in the answer; that in response to demands for payment of the notes, defendant acknowledged his liability and promised to pay them; that defendant made no mention of the letter until October 19, 1950, and that plaintiff had no knowledge of its existence until that month; that in November, 1949, defendant acknowledged his liability on the notes and stated that if plaintiff failed to collect from Brust, he would pay the notes; that the Brust notes were each payable to defendant and by him endorsed to plaintiff as security for the notes sued upon; that Sawday had nothing to do with the transaction under which the notes sued upon were executed and delivered; that said notes were in payment of the purchase price of merchandise sold and delivered to defendant; that Brust was a customer of the defendant and not of the plaintiff; that plaintiff sold no merchandise to Brust; that all of the merchandise covered by the notes here sued upon was sold to defendant, who, in turn, sold it to Brust.

The trial court denied plaintiff's motion, sustained an objection to the additional offered evidence and granted a nonsuit and judgment upon the ground that the agreement pleaded in the answer and not denied by plaintiff was a complete defense to plaintiff's complaint. Plaintiff appeals from the judgment and the sole question involved is whether the court erred in granting the motion for judgment of nonsuit.

[1,2] The motion for nonsuit was presented at the close of plaintiff's case. Its purpose and effect are those of a demurrer

to the evidence, and the trial court, therefore, must assume the truth of and accord full credit to all relevant evidence that is favorable to the plaintiff. To grant the motion was erroneous if a judgment in favor of the plaintiff would find support in substantial evidence or inferences to be drawn therefrom. Vol. 5 Cal.Jur. 10-Yr. Supp., Sec. 35, pp. 267-268. As was said in *Re Estate of Flood*, 217 Cal. 763, 768, 21 P.2d 579, 580:

"\* \* \* A nonsuit or a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" *Newson v. Hawley*, 205 Cal. 188, 270 P. 364; *Perera v. Panama Pacific Int. Exp. Co.*, 179 Cal. 63, 175 P. 454; [*In re*] *Estate of Sharon*, 179 Cal. 447, 177 P. 283; [*In re*] *Estate of Gallo*, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur., pp. 912-918. Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 228, 263 P. 799."

The evidence must be interpreted most strongly against the defendant. If there is any evidence tending to sustain the plaintiff's action, or if the evidence is conflicting, a nonsuit should be denied without passing upon the sufficiency of the evidence. *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 684, 269 P. 529. In the instant case the evidence was that the notes sued upon were executed and delivered to plaintiff, and, unless controverted by other evidence, it is



to be presumed that they were given for a sufficient consideration. Section 1963, subd. 21, Code Civ.Proc. It was also shown that the notes were unpaid. Unless it can be said as a matter of law that the writing of August 1, 1949, signed by Sawday, constituted a complete defense to plaintiff's action, the judgment must be reversed.

[3] It is defendant's contention that plaintiff's failure to file an affidavit under section 448 of the Code of Civil Procedure not only resulted in an admission of the genuineness and due execution of said writing but also was an admission that Sawday, who signed the letter, had authority to bind the plaintiff thereby. We conclude that this contention is without merit. The failure to file the affidavit merely means that the plaintiff admits the due execution and genuineness of the instrument; that the instrument was signed and delivered and that it was not spurious. Nothing more. As was said in *Miller v. McLaglen*, 82 Cal. App.2d 219, 224, 186 P.2d 48, 51:

"Failure to file an affidavit does not preclude a plaintiff from making any defense whatever to the affirmative allegations of the answer. He could, by evidence, controvert the instruments upon any and all grounds except that he could not controvert their due execution or their genuineness. He could controvert the instruments by evidence of fraud, mistake, undue influence, mental incapacity, want of consideration, failure of consideration, compromise, estoppel, that they were void because not fairly made or fully comprehended; he could question their legal effect; he could attack them by any other defense that would be open if the instruments were the basis of an action." (Citing many cases.)

See also *Butler v. Stratton*, 95 Cal.App.2d 23, 28, 212 P.2d 43; *Sparks v. Sparks*, 101 Cal.App.2d 129, 134, 225 P.2d 238; and *McDonald v. Hewlett*, 102 Cal.App.2d 680, 689, 228 P.2d 83.

[4] It is to be noted that the promissory notes sued upon are dated August 1, 1949, and subsequent thereto, and that the quoted letter is dated August 1. It is by no means clear that the writing purports to absolve the defendant from liability for transactions occurring subsequent to the date of the writing. Plaintiff would be entitled to show that the instrument has no relationship to the claims sued upon. *Fox v. Stockton, C. H. & A. Works*, 73 Cal. 273, 15 P. 430; *Newsom v. Woollacott*, 5 Cal. App. 722, 91 P. 347. The writing involved was addressed "To Whom it May Concern" and plaintiff's name is not affixed thereto. The signature is that of C. Trevor Sawday and the document is a memorandum of what was said by Sawday to defendant. It does not contain any statement to the effect that it is a writing authorized by the plaintiff or that it is signed by Sawday as a representative of plaintiff, and even if it were signed in a representative capacity, it cannot be said as a matter of law that it binds the plaintiff. *Benedict v. Wilson*, 10 Cal.App. 719, 103 P. 350. Since the writing does not on its face purport to have been made by plaintiff, an admission that it was genuine and duly executed does not bar plaintiff from showing that it was not authorized by the plaintiff corporation and was without consideration. *Myers v. Sierra Valley, Etc., Ass'n*, 122 Cal. 669, 675, 55 P. 689.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

110 Cal.App.2d 370

**DRAGOVICH v. SLOSSON et al.**

**Civ. 18772.**

District Court of Appeal, Second District,  
Division 1, California.

April 14, 1952.

Action by Nicholas Dragovich against A. E. Slosson and others for personal injuries arising out of collision between plaintiff's automobile and truck of defendant. The Superior Court of Los Angeles County, Frederick F. Houser, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Doran, J., held that trial court did not abuse its discretion when it excused two jurors after they had been approved by both parties, when such jurors informed trial court of previously forgotten fact that they knew one of attorneys to litigation.

Judgment affirmed.

**1. Jury**  $\hookrightarrow$ 75(5), 79(3)

A defendant or party is not entitled to jury composed of any particular jurors, and court may of its own motion discharge qualified juror without committing any error, provided there is finally selected a jury composed of qualified and competent persons.

**2. Jury**  $\hookrightarrow$ 75(1)

Where two jurors, when questioned concerning whether they knew either of attorneys, answered in negative, but upon question being repeated, and after jury had been approved by both parties, such jurors informed trial court that they recognized one of the attorneys from previous service on jury panel on which they had waited to be called as jurors, judge did not abuse his discretion when he thereupon discharged jurors.

**3. Appeal and Error**  $\hookrightarrow$ 1060(2)

In action for personal injuries to plaintiff as result of collision between his automobile and truck of defendants, where in question to defendant driver whether officer had given him citation after defendant driver had finished telling officer how accident happened was objected to, and question was not answered, and judge explained law in reference thereto and

instructed jury to disregard question in reaching its verdict, record and evidence in support of verdict sustained conclusion that asking of such question had not been prejudicial to defendant. Vehicle Code,  $\S$  755.

**4. Appeal and Error**  $\hookrightarrow$ 901

Error and prejudice will not be presumed by appellate court, but must appear from record.

Tipton, Weingand & Tipton, Los Angeles, for appellants.

Stephen Monteleone, Los Angeles, for respondent.

DORAN, Justice.

The plaintiff, respondent herein, recovered a judgment of \$10,000, entered upon a verdict of a jury, for personal injuries received on December 19, 1949; alleged to have been caused by the negligent operation of a gravel truck driven by the defendant Dana Sible and owned by the defendant Slosson, and resulting from a collision between the truck and plaintiff's automobile. There was a cross complaint for damages to the Slosson truck.

There are but two assignments of error, the first of which is that "The court committed reversible error in excusing from the jury two of the jurors after the jury had been accepted by both parties". From interrogation by the trial court it appeared that two jurors had previously served on a jury panel and had waited to be called as jurors in a case in which Mr. Tipton, attorney herein, appeared, but had not served in that case. At the beginning of the present case when the judge questioned the jurors as to knowing either of the attorneys, the two jurors had answered in the negative, not then recognizing Attorney Tipton. Later, upon the question being repeated and after the jury had been approved by both parties, the two jurors informed the trial court of that fact, and were excused. Thereafter, "because of the unfortunate situation", it was stipulated that each party might have one additional peremptory challenge.

It is conceded in appellants' brief that "In the exercise of a proper discretion a juror may be excused after the jury has been accepted or after the trial has commenced", but it is claimed that to do so in the present case amounts to an abuse of discretion in that "after a jury is accepted by both parties, the trial judge could act only for a good and valid reason to excuse jurors, and that the mere fact that they on one occasion saw the attorney for one of the parties in the court room is not such good and sufficient reason".

[1] In 15 Calif. Juris., page 408, section 80, the rule is stated thus: "Since a defendant or a party is not entitled to a jury composed of any particular jurors, the Court may of its own motion discharge a qualified juror without committing any error, provided there is finally selected a jury composed of qualified and competent persons". In *People v. Murray*, 85 Cal. 350, 24 P. 666, quoted with approval in *People v. Harris*, 45 Cal. App. 547, 188 P. 65, 67, the reviewing court said: "The court had the undoubted right to discharge them, or any of them, at any time, without giving any reason for such discharge, and without the existence of any reason."

[2] In the instant case, the record indicates that the trial court was not disposed to take any chances in the matter of securing an impartial jury, and in its discretion, saw fit to excuse the two jurors in question. In this no abuse of discretion is apparent, nor does it appear that the jury which tried the case and rendered the judgment complained of, was other than competent and qualified.

Appellant also complains that "The prejudicial misconduct of the attorney for the plaintiff in asking the following question 'After you finished telling Officer Noah how the accident happened on that particular day, he gave you a citation, didn't he?' entitled the defendants to a reversal". In this connection is cited Section 755 of the Vehicle Code, which provides that "No record of the conviction of any person for any violation of this code, nor any testimony of or concerning or produced at the trial terminating in such conviction, shall

be admissible as evidence in any court in any civil action." In the instant case there was no conviction and the citation was dismissed. The trial court sustained the objection, the question was not answered; the judge explained at some length the law in reference thereto and instructed the jury "to entirely disregard it in reaching your verdict in this case".

It is appellants' contention that the alleged misconduct cannot be deemed harmless for the reason that "the evidence is more than equally balanced. The scales tip markedly in favor of the defendant truck driver". Respondent's brief, on the other hand, denies that any prejudice resulted; and maintains that the question was asked in good faith on cross examination relating to alleged contradictory statements made by the defendant in regard to whether a U-turn or a left turn was being made when appellants' truck pulled back on to the highway from the shoulder. Officer Noah testified to the driver's statement that "he was eastbound, had pulled onto the shoulder and then came back on the highway intending to make a U-turn"; defendant testified, "I said I was making a left turn", etc. The objection question as to whether the officer gave defendant a citation was then asked but because of the objection, was not answered.

The respondent also calls attention to the fact that there was no persistent or intentional misconduct, and that the only other reference to a citation was when the appellant's counsel gave the matter more prominence by insisting the trial court explain to the jury that "although a citation was issued, the case was dismissed and the defendant did not plead guilty". The trial court denied a motion for a new trial sought on the ground of the alleged misconduct.

[3,4] The appellants' arguments in favor of reversal are not persuasive. The trial judge who heard the evidence, observed the witnesses, and refused to grant a new trial on the ground of the alleged misconduct, was evidently convinced that there was substantial evidence in support of the verdict and that no prejudice had



actuated the jury in its action. There is, indeed, nothing in the record to indicate anything of a prejudicial nature, and it is fundamental that error and prejudice will not be presumed. Neither the trial court's action in excusing the two jurors, nor the alleged prejudicial conduct of respondent's attorney, can be deemed reversible error under the facts and evidence presented by the record herein.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



110 Cal.App.2d 515

**HENDERSON v. SCUDDER.**

Cr. 918.

District Court of Appeal, Fourth District,  
California.

April 24, 1952.

Proceeding in habeas corpus seeking to set aside conviction of attempted robbery on ground that perjured testimony was knowingly used by prosecuting officials. The District Court of Appeal, Barnard, P. J., held that where petitioner was held under commitments issued pursuant to three separate judgments, one being for the attempted robbery, and terms for other judgment had not yet been fixed and maximum period for said offenses had not expired, petitioner was not entitled to discharge.

Writ discharged and petitioner remanded.

**1. Habeas Corpus ☞50**

Where petitioner was held in custody under commitments issued pursuant to three separate judgments of conviction including one for attempted robbery, and terms of sentence on other judgments had not been fixed and maximum period for such offenses had not yet expired, petitioner was not entitled to discharge on his application for writ of habeas corpus based on allegedly unlawful conviction of attempted robbery.

**2. Habeas Corpus ☞85(1)**

In proceeding for writ of habeas corpus based on claim that petitioner was convicted of attempted robbery by means of perjured testimony of alleged accomplice, record of the trial disclosed that conviction was amply supported by evidence irrespective of testimony of accomplice who allegedly perjured himself.

**3. Habeas Corpus ☞85(1)**

In proceeding for writ of habeas corpus based on claim that petitioner was convicted of attempted robbery by means of perjured testimony of alleged accomplice, petition and accompanying affidavits were insufficient to show whether accomplice had committed perjury at trial or in his affidavit wherein he stated that he had perjured himself during trial.

**4. Habeas Corpus ☞85(1)**

Petitioner whose application for writ of habeas corpus was based on claim that he was convicted of attempted robbery by means of perjured testimony had burden to prove that alleged perjured testimony was knowingly used by prosecuting officials at trial.

---

Willie L. Henderson, in pro per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of habeas corpus. It appears that on the night of April 8, 1950, one Wheeler and one Johnson entered a service station in Los Angeles and attempted to hold up the attendants. A patrol officer, who saw the holdup in progress, testified that he saw a third man by a pump. He identified this petitioner as that third man. Johnson fired a shot which struck the patrol officer and that officer fired a shot which hit Wheeler. Wheeler ran to the car where the petitioner was, and after getting into the car lost consciousness. Wheeler, who pleaded guilty, testified that the petitioner and Johnson accompanied him to the station

on the night of the robbery and it was arranged that he and Johnson were to go into the station while the petitioner was to park his car and wait for them. A jury found the petitioner guilty of attempted robbery and on October 26, 1950, he was sentenced to state prison for this offense.

The petition is based upon the claim that he was convicted of attempted robbery by means of perjured testimony knowingly used by the prosecuting officials. It is alleged that the police officer who investigated this matter made a deal with Wheeler giving him immunity from conviction on this charge in return for his testimony to the effect that the petitioner participated in this crime; that Wheeler was also promised that certain other matters pending against him in Arizona would be dropped in exchange for his perjured testimony against the petitioner; and that Wheeler, who is now confined in the Chino Institution for Men where the petitioner is confined, has now admitted that he did not tell the truth concerning the petitioner at the trial. An affidavit signed by Wheeler is attached to the petition, in which he states that he was led by duress and fear of being removed to Arizona and other considerations to incriminate the petitioner in this robbery; that for the purpose of righting the wrong he now desires to make a truthful statement of facts; that he now states under oath that the petitioner did not participate in said robbery; and that, so far as he knows, the petitioner was not present when the robbery was committed.

From the return to the writ it appears that the petitioner is held under commitments issued pursuant to three separate judgments, a judgment for conviction of forgery of fictitious name, one for conviction of violation of the dangerous weapon's control law, and the one directly involved herein. All three judgments were entered on October 26, 1950. The return denies all the material allegations of the petition and it is accompanied by the

affidavits of the investigating officer and of the district attorney who tried the case. The affidavit of the district attorney denies any knowledge of the facts presented in the new affidavit of Wheeler, and alleges that at the trial he presented Wheeler as a witness in the belief that he was telling the truth. The affidavit of the investigating officer is to the same effect and presents other facts which would support his belief that Wheeler had agreed to, and did, tell the truth at the trial.

[1-4] It clearly appears that the petitioner is not entitled to a discharge, since he is held on two other judgments under which the Adult Authority has not yet fixed the terms, and the maximum period for said offenses has not yet expired. With respect to the conviction for attempted robbery the record before us, including the transcript of the proceedings at the trial, discloses that the conviction was amply supported by the evidence, irrespective of the testimony of the witness Wheeler. While it would appear that Wheeler has committed perjury, either at the trial or in his affidavit, nothing has been here presented from which it can be told which of his stories is true. Moreover, it is incumbent upon the petitioner to prove that perjured testimony was knowingly used by the prosecuting officials at the trial. In *re* Mooney, 10 Cal.2d 1, 73 P.2d 554; In *re* Lindley, 29 Cal.2d 709, 177 P.2d 918. No attempt was made by the petitioner to establish that fact, no contention was made that evidence to that effect could be produced, and the only evidence that was produced is to the contrary. At the hearing it was stipulated that the petition should be considered as a traverse to the return, and the matter was submitted on the allegations of the petition and the affidavit made by Wheeler.

The writ is discharged and the petitioner is remanded.

GRIFFIN and MUSSELL, JJ., concur.

110 Cal.App.2d 395

**POLIZZI v. PORCARO.**

Civ. 14967.

District Court of Appeal, First District,  
Division 1, California.

April 17, 1952.

Joseph Polizzi brought action against Thomas Porcaro to recover certain monies paid by plaintiff to defendant for an interest in a cannery. The Superior Court of the City and County of San Francisco, Melvin I. Cronin, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Bray, J., held that plaintiff failed to make a demand for return of his money within a reasonable time and was therefore not entitled to a return thereof under agreement of the parties.

Judgment affirmed.

**1. Appeal and Error** *⌋*930(1)

On appeal by plaintiff from judgment for defendant, the District Court of Appeal was required to take the evidence and reasonable inferences therefrom most strongly in favor of defendant.

**2. Pleading** *⌋*129(1)

Failure of defendant to deny certain allegation in first cause of action of complaint was not an admission by defendant of the truth of such allegation, where defendant did deny the same allegation in the other two causes of action.

**3. Corporations** *⌋*121(5)

In action to recover sum of \$12,500 advanced by plaintiff to defendant under written agreement providing that money advanced was for one-fourth interest in new cannery corporation, and that within one year plaintiff had option of returning stock to defendant for refund of money advanced plus 5% interest, or if plaintiff did not desire to accept stock at end of first year, he was entitled to refund of his money plus 5% interest, wherein defendant set up defense that plaintiff was not entitled to return of money because plaintiff did make demand for return within a year or reasonable time thereafter, evidence sustained finding that \$2,000 paid by defendant to plaintiff's wife was merely a loan and was not a return of money to plaintiff.

**4. Corporations** *⌋*121(5)

In action to recover sum advanced by plaintiff to defendant under a written agreement providing that money advanced was for one-fourth interest in new cannery corporation, and that within one year plaintiff had option of returning stock to defendant for refund of money advanced plus 5% interest, or if plaintiff did not desire to accept stock at end of first year, he was entitled to refund of his money plus 5% interest, wherein defendant set up defense that plaintiff was not entitled to return of money because plaintiff did make a demand for return of the money within a year or reasonable time thereafter, evidence sustained finding that plaintiff at no time prior to suit, which was brought about 10 months after expiration of one year, demanded a return of his money.

**5. Licenses** *⌋*18½(27)

Where plaintiff advanced \$12,500 to defendant under written agreement providing that plaintiff was to have a one-fourth interest in corporation to be organized to erect and operate a cannery, and that within one year plaintiff should have option of returning stock to defendant for a refund of money advanced plus 5% interest, or if plaintiff did not desire to accept stock at end of first year, he was entitled to refund of money plus 5% interest, there was a "joint venture" and not a "stock subscription agreement" and the Corporate Securities Law was not applicable. Corporations Code, §§ 25000 to 26104.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venture" and "Stock Subscription Agreement".

**6. Corporations** *⌋*120

Where plaintiff advanced \$12,500 to defendant under written agreement providing that plaintiff was to have a one-fourth interest in corporation to be organized to erect and operate a cannery, and that within one year plaintiff should have option of returning stock to defendant for a refund of money advanced plus 5% interest, or if plaintiff did not desire to accept stock at end of first year, he was entitled to refund of money plus 5% interest, plaintiff had a



reasonable time after expiration of year to demand a return of his money.

### 7. Corporations ⇐120

Where plaintiff advanced \$12,500 to defendant under written agreement providing that plaintiff was to have a one-fourth interest in corporation to be organized to erect and operate a cannery, and that within one year plaintiff should have option of returning stock to defendant for a refund of money advanced plus 5% interest, or if plaintiff did not desire to accept the stock at end of first year, he was entitled to refund of money plus 5% interest, and suit, which was the first demand by plaintiff for return of his money, was not filed until almost 10 months after expiration of the year, plaintiff was not entitled to return of money, since demand was not made within a reasonable time after the year.

### 8. Pleading ⇐129(1)

Where defendant did not deny allegations of second paragraph of third cause of action, court erred in finding such allegations untrue.

### 9. Corporations ⇐121(5)

In action to recover sum advanced by plaintiff to defendant under written agreement providing that money advanced was for one-fourth interest in new cannery corporation, and that within one year plaintiff had option of returning stock to defendant for refund of money advanced plus 5% interest, or if plaintiff did not desire to accept stock at end of first year, he was entitled to refund of his money plus 5% interest, wherein defendant set up defense that plaintiff was not entitled to return of money because plaintiff did make a demand for return within a year or reasonable time thereafter, evidence was insufficient to disclose any fraud or misrepresentation on part of defendant.

---

Elios P. Anderlini, San Francisco,  
Herbert Chamberlin, San Francisco, of  
counsel, for appellant.

Walter F. Calcagno, San Francisco, for  
respondent.

BRAY, Justice.

Plaintiff sought return of certain moneys paid for an interest in a cannery. From a judgment based on a verdict in favor of defendant, plaintiff appeals, on the main ground of insufficiency of evidence. The correctness of the findings is also attacked.

### Evidence

[1] Taking, as we are required to do, the evidence, and the reasonable inferences therefrom, most strongly in favor of defendant, there is substantial evidence to support the verdict. Defendant's son Vincent owned certain buildings and equipment in Fresno. They were subject to a \$10,000 encumbrance. Defendant had a power of attorney from Vincent. Although the organization in November of 1945 was on record with the Corporation Commissioner as California Best Products Co., Inc., the California Best Products Co. was being used. At the time of the agreement, no stock was as yet issued. It was not until after the agreement was signed that "Inc." was actually used in the name. The parties had known each other for many years. Plaintiff had an interest in and managed a San Francisco restaurant. Defendant was in the food brokerage business. Defendant and his son wanted to operate a cannery. None was operated prior to the agreement hereafter mentioned. After some preliminary discussions, plaintiff agreed to invest \$12,500 for a one-quarter interest. On March 18, 1947, a rather crude agreement was drawn up and signed by plaintiff and defendant.

"Thomas Porcaro

7 Front Street

San Francisco 11, California

"Personal

San Francisco, Calif.

March 18, 1947

"Agreement between Thomas Porcaro, 7 Front Street, San Francisco, California and J. Polizzi, 225 California Street, San Francisco, California. J. Polizzi agrees to pay the amount of 12,500 to Thomas Porcaro as 1/4 interest in the new Tomato Cannery to be erected in Fresno, California, at 4150 California Avenue.

"The name of the corporation will be California Best Products Co., Inc., or any other name approved by the members of the corporation. Mr. J. Polizzi, one of the organizers of the corporation for 1/4 of the total capital designated to cover the cost of machinery, labor and expenses required to have the cannery in working status.

"Thomas Porcaro promises to supervise all the necessary work and to supply and to deliver the certificate of the stock covering the \$12,500 to Mr. Polizzi as soon as the corporation papers are ready.

*"Within one year from today, Mr. Polizzi has the choice of returning the stock to Thomas Porcaro for a refund of his capital plus 5% interest on 60 days notice."*<sup>1</sup>

"This stock or interest in the corporation cannot be transferred to anybody without the consent of the other three members of the corporation. Also Mr. J. Polizzi agrees to give first choice to buy his interest to Thomas Porcaro or his son Vincent T. Porcaro in case he decides to sell. *Also in case he does not desire to accept the stock of the corporation, at the end of the first year he is entitled to the refund of his money plus 5% interest.*

"Signed,

(s) T. Porcaro

Thomas Porcaro

(s) Joseph Polizzi

G. Polizzi"

Plaintiff then paid defendant \$12,500. The court found and the evidence shows that defendant used this money in the business, reporting to plaintiff his activities, what he spent the money for, and the progress of the enterprise.

It is undisputed that plaintiff never received nor was offered the stock. Plaintiff testified that defendant never at any time after the execution of the agreement talked to him about the stock. On the other hand, defendant testified that when he told plaintiff the stock was in escrow plaintiff asked him to leave his name out of the corporation and that he did not want the stock then because he was having financial trouble in the restaurant business with "the Frenchman" and also was trying to have his civil

rights restored by a pardon after a felony conviction, and did not want the stock until he had finished with both matters. The liquor license at plaintiff's restaurant was in the name of the bartender, apparently because of plaintiff's conviction and loss of civil rights. Plaintiff testified that in August or September of 1947 he went to Fresno to look at the cannery, taking his brother-in-law, whom he desired to interest in investing money in the business. The brother-in-law did not think much of the deal and would not go in on it. Thereupon plaintiff claimed that he asked for the return of his money and that defendant told him he would return it in sixty days. Plaintiff claimed that from time to time until he filed suit he demanded his money. Each time defendant would promise to repay it as soon as he could sell the property, a deal for which was pending. Plaintiff's claim of demand was supported by the evidence of plaintiff's wife, who had put up part of the \$12,500, his brother-in-law, and an employee of plaintiff. However, defendant denied that plaintiff at any time asked for his money. The court found that no demand was made until the filing of the suit. He testified as to the purchase and installation of equipment, and his services in applying to the R.F.C. for financial assistance and his other actions in trying to get the cannery started.

In July or August plaintiff and defendant were trying to interest Gusmano, a broker, in selling their tomato sauce in the East. In a meeting between the three defendant did all the talking, plaintiff not saying anything. In March, 1948, plaintiff and defendant came to the office of one Pieri with the sauce which had been made in the cannery for sample purposes. These acts of plaintiff support defendant's testimony that until the time of suit, plaintiff was satisfied with the transaction and did not ask for his money.

In October, 1948, the Corporation Commissioner issued his permit authorizing the issuance of fifty shares of the California Best Products Co. to Vincent for the consideration of certain pieces of equipment.

<sup>1</sup> Unless otherwise noted, emphasis is ours.

Defendant testified that the reason such a small amount of stock was issued was to qualify for a loan from R.F.C. The rest of the corporation formation and stock issuance was held in abeyance because of plaintiff's desire not to have his name used at that time.

In October, 1948, a check for \$2000 payable to plaintiff's wife and signed California Best Products Co., Inc., Thomas Porcaro, was given by defendant to plaintiff's wife. Plaintiff claims that this was given as a partial return of his money. Defendant testified that Mrs. Polizzi came to him in the spring of 1948 and told him she needed money for personal reasons. He refused to give her any. He spoke to plaintiff about it and plaintiff said that he was selling the restaurant and would pay her "because she should stay out of all my business." In September plaintiff asked defendant to give Mrs. Polizzi some money and he would pay defendant back as soon as he sold the restaurant. It was on this express promise to repay that defendant drew the check to Mrs. Polizzi and gave it to plaintiff.

[2] Great stress is placed by plaintiff upon the effect of the failure of defendant in his answer to deny the allegation in the first cause of action of the complaint which read: "That no part of said sum of \$12,500 has been paid, *except only the sum of \$2000.00.*" Plaintiff contends that this removes the question of what the \$2000 was paid for as an issue in the case, citing *Fuentes v. Tucker*, 31 Cal.2d 1, 187 P.2d 752, and *Welch v. Alcott*, 185 Cal. 731, 198 P. 626. However, the rule of those cases does not apply here for the reason that, in spite of the technical effect of the pleadings, assuming that on the face of the pleadings the payment is admitted (although there is considerable doubt as to the effect of the failure to deny that allegation; in the other two causes of action it is denied), the parties made it an issue. At no time during the introduction by defendant of evidence of the circumstances of the payment of the \$2000 was any objection made to its introduction, nor was the court's attention called by plaintiff to the admission in the pleadings. Where a case is tried as though no admis-

sion had been made, and the issue of the purpose for which the money was paid was submitted without objection to the court for determination, the rule of the above cases does not apply.

[3,4] In view of the conflict of evidence as to whether the \$2000 was a return of money to plaintiff or a loan, we are bound by the court's finding that it was a loan. The same thing is true of the court's finding that plaintiff at no time prior to suit demanded a return of his money.

#### Joint Venture

[5] The court, after finding that the parties entered into the agreement of March 18, 1947, found "that plaintiff's contribution to the *joint venture* was the sum of \$12,500." Plaintiff contends that this was not an agreement for a joint venture but a corporation stock subscription agreement. Such interpretation is incorrect. It obviously was an agreement for a joint venture in which the adventurers would form a corporation. Plaintiff was to have "1/4 interest in the new Tomato Cannery. \* \* \*" "The name of the corporation will be California Best Products Co., Inc., or any other name approved by the members of the corporation." Plaintiff was "one of the organizers of the corporation. \* \* \*" Moreover, plaintiff had the option either during the first year or at its end to refuse the stock and thereby terminate the joint venture. Plaintiff treated the arrangement as a joint venture by at all times requiring that his name not be included in the corporation. This situation answers the contention that the agreement was illegal because in violation of the Corporate Securities Act, Deering's Gen. Laws, Act 3814, Corp. Code, §§ 25000-26104.

#### Time for Demand

[6,7] In effect, the court found that the agreement gave plaintiff two options to demand a return of his money. 1. (Paragraph 6, Findings.) Plaintiff within the year had an option to demand the return of his money. (As pointed out before the court's finding that he did not do this is supported.) While the agreement actually-



stated that within the year plaintiff had the choice of returning the stock for a refund of his capital plus interest, this part of the agreement would entitle him to a return of his money within that period whether or not the stock had been issued. Plaintiff finds fault with this finding by contending it is a distortion of the contract and means that as no stock was issued plaintiff could not have demanded his money back during the year. Such contention is really a distortion of the finding. Moreover, as plaintiff made no demand during the year, the discussion is academic.

2. (Paragraph 8, Findings.) Plaintiff had a reasonable time after the expiration of the year to demand the return of his money, but did not do so. Plaintiff's main contention here is that the language of the agreement, "Also in case he does not desire to accept the stock of the corporation, *at the end of the first year* he is entitled to the refund of his money plus" interest, gave him almost a year after March 18, 1948 (the agreement was made March 18, 1947), in which to demand his money. The suit, which the court found was the first demand, was filed January 12, 1949, almost ten months after the expiration of the first year. Obviously that was more than a reasonable time, particularly in view of evidence that as late as July or August, 1948, plaintiff seemed satisfied with the deal and met with the broker Gusmano concerning sales of the sauce to be produced by the cannery. Plaintiff also contends that a reasonable time after the end of the first year would include the entire time during which plaintiff's claim would not be barred by the statute of limitations. In *Fergus v. Venice Investment Co.*, 36 Cal.App. 425, 172 P. 396, the question was what was a reasonable time in which to make demand for the recovery of money paid for stock not delivered, in order to start the statute of limitations running. The court pointed out that the defendant kept promising the stock and the parties were friends and held that the delayed demand was made in a reasonable time. The court in that case refers to cases which have decided that by adoption of an analogy, the period which is fixed by the statute of limitations is a reason-

able time. However, the court went on to say this: "However, this rule \* \* \* could not in justice be absolute, as the principal rule announced by the decisions is that the demand must be made within a reasonable time, and appeal is made to the analogy furnished by the statute of limitations only as an aid to the determination of that principal question. \* \* \* what is a reasonable time for making demand must depend upon the facts of each case, whenever those facts are such as to indicate that the analogy of the statute of limitations does not in justice apply." 36 Cal.App. at page 427, 172 P. at page 396.

In the case of *Hougland v. Roth Blum Packing Co.*, 99 Cal.App. 631, 279 P. 159, the court said: "In other words, this contract being silent as to time of performance, the law writes into it terms which require a reasonable performance, having in view the subject of the contract and the place and condition of the objects concerning which the contract was made." 99 Cal. App. at page 635, 279 P. at page 160.

The question of what is a reasonable time is a question of fact. "But whenever the special facts and circumstances are such that the court cannot by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility." *Luckhart v. Ogden*, 30 Cal. 547, 558-559.

Under the circumstances of this case we cannot say that the trial court erred in finding that plaintiff did not act within a reasonable time of the end of the year.

#### Omnibus Findings

[8,9] Among other findings the court found (a) "That none of the allegations contained in paragraphs 2, 3 and 4 of the Third Cause of Action \* \* \* are true." The first cause of action was on a common count for money had and received. The third is based on allegations of fraud and misrepresentation. The defendant did not deny the allegations of paragraph 2 of the third cause of action. Hence the court

erred in finding its allegations untrue. This paragraph reads: "That pursuant to the representations and stipulations recited in said purported agreement, plaintiff turned over to defendant the sum of \$12,500.00." "[P]urported agreement" refers to the March 18, 1947, agreement. Obviously this allegation is true and the court should have so found. (It actually did in other parts of the findings.) Under authority of section 956a of the Code of Civil Procedure finding 12 is hereby amended by striking therefrom the figure "2". The evidence fails to disclose any fraud or misrepresentation nor any cause of action on the common count. The omnibus finding as amended by us, as well as the specific findings, are supported by the evidence.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



110 Cal.App.2d 517

**McKEE v. MIREs et al.**

Civ. 8067.

District Court of Appeal, Third District,  
California.

April 25, 1952.

Action by Orris McKee, doing business as McKee Oil Company, against Roy Mires, and others, including Wallace Lynn and Stanley Rising, individually and doing business as Crescent Gold Dredging Company, a copartnership, to recover the value of petroleum products delivered, and used by a gold mining dredge. The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment favorable to plaintiff, and the defendants Lynn and Rising appealed. The District Court of Appeal, Schottky, J. pro tem., held that the finding that the appellants were ostensible partners was supported by the record.

Affirmed.

#### 1. Appeal and Error Ⓒ989

When judgment is attacked as being unsupported by evidence, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

#### 2. Partnership Ⓒ56

In action against alleged copartnership and members thereof to recover for petroleum products sold and delivered, evidence sustained finding of partnership by estoppel. Civ.Code, § 2334; Corporations Code, § 15016.

#### 3. Evidence Ⓒ258(2)

In action against copartnership and members thereof to recover indebtedness for petroleum products sold and delivered, there was sufficient showing of fact of agency between appealing defendants and employee of firm hired by them to investigate dredging operations to permit introduction of testimony by plaintiff to effect that such employee had requested him to deliver oil. Civ.Code, § 1624, subd. 2.

#### 4. Appeal and Error Ⓒ1041(4)

In action against copartnership and members thereof to recover indebtedness for merchandise sold and delivered, there was no prejudicial error in permitting amendment to conform complaint to proof by alleging that defendants had represented themselves and consented to each other representing themselves, to various creditors, and to plaintiff, as being partners in existing partnership, where finding that they were ostensible partners was supported by record, circumstances of transactions between parties was gone into fully, and appealing defendants had abundant opportunity to refute all issues raised by amended pleading. Code Civ.Proc. §§ 472, 1005, 1010; Rules of Superior Courts, rules 3(a), 4.

#### 5. Pleading Ⓒ237(3)

The allowance of amendments to conform to proof rests in sound discretion of trial court, even where motion is not made until after submission of cause; and greatest liberality is to be encouraged in allow-

ance of such amendments, in order to see that justice is done. Code Civ.Proc. §§ 472, 1005, 1010; Rules of Superior Courts, rules 3(a), 4.

---

Hiram R. Baker, Redding, John G. Evans, San Francisco, for appellants.

Carr & Kennedy, Redding, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff brought this action to recover the value of petroleum products delivered, and used by a gold mining dredge operated in Trinity County. The action was against the defendants individually, and against the defendants doing business as Crescent Gold Dredging Co., a copartnership. The complaint set forth three causes. The first count alleged an oral contract to pay plaintiff the reasonable value of gas, oil, and Diesel fuel delivered by him to defendants, and that there remained unpaid the sum of \$1,236.08. The second cause was a common count upon a "mutual, open and current book account for goods, wares and merchandise." The third cause was a common count for goods sold and delivered. The complaint was amended to conform to proof as follows: "That defendants, and each of them, by their spoken and written words and conduct, have at all times herein mentioned represented themselves and consented to each other representing themselves to various creditors and to plaintiff as partners in an existing partnership, and in reliance thereon plaintiff on the faith of such representation has given credit as hereinabove alleged to all of said defendants under the belief that there is and was an actual and apparent partnership, and said representations were made and consented to be made by said defendants in a public manner."

Findings of fact were favorable to plaintiff, and judgment was thereafter entered against all defendants. Defendants Lynn and Rising appeal from the judgment.

[1] The principle contention of appellants is that the evidence is insufficient to establish their liability. Bearing in mind the familiar rule that when a judgment is

attacked as being unsupported by the evidence the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, we shall give a brief summary of the evidence as shown by the record.

The facts are somewhat similar to those involved in *Gerlinger v. Crescent Gold Dredging Co.*, 108 Cal.App. 185, 238 P.2d 608 (hearing denied), recently decided by this court. The same dredging operation and same parties defendant were involved in that case.

Defendants Roy Mires and Joseph H. Garner owned and operated a dredge on Coffee Creek in Trinity County. Prior to the fuel deliveries for which suit was filed, appellants Rising and Lynn entered into an option contract dated October 18, 1949, providing that appellants were given an option to acquire an interest in the gold mining operation conducted by Mires and Garner for a consideration of \$12,500 and an extension of the indebtedness then owed by Mires and Garner. Under the agreement, if the option was exercised the business would be incorporated under the name of "Crescent Gold Dredging Company." The agreement provided: "It is expressly understood and agreed that Lynn and Rising are not, nor do they become by the execution of this agreement, copartners with the said Mires and Garner in their copartnership operations, and it is further understood and agreed that the said Lynn and Rising are not assuming any liability of any nature whatsoever concerning said copartnership, or its operations, save and except as may in writing be authorized by them." The option was never exercised. However, a bank account was established for the purpose of conducting preliminary dredging operations. In this connection appellant Lynn testified:

"Q. Did you or Rising give any instructions to anyone or make arrangements with anyone to proceed to get the dredge operating prior to the signing of an agreement? A. Yes, we did because we didn't have the agreement. We told Andrews [an account-



ant], I think it was, to set up the bank account and to disburse the money or pay it out as he was instructed by Mires and Garner, or Mires."

This account was opened in the name of the "Crescent Gold Dredging Company."

After the above arrangements the respondent discussed deliveries with appellant Rising. The respondent testified as follows:

"Q. Now did Rising tell you anything about this Crescent Gold Dredging Company? A. He said that they were forming a new company and he mentioned that Mr. Lynn was in it but he was out at that time.

"Q. Did he state anything else that you remember? A. He told me that he would personally see that my bills were all paid."

Respondent also testified that appellant Rising did not place a limit on anybody's authority to order oil, or limit the amount of oil that could be delivered, and that he was specifically informed by appellant Rising that Donaldson, Thomas, or Mires had authority to order fuel.

The unpaid oil bills represented deliveries made between the 22nd and the 31st of October, 1949. From October 4th through the 19th of October, 1949, deliveries were made in the amounts of \$604, \$604.49, \$457.-82, \$369.87 and \$332.13. These amounts were paid by check from Crescent Gold Dredging Company and signed by Mr. Andrews.

It appears that prior to the date of the option contract, respondent had furnished fuel to defendants Mires and Garner and that respondent notified said defendants that their credit rating was bad and that they could not have any more deliveries of fuel on credit. The last delivery was made to Mires and Garner on August 14, 1949.

Appellants first contend that the evidence is insufficient to support a finding of an actual copartnership, but in view of the fact that the court did not make a finding of actual partnership this contention becomes immaterial and need not be discussed.

[2] Appellants next contend the evidence is insufficient to show a partnership by estoppel. The court found: "That it is also true that defendants, Wallace Lynn, Stanley Reising, Roy Mires and J. H. Garner, and each of them, by their written words and conduct, did at all times, mentioned in plaintiff's complaint, represent themselves and consent to each other representing themselves, to various creditors and the plaintiff, as partners in an existing partnership entitled Crescent Gold Dredging Company; and in reliance thereon plaintiff on the faith of such representations gave credit to said defendants, and each of them, under the belief that there was an actual and apparent partnership existing between said defendants, and the said representation of each of said defendants was made and consented to be made by said defendants and each of them in a public manner."

Section 15016 of the Corporations Code provides: "When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership \* \* \*."

We believe that the declarations, acts and conduct of appellants, as shown by the record, amply support the above findings of the court. While it is true, as stated in section 2334 of the Civil Code, that "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith \* \* incurred a liability or parted with value, upon the faith thereof", we are satisfied that upon the record here and in view of the authorities cited in *Gerlinger v. Crescent Gold Dredging Co.*, supra, the court was fully justified in concluding that appellants invested Donaldson and Mires with apparent authority to buy supplies for the operation of the dredge upon the credit of appellants.

Appellants argue, also, that Rising is not liable as a guarantor by stating to respond-

ent that he would pay the fuel bills since any promise to be responsible for the debt, default or miscarriage of another must be in writing pursuant to section 1624(2) of the Civil Code. There is no finding that appellant Rising was a guarantor, but the court found "that in making the promise to see that plaintiff was personally paid for his delivery of goods, defendant Stanley Reising did not promise to answer for the debt, default or miscarriage of any of the defendants, but made said promise under authority given by all of said defendants to personally bind them to the contract.

\* \* \*

[3] Appellants next contend that the court committed prejudicial error in allowing respondent to testify as to conversations between respondent, defendants Mires and Garner, and one Donaldson which were outside the presence of appellants. Respondent testified that Donaldson requested him to deliver a load of oil to the dredge. Appellants objected to this testimony upon the ground that the declarations of an agent are not admissible unless a foundation is laid to show the fact of agency.

However, the record shows that appellant Lynn testified that appellants hired an engineering company to investigate the dredging operations, and that the company sent Donaldson to do this work. Defendant Mires testified that Thomas, the dredge master, and Donaldson prepared the payrolls for the operation, and respondent testified that appellant Rising informed him that Donaldson was authorized to order fuel. Under the circumstances shown by the record the conversations objected to were admissible as there was sufficient evidence to indicate that Donaldson was an employee or agent of appellants.

[4, 5] Appellants' final contention is that the court committed prejudicial error in permitting the amendment to the complaint. It is urged that the proposed amendment did not conform to Rule 4, Superior Court Rules, in that it did not designate the page and lines of the prior pleading which was to be amended; that the procedures for amendments prescribed in sections 472, 1005 and 1010 of the Code of Civil Procedure, and Rule 3(a), Rules of

Superior Courts, were not complied with in that no motion was served and filed and no notice of hearing thereon given; and that the amendment alleged conclusions of law.

An amendment which in substance is identical to the amendment quoted above was offered at the commencement of trial. The amendment above quoted was offered at the conclusion of the case to conform to proof. The respondent points out that the amendment to conform to proof designated the line, page and paragraph of the complaint; and that since the motion was made in open court it was unnecessary to serve and file the motion.

We are unable to perceive how appellants could suffer prejudice by reason of the allowance of the amendment because they were sued individually and as partners in the original complaint. The finding that they were ostensible partners is supported by the record and there was no error in permitting the complaint to be amended to conform to proof as was done in the instant case. The facts and circumstances of the transactions between the parties was gone into fully and appellants had abundant opportunity to refute all issues raised by the amended pleading. They were in no way misled or prejudiced by the amendment. As was said in *Carman v. Athearn*, 77 Cal.App.2d 585, at page 594, 175 P.2d 926, at page 931:

"The allowance of amendments to conform to the proof rests in the sound discretion of the trial court. This is so even where, as here, the motion is not made until after submission of the cause. *Stoops v. Pistachio*, 70 Cal.App. 772, 234 P. 423; *Lee v. Murphy*, 119 Cal. 364, 51 P. 549, 955; §§ 469 and 470, Code of Civil Procedure; see cases collected 21 Cal.Jur. p. 211, § 144. The greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done. See cases collected 21 Cal.Jur. p. 209, § 143."

In view of the foregoing the judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

110 Cal.App.2d 436

**BRADLEY et al. v. FRAZIER PARK PLAY-  
GROUNDS, Inc. et al.**

Civ. 4351.

District Court of Appeal, Fourth District,  
California.

April 21, 1952.

Hearing Denied June 19, 1952.

Grace Bradley and others sued Frazier Park Playgrounds, Inc., and others to establish their right to use certain recreational facilities which were included within the real estate development in which they had bought lots relying upon salesmen's representations that they would have permanent use of such facilities without restriction. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment for plaintiffs, and one defendant appealed. The District Court of Appeal, Griffin, J., held that plaintiffs were entitled to an equitable easement to use such facilities, though no such right of use or easement had been granted by written conveyance.

Affirmed.

**1. Easements ⇐16**

Where, in advertising sale of lots in real estate development, lots were located on map showing playground area, club house, and lakes, and availability of such recreational facilities, which were owned by owner of development, was given great emphasis by promoters of development and there was evidence that purchasers of lots relied upon salesmen's representations that they would have permanent use of such facilities without restriction, such purchasers were entitled to equitable easement to use such facilities, though no such right of use or easement was granted by written conveyance. Civ.Code §§ 801 et seq., 1104.

**2. Easements ⇐30(1), 61(8)**

Mere nonuser does not necessarily constitute abandonment of an easement, and therefore in action to establish equitable easement, trial court did not abuse discretion in denying defendant right to amend answer so as to include defense of abandonment by reason of nonuser for over 14 years. Civ.Code, §§ 801 et seq., 1104.

**3. Easements ⇐36(3)**

In action by purchasers of lots in real estate development against successor in in-

terest of such development which included certain recreational facilities to establish equitable easement to use such facilities, evidence did not establish, as contended by defendant, that purchasers had abandoned or intended to abandon any of the rights claimed by nonuser for over 14 years.

William R. Hulsy, Bakersfield, for appellant.

Siemon & Siemon, Bakersfield, for respondents.

GRIFFIN, Justice.

In 1924, a real estate promotion was commenced by a group of real estate operators who had organized, in August, 1924, a corporation known as "Frazier Mountain Park and Fisheries Company, Inc." This corporation secured about 800 acres of real property for subdivision purposes lying to the west of U. S. Highway 99, approximately on the border line between Kern County and Ventura County, in the mountainous area just south of Lebec. One Harry G. MacBain was president and the moving spirit in its promotion. In the heart of the subdivision was a playground area consisting of about ten or twelve acres, sometimes designated in the evidence as the "commons". It contained some springs and a grove of trees through which flowed the Cuddy Creek. Artificial lakes were excavated to take advantage of certain waters which were there available. Subdivision maps of the several tracts were duly recorded and lots were sold according to said maps. The entire subdivision contained in excess of 1700 numbered lots. The general subdivision map (Exhibit 1) which does not appear to have been recorded, designated the numbered lots and showed the unnumbered area containing the "commons" and the lakes above described. A footnote is set forth on that map as follows: "All streets, trails, drives, or unnumbered areas adjacent thereto, are reserved for the use of owners of real property within said subdivision and are not dedicated to the public."

The rustic clubhouse or lodge was erected in this unnumbered area which was used



as a meeting place for the residents and property owners and which was also used as the focal point in the promotion of the sale of lots in the subdivision. The Frazier Park Water Company, a corporation, was organized in March, 1926, for the purpose of producing and distributing water to the lots in the subdivision. Upon the completion of payments, after the sale of the lots, each purchaser of a lot was entitled to receive two shares of stock in the water company.

Mr. MacBain and his associates envisioned the area as being a natural resort and playground spot, and took the steps which they considered necessary to make it so. Five artificial lakes were constructed in the playground area of the property. Cabins were erected for rentals, and the real estate promotion boomed. A large number of lots were sold for cabin sites, and many summer homes were erected within the subdivided portions of the area.

One of the selling points for the lots was the representation that with each lot the purchaser would receive the right to membership in a "Rod and Gun Club" (later to be called a "Rod and Reel Club") which club would own and operate the clubhouse and grounds, and which would maintain fish in the lakes, and would carry on the usual activities of a country club. Membership in the club was to be based either on ownership of lots in the subdivision or could be purchased by non-lot-owners at the discretion of the board of directors of the club. The printed matter furnished to potential purchasers suggested that the club membership would increase in worth and be of great value. The Frazier Mountain Park and Fisheries Company, Inc., on October 8, 1928, borrowed a sum up to \$400,000 on bearer promissory notes, secured by a trust deed, not only on all of the unsold lots in the tracts numbered 1 to 5 inclusive, in the area, but also the lots which had been sold on contract, and in addition, all of the unsubdivided portion of the land, including the area on which the lakes, playgrounds, and clubhouse were situated. The Metropolitan Trust Company was named as trustee under the deed of trust.

All of the expenses incident to the clearing of the playground area, the building of the clubhouse, the excavation for the lakes, the stocking of the lakes with fish, and the care and maintenance of the area, were borne by the real estate promoters up to the time that the Frazier Mountain Rod and Reel Club was created on March 1, 1926. (MacBain's attorney was one of the incorporators.) After that time the Rod and Reel Club operated the clubhouse and the grounds, stocked the lakes with fish, and generally conducted the area in the normal manner for the benefit of its members, collecting dues, incurring expenses for the pumping of the water into the lakes, stocking them with fish, and paying out money for care and improvements on the grounds. In 1933 the Rod and Reel Club was permitted to lapse into inactivity from which it has never revived. Its unpaid obligation to the water company for water pumped into the lakes amounted to approximately \$9,000.

The Frazier Mountain Park and Fisheries Company, Inc., and its successor, the Harry G. MacBain Corporation, Ltd., used the usual and customary type of contract of sale for real property, which contained the words: "It is further agreed that the seller shall not be responsible or liable for any inducement, promise, representation, agreement or stipulation not set forth herein." On its face it contained no grant of membership in the Rod and Reel Club, but on the reverse side there was printed: "Sample of Membership given with each lot", and "This certifies that ——— is a member of the Frazier Mountain Park Rod and Reel Club and entitled to all the benefits and privileges thereto". The face of the deed contained merely the usual grants and restrictions, and contained no reference to the shares in the water company, the membership in the Rod and Reel Club, or any of the easements or rights here claimed.

From the inception of the subdivision, apparently there was great emphasis placed on the value of the area as a playground spot, and the fact that the property owners would be able to use the lakes, the clubhouse, the playgrounds and the picnic

grounds, through their membership in the Rod and Reel club and by virtue of their ownership of the lots. During the trial there were numerous bits of testimony in which persons who later purchased lots, or who were considered as prospects, were told by salesmen for the owners that the whole area would be permanently available to them for their use as a playground. Also, advertisements were introduced into evidence which had been taken from local newspapers, etc., showing that there was a great deal of emphasis placed on the fact that the area would be devoted to use as a playground and that ownership in the lots would carry with it the right to catch fish in the various lakes. Salesmen employed by the owners also testified that they made these representations to prospective purchasers and that the permanent use of the playgrounds and lakes was without restriction. Several salesmen testified that Mr. MacBain and his sales agent authorized them to so represent the property to the prospective lot buyers. Many of the purchasers who testified stated that they relied on these representations and the court, by its decision, at least impliedly found that this was true.

It appears that the 1929 depression so affected the area that the sale of lots fell off, and the real estate promotion bogged down. By 1931, most of the activities of the area ceased, including the full operation of the clubhouse, the lakes, the grounds and the water company.

In 1931, a group of residents undertook to operate the water company in order to supply water to the residents. Ultimately, a public utility district was formed, and the furnishing and distribution of water was taken over by the defendant Frazier Park Public Utility District, a public corporation.

The Harry G. MacBain Corporation, Ltd., kept a caretaker on the premises until 1932, when possession was released to the Metropolitan Trust Company, as trustee, under the deed of trust above mentioned. The clubhouse grounds and lakes were used occasionally by the residents and property owners and on occasion the clubhouse

was open to groups for rental with the permission of the caretaker.

On July 19, 1940, the Pacific Capital, Ltd., a corporation, filed an action in the Superior Court of Los Angeles County against the Metropolitan Trust Company, as trustee, and against the owners of the bearer notes which had been given at the time of the floating of the loan. It prayed, among other things, that Harry G. MacBain Corporation surrender its bearer notes to the trustee in exchange for a quitclaim deed from the Metropolitan Trust Company to the purchasers who had purchased lots from the Frazier Mountain Park and Fisheries Company, Inc., or from the Harry G. MacBain Corporation, Ltd., its successor, which purchasers had paid the full purchase price for the property, but for which there had been no release secured from the trust company. It also asked that the trustee be instructed to dispose of the property because of the fact that the trustor corporation had for many years failed to operate the clubhouse, swimming pool, playgrounds, lakes, and other improvements on the property, and that the trust company had advanced sums to pay taxes and insurance on the clubhouse and upon the improved portions of the unsubdivided property, and because it had been forced to maintain, at its expense, a caretaker on the property. That court granted the relief prayed for and ordered the trust company to immediately take measures looking toward the sale of the trust property to defray costs of administration of the trust, and ordered that any balance be paid to the bearers of the promissory notes.

The trust company unsuccessfully attempted to sell the real property to the county of Kern to be used by the county as a recreational area for \$12,500. Subsequently, the Frazier Park Playgrounds, Inc., a corporation, was formed by defendant Harry H. Holland for the purpose of purchasing the property. In December, 1941, it purchased the property, including the clubhouse, grounds, and lakes, from the trust company for \$12,500, on an agreement of sale by the terms of which the corporation took title to the property and gave back

a deed of trust for \$7,500, being the unpaid balance of the purchase price. The unsold lots in the subdivision were quitclaimed by the trust company to the Frazier Park Playgrounds, Inc., because many of them had been forfeited to the State for unpaid taxes. The unsubdivided portion of the property was conveyed to the Frazier Park Playgrounds, Inc., by grant deed. Thereafter, the Frazier Park Playgrounds, Inc., attempted to open the clubhouse commercially but it was never able to operate it on a profitable basis. Thereafter, there was occasional use of the swings, croquet court, clubhouse and horseshoe pits by residents and lot owners.

In 1947, the Frazier Park Playgrounds, Inc. fenced the clubhouse and the playgrounds, and permitted cattle to graze in the enclosed area. This act was met with strong disapproval by persons who owned lots in the subdivided portion of the area, and this action was filed by four of them, as representatives of a class, to have their rights determined to the use of the clubhouse, playgrounds, swings, right to take water, and to fish in the lakes without hindrance.

Plaintiffs' complaint alleged all of the facts hereinabove mentioned and prayed that the rights of the plaintiffs, as members of a class, be recognized by law, and enforced, and that the defendant Frazier Park Playgrounds, Inc., be required to remove its fence, and that it grant the plaintiffs, as members of a class, the right to perpetual use of the clubhouse, lakes, playgrounds, and other improvements within the unsubdivided area.

Defendant Frazier Park Playgrounds, Inc., answered that it was a successor in interest of the Metropolitan Trust Company which had sold the trust property at a distress sale, under instructions from the court. It denied that the plaintiffs had any rights to the property and alleged that this property had remained unused for many years. However, it failed to specifically plead abandonment of these claimed rights by the plaintiffs.

The court found generally in accordance with the allegations of plaintiffs' complaint, including the allegations that the grounds

which included the springs constituted a natural park and that the property which was subdivided had been sold to the public, with the representation that the area, which contained the swings, playgrounds, walks, artificial lakes, and clubhouse, including the springs, had been sold to purchasers with the representation that they would be entitled, perpetually, to the use thereof; that these claimed rights were at all times open and notorious and of common knowledge. It specifically found that there had been no *public* dedication of this area for the purposes indicated. Judgement was entered accordingly and by mandatory injunction the court specifically designated the property to which the easement related and granted unrestricted and uninhibited ingress thereto and egress therefrom by the property owners, and restrained appellant Harry H. Holland, successor in interest to the Frazier Park Playgrounds, Inc., and his agents, from in any manner interfering with or obstructing said uses, and further ordered that a prescribed portion of the fence surrounding the area be removed, and required the defendants to permit the owners of lots in said tracts to have ready access to the same and to the clubhouse and to the other improvements thereon, without hindrance, subject, however, to certain prescribed rules. It was ordered that plaintiffs take nothing against defendant Frazier Park Public Utility District, a corporation.

Harry H. Holland, as successor in interest of the Frazier Park Playgrounds, Inc. appealed from the judgment.

The evidence fully supports the court's finding that it was the intention of the subdivider and of its sales agents to create and set aside a portion of the subdivision as a "commons" or playgrounds, for the specified use and benefit of the purchasers of lots, in perpetuity. The subdivision map so indicates. The price obtained for the lots clearly indicates such rights were considered a portion of the price paid. Appellant Holland and his predecessors in interest apparently had knowledge of these facts or, at least, evidence of these claimed rights and privileges was, as found by the court, so notorious and of such common knowledge as to impart notice to them.



The evidence shows that Holland lived near the park before, during and after its inception and visited it during the sale and promotion of the tract; that in 1935, he bought adjoining land; that in 1941, he and a lot owner in the park who purchased his lot on the representation that the unsubdivided portion was reserved for the use of the lot owners, joined in forming the Frazier Mountain Park Playgrounds, Inc., for the purpose of buying a portion of the tract with the idea of conducting a private park enterprise. (Holland subsequently purchased this lot owner's interest in the corporation.)

In *Ocean Shore R. R. Co. v. Spring Valley Water Company*, 218 Cal. 86, 21 P.2d 588, the court held that every person having actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact is charged with constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact. That case quoted with approval from *Chicago & E. I. R. R. v. Wright*, 153 Ill. 307, 38 N.E. 1062, wherein it is said (quoting from *Indiana, B. & W. R. Co. v. McBroom*, 114 Ind. 198, 15 N.E. 831):

"“A person who is about to purchase land upon which a grade for a railroad is constructed is warned that there is some claim of right, and if he fails to make proper inquiry as to the nature of the claim he buys at his peril;” \* \* \* A man cannot buy property where there are facts known to him sufficient to put him upon inquiry, and hold it free from prior claims or equities of which due inquiry would have given him information.” [218 Cal. 86, 21 P.2d 589.] (See also, *Wallace v. Whitmore*, 47 Cal.App.2d 369, 374, 117 P.2d 926; *De La Cuesta v. Bazzi*, 47 Cal.App.2d 661, 668, 118 P.2d 909; and 74 A.L.R. 1250; 9 Cal. Jur. p. 956, sec. 10.)

[1] The main question involved is the authority of the trial court to hold that the property owners in the area were entitled to a so-called “equitable easement” to the use of the grounds, clubhouse, and lakes,

where no such right of use or easement was granted by the written conveyance.

It was said in *Danielson v. Sykes*, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024, that where a lot conveyed by deed is described by reference to a map, such map is made a part of the deed; that if streets are marked on the ground in the absence of a map, and lots are sold on the representation that such streets exist, the appurtenant right to use the streets, not expressed in the deed, rests upon an equitable estoppel; that the right of the owner may be enforced in equity with respect to all the streets which the particular lot owner has occasion to use; and any street or alley in close vicinity to a lot owner, which either is or may become of substantial benefit to him, will be protected against closure by injunction. *Prescott v. Edwards*, 117 Cal. 298, 49 P. 178, as well as many other authorities, are cited therein. See, also, *Davidow v. Griswold*, 23 Cal.App. 188, 192, 137 P. 619; Secs. 801 et seq., 1104, Civ.Code. The authorities cited support the findings and judgment of the court.

[2-4] The remaining question involves the ruling of the trial court in denying to appellant the right to amend his answer to include the defense of abandonment of the easement claimed by reason of the nonuser thereof for over 14 years. No abuse of discretion appears in this respect for several reasons. First, it was not originally alleged as one of the defenses to said action. Second, mere nonuser does not necessarily constitute abandonment. 1 Cal.Jur. p. 12, § 8; *People v. Southern Pacific Company*, 172 Cal. 692, 158 P. 177; *Flanagan v. San Marcos Silk Company*, 106 Cal.App.2d 458, 235 P.2d 107. The showing here made does not indicate that the lot owners, as such, had abandoned or intended to abandon any of the so-called rights herein claimed, nor is there any offer of proof indicating this fact. *Ocean Shore R. R. Co. v. Spring Valley Water Company*, 87 Cal.App. 188, 262 P. 53. It further appears that the trial judge did give some consideration to this contention and in his written opinion, as pointed out by appellant, the court did make a direct finding that there was no abandon-

ment and that the showing of nonuser was the only possible evidence of abandonment produced. It therefore does not appear that appellant would have been successful had the court permitted him to plead abandonment. No prejudicial error appears in the ruling of the trial court.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



110 Cal.App.2d 322

HERRING v. FISHER et al.

Civ. 18852.

District Court of Appeal, Second District,  
Division 2, California.

April 8, 1952.

Action by Willard Herring against Floyd O. Fisher, Elfieda Properties, Inc. to recover commissions for sale of real property. The Superior Court, Los Angeles County William S. Baird, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Moore, P. J., held that broker, who was authorized by president of corporation to sell certain properties for \$20,000 net to vendors, where broker brought the properties to vendee's attention, exhibited them to him and received his written offer to buy accompanied by \$500 as partial payment and thereafter closed transaction directly with vendee whereby vendors received \$21,500, was entitled to compensation.

Judgment reversed with directions.

McComb, J., dissented.

#### 1. Brokers ⇨7, 40

Mere action of an owner in naming a price in writing to a broker at which owner is willing to sell his real property does not constitute an employment of the broker or bind owner to pay a commission.

#### 2. Brokers ⇨43(2)

A memorandum of an owner to be sufficient under statute of fraud relative to em-

ployment of an agent to sell realty must show an authority to negotiate sale on behalf of owner. Civ.Code, § 1624.

#### 3. Brokers ⇨49(1), 50

To bind owner to pay a commission to a broker authorized to sell real estate, broker must have sold real estate on the precise terms of his contract and within the period of his agency.

#### 4. Brokers ⇨54, 84(2)

In action to recover commission for sale of real property, even though broker was authorized to negotiate, before commission would be earned, it was not sufficient that he had found a willing purchaser, but purchaser must have had ability to pay and the burden was on the broker to show the financial ability of his prospective vendee.

#### 5. Brokers ⇨43(2)

When provision of statute of fraud requiring some note or memorandum setting forth the terms of employment of a person to sell realty to be in writing, signed by the owner has been met with reference to a definite parcel, the agreement to pay a commission and its amount may be shown by parol. Civ.Code, § 1624.

#### 6. Brokers ⇨43(3)

In action to recover commission for sale of real property, a formal written authorization with all the terms agreed upon is not essential to warrant a finding of employment.

#### 7. Brokers ⇨43(3)

Letters written by an operator dealing in properties to a realty broker, which did not designate property by legal description, or commission by percentage or specific brokerage, but did describe the property by a number on a public street and did fix the price and specify the terms of the sale of the property, were sufficient to comply with the statute of frauds requiring some note or memorandum setting forth terms of employment of a person to sell realty to be in writing, signed by the owner. Civ.Code, § 1624.

#### 8. Brokers ⇨84(1)

In action to recover commission for sale of real property, where no commission

was mentioned in contract between broker and owner, but owner had previously paid broker 5 per cent commission on sales of properties made in the same vicinity, it was assumed that a 5 per cent commission for sale of real property was a reasonable compensation.

#### 9. Brokers ⇨87

In action to recover commission for sales of real property where court found that 5 per cent commission would be a reasonable compensation for sale of apartment house for \$22,000 and broker demanded only \$1,000, award of \$1,000 to broker for services rendered did not do injustice.

#### 10. Work and Labor ⇨11

Where no amount of compensation is specified in the memorandum of employment, there is an implied promise to pay a quantum meruit.

#### 11. Contracts ⇨9(2)

A contract employing a realty broker is not void for uncertainty when defect in description of property can be cured by pleadings and proof of extrinsic facts.

#### 12. Corporations ⇨410

The executive officer of a corporation organized to deal in properties is more than an agent, and he acts and speaks for the corporation in furthering its express objects and may sell all the properties of his corporation.

#### 13. Corporations ⇨406(2)

In the advancement of corporate interest, a corporation can act only through its agent and in its ordinary course of business its president as corporate representative may execute contracts to bind the corporation.

#### 14. Corporations ⇨426(7)

In action against corporation to recover commission for sale of real property, where corporation was organized to deal in property and president and his wife were owners of all its stock and where president authorized broker to sell property on behalf of corporation and during the period that broker was attempting to sell the property of the corporation, other officer in corporation remained quiet, employment of broker was approved by corporation.

#### 15. Brokers ⇨54

A broker has earned his commission when he has produced a purchaser ready, able and willing to purchase on vendor's terms.

#### 16. Brokers ⇨52

In action to recover commission for sale of real property, where president of corporation organized to deal in properties authorized broker to sell the property for \$20,000 net and broker brought the property to vendee's attention, exhibited it to him and received vendee's written offer to buy accompanied by \$500 as partial payment and thereafter closed a transaction directly with vendee whereby vendors received \$21,500, broker had earned his commission for effecting the sale to the vendee.

---

Tudor Gairdner, Los Angeles, for appellants.

Walter E. Egerman, Beverly Hills, and Morris L. Marcus, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent was awarded judgment against appellants on eight counts for eight commissions for sales of real properties. The findings recite that the sales were made pursuant to respondent's employment by appellants. The grounds for appeal are that (1) the evidence does not support the findings that appellants by writing authorized respondent to sell the properties; (2) the purported authorizations lack sufficient descriptions of the properties; (3) there is no evidence to support the finding that the corporation was the alter ego of Fisher and that the two appellants owned the properties; (4) the offers of three alleged buyers expired by their own terms; (5) there is no proof to support the finding that each purchaser signed a written agreement to buy the property allegedly sold to him; (6) the judgment grants commissions upon successive sales of the same property.

Did Appellants' Writing Authorize Respondent to Make Sales?

Fisher and his wife owned respectively 53 and 47 per cent of the capital stock of El-



fleda Properties, Inc., incorporated in 1943, herein referred to as the corporation. The titles of the several properties were vested in the corporation which had acquired them for rental purposes. Having sold twelve other properties for appellants, respondent sought purchasers for the four apartment houses on Alameda street in Burbank. They were numbered 1307, 1317, 1511 and 1515.

Four writings are relied upon as supplying the proof required by the statute of frauds (sec. 1624, Civil Code<sup>1</sup>). While none of the four memoranda designates a property by legal description, or a commission by percentage or a specified brokerage, all of them construed together may be a compliance with the last cited statute. Of this, more later. While the court found that the alleged vendees named in the first six counts (Ridgeway, Schliesser, Talcott, Tussing, and Wright) severally signed written agreements to purchase, such signed contracts do not appear in the record. Although it found that each of the alleged purchasers was ready, willing and able to buy, with the exception of Ridgeway the record is destitute of evidence to support such finding. Respondent's testimony that they were able is a conclusion and is not proof of financial responsibility.

In presenting the memoranda written by Fisher, the emphasis is supplied. His first letter to respondent was written in late April, 1946, refers to the terms for the sale of a house "North of Kittridge," to a "deal on Victory Blvd," and to a split commission, "or would you rather take your folks on Alameda." He closes with the following: "I would prefer if you concentrated your efforts on Alameda & Screenland Dr. & let the two English Bldgs stay until last—that is unless you get something very attractive as I mentioned in the early part of the letter. You are welcome to put a sign up on Alameda & Screenland for your own

benefit if you so desire. But they must buy them as is. If there are odds & ends to be done they can afford to get them fixed. Write when you have time.

"Floyd Fisher"

The second writing signed "Floyd" (Ex. 14) written May 18, 1946, after referring to a deal on "Victory Blvd" concludes with "*Don't quote those on Alameda less than 20,500—4500 dn. min. Your Adds are definitely very good after reading them I feel as tho I'd like to buy a couple myself.*"

The third communication signed "Floyd" (Ex. 6) was written on May 20, 1946. Fisher there says: "*Get more dough on the last one on Alameda—They are quite nice inside and only one year old—they cost me considerably more \* \* \* I want to average 19500 net to me on all bldgs so get more where you can.*"

On August 10, 1946, "Floyd" wrote respondent (Ex. 4) rejecting alleged offers: Talcott, 20,500 for 1515-17 Alameda; Ridgeway, 20,500 for 1311-13, Alameda; Schultz, 20,500 for 1307-09 Alameda; Tussing, 21,500 for 1511-13 Alameda; Wright, \$21,500 for 1317-21 Alameda. He did not forward it until August 21, 1946, when he added the following postscript: "*Here is the lineup for the moment, subject to change if there is any delay.*"

Talcott—no deal  
Ridgeway 20,000 net  
Schultz 20,000 net if title is not clouded  
Tussing 21,000 net  
Wright 21,000 net  
\$4000 dn. payment required  
\$500 due in 1 yr.  
\$40 per mo (no more) 6% int.  
Hope this cleans up the situation."

In addition to the foregoing, writings were introduced which relate to the other alleged sales but contain nothing of a substantial nature as proof of respondent's employment. To prove the several counts,

1. Civil Code, section 1624. "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent \* \* \*. 5.

An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission \* \* \*."

deposit receipts were filed in evidence as follows:

|            |                               |
|------------|-------------------------------|
| Count I    | Ridgeway dated June 21, 1946; |
| Counts IV  |                               |
| & V        | Tussing " July 17, 1946;      |
| Count VI   | Wright " July 14, 1946;       |
| Count VII  | Schultz " July 14, 1946;      |
| Count VIII | Grossman " April 29, 1946;    |
| Count VI   | Talcott " April 24, 1946.     |

Also, in proof of Count VIII, an unsigned carbon copy of escrow instructions was received in evidence along with an unsigned note dated May 11, 1946, for \$5,075, an unsigned deed of trust containing a copy of the same note and "additional escrow instructions," also unsigned.

[1-3] Whereas the combined effect of the writings may justify a finding of employment of appellant to make a sale, it is significant that not a word is to be found in all the writings to deprive Fisher or the corporation of the right to reject any sale made by Herring. That privilege he exercised by a writing on August 10. In the same letter he fixed the prices and specified the terms of sales of the several parcels. For respondent to earn a commission for the sale of any of those properties, it was essential that a buyer execute a purchase contract on terms substantially as required by appellants and be ready to consummate the purchase and be able to pay the price exacted. The mere act of an owner in naming a price in writing to a broker at which he is willing to sell his real property does not constitute an employment of the broker or bind him to pay a commission. *Herzog v. Blatt*, 80 Cal.App.2d 340, 342, 180 P.2d 30; *Patterson v. Torrey*, 18 Cal.App. 346, 348, 123 P. 224. The memorandum of the owner must show an authority to negotiate on behalf of the owner. *Morrill v. Barneson*, 30 Cal.App.2d 598, 602, 86 P.2d 924. And to bind the owner to pay a commission on the broker's demand the latter must have sold the property on the precise terms and within the period of his agency. *Jauman v. Mc-*

*Cusick*, 166 Cal. 517, 521, 137 P. 254. While no term of respondent's employment is specified, the several writings sufficiently imply an authority to negotiate sales. However, even though the broker was authorized to negotiate before a commission would be earned, it was necessary for appellants to confirm the sale by accepting the services of the broker in effecting the deal.

[4] The evidence received does not fulfill the requirements of the foregoing rule as to Counts II to VIII inclusive. Not one of those alleged purchasers put any money in escrow. Not one of them was proved to have any money or a source from which to obtain the funds required to complete the purchase. That they may have been ready and willing to buy is not enough. There must have been ability to pay and the burden is on the broker to show the financial ability of his vendees. *Phelan v. Hilda Gravel Mining Company*, 203 Cal. 264, 268, 263 P. 520, 56 A.L.R. 476. *Schliesser* signed no "deposit receipt." While *Talcott*, *Tussing* and *Wright* presumably signed the deposit receipts bearing their names as signers, there is no actual proof that any of them was able to buy. In none of the basic writings is there a promise by appellants to pay anything at any time. If by inference a promise of reward for effort be derived, if cannot be said that such promise comprehended payment of a commission prior to the broker's achievement of a sale. Certainly there is no promise to pay a commission before a sale is consummated on the terms prescribed by appellants. Moreover, neither in exhibits 4, 6, 7, 14 nor in any other writing did appellants promise to pay anything for mere effort. *Schliesser* (Count II) became "sick and tired of the whole mess and the only way they will do the deal is the original way—\$6000 down." *Talcott's* offer was rejected and there is no proof that *Wright* ever even offered to purchase. As to *Tussing*, respondent could not learn (Ex. 18) <sup>2</sup> how *Fisher* wanted the deal handled

2. "Willard Herring  
 "3905 W Victory  
 "CH 8-3455 Burbank Calif  
 "August 20th '46  
 "Dear Floyd Fisher:  
 "Haven't heard from you up to to-  
 days mail concerning those deals, A cou-

ple of those guys expect to evict for occupancy and they are getting mad at me.

"I have Mr. Lyle Tussing's house for sale, 3 bedrooms, and have made it \$3500. down in accordance with your latest deal, —He expected one in the 1500 Block at \$21,500. having purchased it (like all the



"as you [Fisher] wont comment one way or other."

#### Ridgeway Sale—Count I

[5] The foregoing discussion leaves no doubt that the writings signed by Fisher were clearly intended to authorize respondent to make sales of the four properties. They are sufficient to comply with the statute of frauds, *supra*, requiring some note or memorandum setting forth the terms of employment of a person to sell realty to be in writing, signed by the owner. When that requirement has been met with reference to a definite parcel, the agreement to pay a commission and its amount may be shown by parol. *Caminetti v. National Guaranty Life Company*, 56 Cal.App.2d 92, 95, 132 P.2d 318; *Moore v. Borgfeldt*, 96 Cal.App. 306, 311, 273 P. 1114.

[6,7] Therefore, appellants' failure to specify the amount of respondent's compensation for sales of the properties in any of the communications is no reason why under familiar principles, the trial court could not have derived a fair sum to be paid for the Ridgeway sale (Count I) since that was achieved by respondents after the buyer had been induced to complete the purchase of the property known as 1317 West Alameda. The sale was made substantially on the terms prescribed in Mr. Fisher's letter of August 10, 1946. Also, it must be inferred from the writings of Fisher that he purposed to pay respondent in case the latter should succeed in

effecting a sale. No one could fairly determine that in April or May, 1946, he intended to take the benefits of respondent's advertising, entertaining prospects in his office, conducting them on tours of inspection and yet pay him nothing. The letters written by an operator who had on previous occasions employed appellant to sell properties could mean nothing less than an authorization to negotiate for the sale of the Alameda properties. A formal written authorization with all the terms agreed upon is not essential to warrant the finding of employment. *Moore v. Borgfeldt*, *supra*, 96 Cal.App. at page 311, 273 P. 1114. The letters quoted acknowledge respondent as appellant's agent to make sales of the apartment buildings. *Needham v. Abbot Kinney Company*, 217 Cal. 72, 75, 17 P.2d 109. Despite such principle and the cited cases, other authorities are referred to as showing that there was no compliance with the statute of frauds. *Marks v. Walter G. McCarty Corporation*, 33 Cal.2d 814, 205 P.2d 1025; *Blanchard v. Pauley*, 92 Cal. App.2d 244, 206 P.2d 864; *Herzog v. Blatt*, 80 Cal.App.2d 340, 180 P.2d 30; *Morrill v. Barneson*, 30 Cal.App.2d 598, 86 P.2d 924; *Irwin v. Klimper*, 56 Cal.App. 434, 205 P. 714; *Kleinsorge & Heilbron v. Liness*, 17 Cal.App. 534, 120 P. 444. A close scrutiny of those decisions discloses that the rights of the plaintiffs therein were in each instance governed by the rule that the naked act of an owner of real property giving a broker a writing containing the terms on which he will sell does not con-

rest) during the period the OPA was off. We thought he could serve a 30 day notice on a tenant, I would sell his house and give occupancy. But now that the OPA is off, I brought him to the corner one of Griffith Park Dr. & Alameda—1317-21. He will purchase that at the same price with the occupancy. Wagner has now moved out entirely and I have the keys to the Apartment. They left it pretty clean.

"Now the question is, if you are going to change your mind about the down payment on it, I'll have to change the deal on his house, perhaps to a G. I. deal as buyers don't have too much down anymore. However, I must know how you want that deal handled. Evidently

you've been unhappy about the deals lately as you wont comment one way or other.

"Will you please therefore, tell me how you want this handled, and Please don't change your mind afterward, as I can't on this guy as I'm selling his house to get the dough.

"Carmen is getting back in a week and I haven't had a vacation and I'd like to hear from you on these deals right away so I can clean them up one way or the other \* \* \* I'd also like to get these deals cleaned up so I can start on something fresh. I'm sure you'll co-operate with me on this.

"Best wishes,  
"Bud."



stitute an employment of the broker or entitle him to recover a commission for making a sale. *Patterson v. Torrey*, 18 Cal.App. 346, 348, 123 P. 224.

The letters of appellants in view of the past relationship of the parties can mean no less than a direction to respondent to arrange for the sale of the Alameda properties. Such writings were held to be a compliance with the statute of frauds in the case of *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130.

[8-10] From appellant's previous payment of five per cent commissions to respondent on sales made in the vicinity of Burbank, it must be assumed that five per cent is a reasonable compensation for the sale of the apartment house for \$22,000. Appellant attempts to make a point of the fact that five per cent would be \$1,100, whereas respondent demanded only \$1,000. Since the amount of the award is less than reasonable for the services rendered, no injustice was done by the discount. Where no amount of compensation is specified in the memorandum of employment, there is an implied promise to pay a *quantum meruit*. *Kennedy v. Merickel*, 8 Cal.App. 378, 383, 97 P. 81.

[11] The same principle applies to the claim of the insufficiency of the description of the property sold to the Ridgeways. It had a number on a public street. The communications between Fisher and respondent leave no doubt that both parties knew the exact property intended. A contract employing a realty broker is not void for uncertainty when such defect can be cured by pleadings and proof of extrinsic facts. *Needham v. Abbot Kinney Company*, 217 Cal. 72, 76, 17 P.2d 109.

[12-14] The contention that Fisher was not authorized to bind the corporation to sell its lands pales in the presence of the facts. The corporation was organized to deal in "properties." Fisher and his wife were owners of all its stock. Fisher was the unquestioned spokesman of the cor-

porate entity if he was not indeed its alter ego. In his correspondence with respondent he never referred to the corporation. The president did not require written authority to make sales or to employ an agent to do so. *Jeppi v. Brockman Holding Company*, 34 Cal.2d 11, 17, 206 P.2d 847, 9 A.L.R. 2d 1297. The executive officer of such a corporation is more than an agent. He acts and speaks for the corporation in furthering its express objects and may sell all the properties of his corporation "because that is the very object of its organization." *Ibid*, 34 Cal.2d page 16, 206 P.2d at page 849. In the advancement of the corporate interests, a corporation can act only through its agents, and in its ordinary course of business its president as corporate representative may execute contracts to bind the corporation. *Grummet v. Fresno Glazed Cement Pipe Company*, 181 Cal. 509, 513, 185 P. 388. Moreover, in view of the publicity given by respondent to his activity during the period of his attempting to sell the properties of the corporation at the behest of its president while the other officer remained quiet it must from such silence be assumed that the employment of respondent was approved by the corporation.

[15, 16] To deny respondent's compensation for effecting the sale to Ridgeway would operate an injustice. He brought the property to Ridgeway's attention; exhibited it to him; received his written offer to buy accompanied by \$500 as partial payment. Whereas by his communication of August 10, 1946, Fisher authorized respondent to sell the property for \$20,000 net to Ridgeway, on August 29 he closed<sup>3</sup> a transaction directly with Ridgeway whereby appellants received \$21,500 and on the same day Ridgeway "withdrew from the real estate deal, purchased on July 30, 1946." A broker has earned his commission when he has produced a purchaser ready, able and willing to purchase on the vendor's terms. *Twogood v. Monnette*, 191 Cal. 103, 107, 215 P. 542.

3. Respondent evidently made two sales to Ridgeway, June 21 and August 24, 1946. However, respondent's check refunding

the payment bears date of August 24, 1946.

The judgment is reversed with instructions to enter a new judgment for plaintiff in the sum of \$1,000, each side to pay its own costs on appeal.

FOX, J., concurs.

McCOMB, Justice.

I dissent. See *Blanchard v. Pauley*, 92 Cal.App.2d 244, 247, 206 P.2d 864.



110 Cal.App.2d 503.

**PEOPLE v. VOGEL.**

Cr. 769.

District Court of Appeal, Fourth District,  
California.

April 24, 1952.

Rehearing Denied May 6, 1952.

Defendant was convicted of wilfully and unlawfully failing to provide necessary food, clothing, shelter and medical attention for his minor children in the Superior Court of Imperial County, and from the judgment and an order denying a new trial the defendant appeals. The District Court of Appeal, Mussell, J., held that the evidence sustained the conviction and that the attempted appeal from the verdict of the jury was required to be dismissed.

Judgment and order affirmed.

**1. Parent and Child** ⇨17(6)

Evidence sustained conviction of defendant for unlawfully and without lawful excuse omitting to provide necessary food, clothes, and medical attention for his minor children. Pen.Code, § 270.

**2. Parent and Child** ⇨17(6)

Evidence did not establish that defendant was abandoned by his minor children so as to preclude his conviction for failure to provide necessary support for the children. Pen.Code, § 270.

**3. Parent and Child** ⇨17(6)

Proof of omission by defendant to furnish necessary food, clothing, shelter or medical attention for his minor children is

prima facie evidence that such omission was wilful and without lawful excuse. Pen. Code, § 270.

**4. Parent and Child** ⇨17(1)

In prosecution of defendant for failure to support his minor children, fact that the children were working was not a defense where it was due to the failure of the defendant to provide support. Pen.Code, § 270.

**5. Parent and Child** ⇨3(1)

Defendant was not relieved of liability for failure to support his minor children because of his personal expenses. Pen. Code, § 270.

**6. Criminal Law** ⇨1023(10)

An attempted appeal from the verdict of the jury would be dismissed.

Leslie L. Burr, El Centro, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was found guilty by a jury of violation of section 270 of the Penal Code in that on or about the 1st day of September, 1951, he did wilfully and unlawfully and without lawful excuse omit to provide necessary food, clothing, shelter, medical attention and other remedial care for two of his minor children. A motion for a new trial was denied and defendant was sentenced to the county jail for sixty days. The sentence was suspended and defendant was placed on probation for one year on the condition that he pay the sum of \$80 per month for the support of his children.

Evidence.

Defendant's wife testified that she and the defendant were married in 1931; that there were three children the issue of that marriage: Louis, aged 19, Hilda, aged 18 and Joe, aged 15; that all three were living with her in El Centro; that she was supporting Hilda and Joe by taking in washing and ironing; that she received the sum of \$40 from the defendant in the latter part of August, 1951, and that she had re-

ceived no other money from him; that whenever she asked defendant for money, he refused and said "You can work"; that she had been providing food and clothing for the children; that the boys had newspaper routes; that she paid defendant \$50 per month because he demanded part of what she and the children were making; that he had not purchased any clothes for her or for the children for the past five years; that she was not in good health; that one of the children needed dental care and they both needed clothing; and that defendant "drank very much" and spent "a great amount" for liquor, buying at least one-half gallon of wine or four quarts of beer each day "sometimes more".

A payroll supervisor of the Imperial Irrigation District testified that defendant was employed by the district from October 9, 1950, to September 1, 1951, as a watchman and during that period his average earnings exceeded \$200 per month.

Defendant testified that from July, 1951, to September 1, 1951, he paid out a total of \$369. However, of this amount, only \$40 was paid to his wife.

[1] The stated evidence was uncontradicted and is ample to sustain the verdict and judgment. *People v. Dorius*, 49 Cal. App.2d 259, 260-262, 121 P.2d 508.

[2] Defendant argues that he was ejected from the family home July 17, 1950, and that since he was thus deprived of all contact with his family, the children had abandoned him, relieving him from the duty to support them. This argument is entirely without merit. The evidence does not support any inference that defendant was abandoned by his children. The testimony showed that defendant moved from the family residence and was not ejected therefrom; that he stayed in the vicinity and was in a position to see his children and to make provision for them.

[3] Proof of the omission by the defendant to furnish necessary food, clothing, shelter or medical attendance or other rem-

edial care for his children is prima facie evidence that such omission was wilful and without lawful excuse. Section 270, Penal Code; *People v. Norton*, 47 Cal.App.2d 139, 142, 117 P.2d 402.

Defendant contends that he is relieved from the responsibility to support his children by reason of the provisions of sections 207 and 208 of the Civil Code. These sections are not applicable to the situation here presented as we are not here concerned with the defendant's possible liability to third persons but only with his failure to provide suitable support for his children.

[4] At the trial the defendant contended that the fact that the children were working should have been taken into consideration. The evidence was that the children and defendant's wife worked because of defendant's failure to provide for them and that their combined earnings were not sufficient to provide them with the necessary food, clothing, and medical attendance.

[5] Defendant next argues that he was unable to provide for his family because of his other personal expenses. This argument likewise is without merit as the obligation to pay such expenses does not relieve defendant's obligation to support his minor children. *People v. Curry*, 69 Cal. App. 501, 506-507, 231 P. 358. Furthermore, the evidence is that the defendant was earning sufficient money to support himself and also pay a substantial amount to his wife and family.

[6] Defendant attempts to appeal from the verdict of the jury and since no appeal lies therefrom, the attempted appeal from such verdict is dismissed. *People v. D'Elia*, 73 Cal.App.2d 764, 766, 167 P.2d 253.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.





























NATIONAL UNIVERSITY LIBRARY



3 1786 10047 6933

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON-CIRCULATING



